EMPLOYMENT TRIBUNALS

Claimant: **Miss V Woodhouse**

Respondent: **Doncaster Metropolitan Borough Council**

Heard at: Sheffield by CVP **On: 26, 27 and 30 January 2023**
1, 2 and 3 February 2023

Before: **Employment Judge Brain**

Representation

Claimant: In person
Respondent: Miss A Hashmi, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was constructively dismissed for the purposes of section 95(1)(c) of the Employment Rights Act 1996.
2. The claimant was constructively unfairly dismissed.
3. Accordingly, her complaint of unfair dismissal brought pursuant to the 1996 Act succeeds.
4. There shall be no reduction to any basic or compensatory award by reason of the claimant's conduct.

REASONS

Introduction and preliminaries

1. The Tribunal heard evidence in this matter over five days on 26, 27 and 30 January 2023 and then on 1 and 2 February 2023. Helpful submissions were received from Miss Hashmi and from the claimant on 3 February 2023. The hearing concluded at around 4.30pm that day. The Tribunal reserved judgment. Reasons are now given for the judgment which the Tribunal has reached.

2. The Tribunal was presented with a bundle of witness statements. There were also three hearing bundles. Two of these were labelled *"supplemental*

bundle". The Tribunal shall refer to them as such where reference is made to documentation within them. Where the Tribunal refers to *'the bundle'*, this shall be taken as a reference to the bundle running to 304 pages. It was to this bundle that most references were made.

3. The claimant was employed by the respondent as a social worker working within the Adults Health and Well-Being Directorate within the Adult Social Care Department. A statement of her main terms and conditions is in the bundle at pages 56 to 67. The claimant commenced her employment with the respondent on 23 July 2018. However, it is recognised that she has continuity of service from 29 November 1999.

4. The claimant resigned from her position on 14 June 2021. The effective date of termination of her contract of employment was on 13 July 2021.

5. The claimant brings a complaint of constructive dismissal. This claim is brought pursuant to the Employment Rights Act 1996.

The relevant law

6. Section 95(1)(c) of the 1996 Act provides that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that they are entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred as *"constructive dismissal."*

7. In **Western Excavating (ECC) Limited v Sharpe** [1978] ICR 221 CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it, *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

8. It follows therefore that in order to claim constructive dismissal, the employee must establish that: there was a fundamental breach of contract on the part of the employer (that is to say, one that goes to the root of the contract) ; the employer's fundamental breach of contract caused the employee to resign; and that the employee did not delay too long before resigning, thus affirming the contract by waiving the right to resign in response to the breach and losing the right to claim constructive dismissal.

9. A constructive dismissal is not necessarily an unfair dismissal. As is the case with an express dismissal, it is open to the employer to advance a reason for the constructive dismissal of the employee which is one of the permissible reasons for dismissal provided for in the 1996 Act.

10. Implied into every contract of employment is a term the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. A breach of the implied term of trust and confidence is a fundamental breach as it goes to the root of the contract: (see also paragraph 16 below). It is a breach of the implied term of trust and confidence upon

which the claimant relies as entitling her to resign and claim that she was constructively dismissed. (The Tribunal shall refer to this from time-to-time as '*the implied term'* or the *'implied term of trust and confidence'*).

11. As we shall see, the claimant raises a number of matters in respect of which she says the respondent was in breach of the implied term. Amongst these is that the respondent was in breach of the Equality Act 2010. She contends that the respondent breached the duty in section 20(1), (3) and (5) of the 2010 Act to make reasonable adjustments by taking reasonable steps to ameliorate disadvantages to the claimant because of disability and by failures to provide auxiliary aids for the same purpose.

12. It is the case that acts of discrimination may amount to a breach of the implied term of trust and confidence. In **Meikle v Nottinghamshire County Council** [2005] ICR 1, CA, the Court of Appeal held that the employer's failure to carry out reasonable adjustments in accordance with the Disability Discrimination Act 1995 (which was then in force) amounted to a breach of the implied term of trust and confidence. A similar conclusion was reached by the Employment Appeal Tribunal in **Greenhof v Barnsley Metropolitan Borough Council** [2006] ICR 1514, EAT.

13. However, an employer's discriminatory act will not always amount to a fundamental breach of the implied term of trust and confidence. In **Amnesty International v Ahmed** [2009] ICR 1540, EAT, the employee was of Northern Sudanese origin. She applied for promotion to the post of Sudan researcher. The employer felt that her ethnicity would compromise their perceived impartiality and expose the employee to a safety risk when travelling in Sudan or Eastern Chad. The Employment Appeal Tribunal upheld the Employment Tribunal's findings that the employee had suffered direct race discrimination. However, the Employment Appeal Tribunal held that the Employment Tribunal was in error in finding that the employer had also breached the implied term of trust and confidence.

14. It was held that an employer's unlawful discrimination did not automatically give rise to a breach of the implied term although it will do so in most cases. Amnesty International had not breached the implied term as they had reached their decision after a thorough and reasoned process, motivated by no racial prejudice. The EAT held that they acted with reasonable and proper cause and the employee was not entitled to feel that the relationship of trust and confidence was destroyed or seriously damaged. The employer was effectively saving the employee form herself. Even if those were in fact her feelings, it is well established that the test is objective. The EAT also noted that the conduct complained of by the employee did not affect her current employment in any way but related to a potential promotion to a different job with the same employer.

15. It can be a breach of the implied term of mutual trust and confidence for the employer to fail to provide the employee with reasonable support. The reasonableness of support may be tested by asking whether what the employer did or did not do fell within the range of reasonable responses of a reasonable employer to the situation: **Hobbs v British Railways Board [EAT 340/94**].

16. It is an important feature of the implied term of mutual trust and confidence that any breach of it will be regarded as repudiating the contract of

employment. This was made clear by the Employment Appeal Tribunal in **Woods v WM Car Services (Peterborough) Limited** [1981] ICR 666, EAT. There, it was stated that, *"any breach of the implied term [of trust and confidence] is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract."*

17. The formulation of the test by Lord Denning in **Western Excavating** refers to an employer's intention no longer to be bound by the contract. The legal test for a repudiatory conduct generally is whether, looking at all the circumstances objectively, from the perspective of a reasonable person in the innocent parties' position, the contract breaker has clearly shown an intention to abandon and altogether refused to perform the contract. Authority for this proposition may be found in the non-employment case of **Eminence Property Developments Limited v Heaney** [2010] EWCA Civ 1168.

18. This brings into the question that of the relevance of the employer's intentions. Just as a breach of the implied term of trust and confidence will not occur simply because the employee subjectively feels that a breach has occurred, the legal test entails looking at the circumstances objectively such that an employer cannot escape a finding of constructive dismissal simply because they may have acted with good intentions or a wish to maintain the employment relationship. As was said in **Eminence Property**, the question of whether a breach is repudiatory is to be answered not by reference to what the party in an alleged breach wanted or wished *"in the recesses of their minds"* but by reference to whether the parties' conduct objectively showed an intention no longer to be bound by the contract.

19. Guidance about how the breach is to be tested and the role of the employer's intentions in that assessment was given in **Tullett Prebon Plc v BGC Brokers** [2011] EWCA Civ 131. The Tribunal directed the parties' attention to this case. An issue arose in the case about the extent to which the court may take account an employer's intentions. On the facts, it had been found that the employer had been acting with the intention of seeking to persuade the employees to stay, when reminding them of their contractual obligations (and in particular, in the context of a team move to a rival, their post-termination covenants). The employees' contention was that the employer was putting improper pressure upon them which amounted to repudiatory conduct. This was rejected by the trial judge.

20. Kay LJ in **Tullett Prebon** said that the question of whether the employer's conduct is sufficiently serious to be repudiatory is highly context specific. It may be objectively considered to be repudiatory because of the employer's actions towards the employee. However, the conduct need not be aimed at the employee. Conduct may be repudiatory because of the way in which the business was run. An example of this may be seen in **Malik v BCCI** [1997] IRLR 462. In that case, the running of a corrupt business by the employer (unbeknown to the employees) was held to be a breach of the implied term of trust and confidence even though not specifically directed at the employees. In **Malik**, Lord Steyn said that, *"the motives of the employer cannot be determinative, or even relevant, in judging the employee's claims for breach [of the implied term of trust and confidence]."*

21. Kay LJ in **Tullett Prebon** observed there to be a distinction between cases of indirect corporate behaviour not directed at the employees (as had taken

place in **Malik**) and those cases of conduct directly impacting upon the employment relationship. He therefore held that it had been necessary for the court in **Tullett Prebon** to include an objective assessment of the true intention of the employer's management. The issue of repudiation (by showing an intention no longer to be bound by the contract) has to be judged objectively in all of the circumstances as known to a reasonable observer. The court is therefore entitled to look at the employer's intentions in judging what is the objectively assessed intention. This is of paramount importance. He held that the employer in **Tullett Prebon** did not show an intention to abandon and altogether refuse to perform the contract of employment. Quite the reverse – they wanted to preserve their contract with the employees.

22. In **Leeds Dental Team Limited v Rose** [2014] ICR 94, EAT, an argument was rejected that the Court of Appeal's decision in **Tullett Prebon** had altered the law so as to require a court or tribunal to make a specific finding as to the employer's intention in acting in the manner said to amount to breach of the implied term. The EAT interpreted Kay LJ's remarks in **Tullett Prebon** as emphasising simply that all of the circumstances must be taken into account in so far as they have a bearing on an objective assessment of the intention of the party said to have breached the contract. While a parties' intention may be relevant, that intention is to be judged objectively and the Tribunal is not required to make a factual finding as to what the actual intention of the employer was. The employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that their conduct was likely to destroy or seriously damage the relationship of trust and confidence then they will be taken to have the objective intention in question.

23. To illustrate the application of these principles, the Tribunal referred the parties to the case of **Bliss v South East Thames Regional Health Authority** [1985] IRLR 308. In this case, it was held that the employer's requirement for the employee to undergo a psychiatric examination when there was no mental or pathological illness but merely a severe breakdown of personal relationships within the organisation objectively was in breach of the implied term of mutual trust and confidence. This was held to be so, notwithstanding that the employer in good faith thought there were reasonable grounds for requiring medical examination and with a view to ascertaining fitness for work and preserving the employment relationship. The employer wished to retain the employee's services if the personality clash could be resolved.

24. Reference was made in **Bliss** to **Federal Commerce and Navigation Co Limited v Molena Alpha Inc** [1979] AC 757 where Lord Wilberforce said that, "*If a party's conduct is such as to amount to a repudiatory breach, his subjective desire to maintain the contract cannot prevent the other party from drawing the consequences of his actions."*

25. It was held in **Bliss** that it would be difficult *"to think of anything more calculated or likely to destroy the relationship of confidence and trust which ought to exist between employer and employee than, without reasonable cause, to require a consultant surgeon to undergo a medical, which was correctly understood to mean a psychiatric examination, and to suspend him from the hospital on his refusing to do so."* The employer was to be judged by what they did and not by their private intentions. It was held that what they did in that case was *"by any objective standard outrageous."*

26. We can see, therefore, how the objective test of repudiatory breach of contract is applied by reference to these examples. Both in **Tullett, Prebon** and **Bliss**, the employer wished to maintain the employment relationship. However, their subjective intentions were not relevant to the question of whether the employer's conduct was repudiatory. This was to be judged by reference to the objective test. In **Tullett Prebon**, the employer's conduct was held not to be repudiatory. Objectively, they were doing nothing more than seeking to preserve the employment relationship by reminding the employees of their contractual obligations. In contrast, in **Bliss,** while the employer may have been acting with good intentions subjectively, the conduct in question was outrageous and destructive or seriously damaging of trust and confidence from an objective perspective.

27. Once it has been established that the employer has committed a repudiatory breach of contract, the employee must go on to show that they have accepted the repudiation. Pursuant to section 95(1)(c) of the 1996 Act this means that the employee must terminate the contract by resigning, either with or without notice. There is no issue that claimant did resign in this case.

28. The employee will be regarded as having accepted the employer's repudiation only if their resignation has been caused by the breach of contract in question. It is not necessary for the employee to inform the employer as to why they are resigning. The reason given by the employee in a resignation letter is merely one piece of evidence for the Tribunal to consider when reaching a conclusion as to the true reason for the resignation.

29. It is sufficient that the employer's conduct must be an effective cause of the resignation. It need not be the sole cause. In **Meikle**, Elias P said that, *"The crucial question is whether the repudiatory breach played a part in the dismissal."* Even if the employee leaves for a whole host of reasons they can claim constructive dismissal if the repudiatory breach is one of the factors relied upon.

30. Where the employee waits too long after the employer's breach of contract before resigning, they may be taken to have affirmed the contract and therefore lost the right to claim constructive dismissal. Affirmation is a question of conduct and not simply passage of time. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than to resign.

31. Once the employee has established that they have been dismissed then it is for the employer to make out a potentially fair reason for dismissal. The permitted reasons for dismissal are to be found in section 98(1)(b) and (2) of the 1996 Act. It is for the employer to show the reason for dismissal and that it was a potentially fair and statutorily permitted reason. If the employer does not advance a potentially fair or permitted reason for dismissal or the tribunal rejects the employer's asserted potential fair reason, then the dismissal will be unfair.

32. Constructive dismissals can pose problems for employers when explaining their reasons for dismissal. In a constructive dismissal case, the reason for the dismissal will be the reason for which the employer breached the contract of employment. If an employer does not attempt to show a potentially fair reason at all in a constructive dismissal case but instead simply relies on the argument that there was no dismissal, a tribunal is under no obligation to

investigate the reason for dismissal (or its reasonableness) for itself – **Derby City Council v Marshall** [1979] ICR 731, EAT. This essentially means that the constructive dismissal, if shown, will be unfair because no reason for the dismissal has been given.

33. It is against these legal principles that the Tribunal will adjudicate upon the claimant's constructive dismissal complaint. The Tribunal will now turn to making findings of fact.

Findings of fact and the application of issue estoppel to the case

34. It is necessary to say at the outset that an Employment Tribunal has already adjudicated upon a case to which the parties were privy. This was a claim brought under the 2010 Act by the claimant against the respondent and which proceeded with case number 1800167/2020.

35. On 23 September 2020, Employment Judge Maidment (in that case) determined, at a preliminary hearing, that the claimant's conditions of Ehlers Danfoss Syndrome and mild cognitive impairment amount to disabilities for the purposes of section 6 of the 2010 Act. The claimant's impairments consist of joint and back pain, fatigue, short term memory loss and temporary disruption of cognitive function.

36. The final hearing in that matter came before Employment Judge Deeley in March 2021. She sat with non-legal members. The claimant's complaints of disability discrimination and harassment related to disability were dismissed.

37. The allegations raised by the claimant are set out in the table within Employment Judge Deeley's reasons for her Tribunal's judgment. The table is at page 208 of the bundle. The claimant raised six allegations encompassing the period between 31 January 2019 and October 2019 inclusive.

38. In paragraph 112 of her factual findings, Employment Judge Deeley mentions that the claimant raised a grievance about matters in October 2019. No findings of fact were made by her tribunal about that grievance, the outcome of which has some significance for what happened subsequently and in an important feature of this case.

39. Where a cause of action or an issue has already come before a court or tribunal and has been decided, or an issue could have been brought before a court or tribunal in previous proceedings but was not, a party who seeks to re-open or raise such an action or issue in subsequent proceedings before a different court or tribunal may be barred or *"estopped"* from doing so.

40. There can be no suggestion here that the claimant is estopped from pursuing her constructive dismissal case by what is known as cause of action estoppel. Plainly, she did not have cause to bring a constructive dismissal complaint before Employment Judge Deeley's Tribunal. The matters upon which she now relies in support of her case that the respondent was in repudiatory breach of contract did not arise for determination (and indeed had largely not yet even taken place) in March 2021. Constructive unfair dismissal was not a cause of action which it was open to the claimant to bring in case number 1800167/2020 upon the matters before this Tribunal.

41. The Tribunal raised with the parties the question of issue estoppel. This is conceptually different to cause of action estoppel.

42. Issue estoppel precludes a party from re-opening an issue that has been decided in earlier proceedings. Issue estoppel does not mean that one tribunal can never disagree with another tribunal's findings of fact. However, a subsequent tribunal or court may not disagree with a previous tribunal or court's findings of fact where, in an action to which the parties are privy, an issue forming a necessary ingredient to the cause of action has been litigated and decided upon already. It follows therefore that estoppel will only apply to issues that are the same as those determined in earlier proceedings.

43. For example, in **Ridge v HM Land Registry** (EAT) 0485/12 it was held by the Employment Appeal Tribunal that an Employment Tribunal had erred in law by holding that an issue estoppel arose in a complaint of unfair dismissal and discrimination for something arising in consequence of disability, where there had been earlier employment tribunal proceedings which had been determined upon different issues.

44. As has already been said, the claimant seeks to argue that a breach by the employer of the duty to make reasonable adjustments was a breach of the implied term of trust and confidence. Accordingly, that is a necessary ingredient of the claimant's constructive dismissal complaint. However, the alleged failure to comply with the duty to make reasonable adjustments in question in this case does not concern the same alleged breaches of that duty adjudicated upon by Employment Judge Deeley's Tribunal. Accordingly, the Tribunal's view in this hearing was that no issue estoppel arose as a result. The parties (particularly the respondent) did not disagree with that suggestion.

45. Notwithstanding that no issue estoppel arises, the parties were content to adopt Employment Judge Deeley's findings of fact which effectively deals with the matters which arose between the date of commencement of the claimant's employment with the respondent in July 2018 and the grievance which she lodged in October 2019. To avoid unnecessary repetition, therefore, the parties and the reader are referred to Employment Judge Deeley's factual findings between paragraphs 37 and 114 of the written reasons promulgated on 10 May 2021.

46. It is worth perhaps setting the scene briefly. The respondent is a local authority with responsibility for social care for their residents. The respondent divides their adult social care services into four teams:

    (1) The East Team (where the claimant was based initially in July 2018).

    (2) The North Team (to which the claimant transferred with effect from 10 December 2018).

    (3) The South Team; and

    (4) The Central Team.

47. The work performed by the claimant in the East Team from 8 October 2018 was that of discharge to assess social worker. This is known as *"D2A"* for short. As Employment Judge Deeley recorded in paragraph 53 of her reasons, the D2A role was funded by the Care Commissioning Group and related to adults in nursing homes. The role involved:

    (1) Working with a multi-disciplinary team (including health professionals) to assess a person's needs to see if they should remain in a nursing home or whether they could be discharged;

(2) Completing assessments and support plans set out in the duty D2A procedure, via a computer and workflow processes; and

(3) Handling a lower volume of cases with higher turnover rate, compared to a community social worker's caseload working within any of the teams.

48. When the claimant transferred to the North Team she worked as a community social worker. As Employment Judge Deeley recorded in paragraph 54 of her reasons, this role involved:

(1) Dealing with a higher volume of cases, compared to the D2A role, relating to any vulnerable adults within the community and at residential homes;

(2) Performing home visits and working autonomously;

(3) Completing end to end assessments as part of the respondent's *"care first"* system;

(4) Considering direct payment issues (for people who employ their own care assistants);

(5) Performing duty work on a rota basis; and

(6) Carrying out carer assessments at the hub.

49. The claimant also continued working on her existing East Team cases when she transferred to the North Team. In summary, the claimant's experience of working in the North Team under the management of Sara Clark was an unhappy one. This is dealt with in some detail in Employment Judge Deeley's reasons. The Tribunal shall not repeat them here. Before going on sick leave in March 2019, the claimant had requested a return to the East Team. This was refused. Further, the claimant had seen that there was a vacancy in the East Team in October 2019. Again, the respondent refused to transfer the claimant.

50. The Tribunal will now turn to making findings of fact upon the evidence led by the parties at the hearing. The Tribunal will give reasoning where is necessary to resolve disputes of fact. Otherwise, the facts have been accurately recounted in the witness statements.

51. The Tribunal heard evidence from the claimant. On her behalf, evidence was heard from Mark Whitehouse. He has worked for the respondent for 30 years as an electrician. For the last four years, he has been the branch secretary and full time Unite the Union convener.

52. The Tribunal heard evidence from the following witnesses called by the respondent:

(1) Claire Warren-Higgs. She is employed as the head of communities, care and support. She became head of service in August 2019.

(2) Louise Shore. Her current role is team leader of the integrated discharge team ("IDT"). The IDT comes within the remit of Claire Warren-Higgs.

(3) Sarah Brown. She is employed by the respondent as senior HR officer.

(4) Faye McKenzie. She is the team leader for the East Team. She held that post when the claimant joined the respondent working within the East Team in July 2018.

(5) Claire Scott. Her current role is head of service communities and well-being within the Directorate of Adults, Health and Well-being.

53. Arising from her unhappy experience in the North Team and the refusal to transfer her back to the East Team, the claimant raised a grievance. This is at pages 150 to 156 of the larger supplemental bundle. This was dealt with as a stage 1 grievance under the respondent's grievance procedure.

54. On 17 January 2020, Griff Jones, head of safeguarding and mental health, wrote to the claimant to confirm the outcome of her grievance. He listed eight actions to be taken arising from it. These eight actions also appear in the bundle at page 299. Amongst other things, it was recommended that, "*When staff do move from one team to another in adult social care, a formal handover meeting should take place prior to this move at which the following issues and others will be discussed; work being carried over from one team to another, learning and development, objectives and needs, occupational health needs and support, HR related issues."*

55. This was in recognition of the breakdown in communication between the East and North Teams around the claimant's transfer in December 2019.

56. The claimant appealed against the stage 1 grievance outcome. The outcome of the grievance appeal (at stage 2) was sent to her on 19 June 2020 (pages 297 to 311 of the larger supplemental bundle). The appeal was dealt with by Annika Leyland-Bolton, head of service – Adult Social Care and Support. She went through the 34 points of appeal raised by the claimant. She did not shy away from Mr Jones' findings about the handling of the transfer of the claimant from the East to the North Team. His eight recommendations stood (including that referred to in paragraph 54).

57. On 1 April 2020 the claimant emailed Mrs Brown to enquire about returning to work (page 94). She said, *"I want to return to work, however I remain unable to do so because my request to return to the East Team which I first raised on 24 January 2019 remains unresolved."* The claimant and Mrs Brown spoke on 9 April 2020. A note of the conversation is at page 95. Mrs Brown suggested that the claimant speak to her GP about her fitness to return. The claimant again expressed a willingness to return to work. It is recorded that she commented that, *"with everything going off at the moment with Covid she would like to help and support and return."*

58. At this stage, due to Covid, the locality teams were no longer in place. Mrs Brown says in paragraph 4 of her witness statement that she was informed by Mrs Warren-Higgs that, "*there were only two work streams; the integrated discharge team based at Doncaster Royal Infirmary ('IDT') and the Safeguarding Adults Personal Assets Team ('SAPAT'). They were operating on a seven day rota 8 to 8pm, which all staff, team leaders and advanced practitioners were part of. The rota included working at the hospital, in the community for essential visits/assessments and remote working to support a hospital discharge multi-disciplinary team function."*

59. Mrs Warren-Higgs gives corroborative evidence about this in paragraph 5 of her witness statement. She says that *"At this time [in April 2020], I had*

activated the service business continuity plans due to the Covid-19 pandemic, the social worker role had temporarily changed and there were no area locality teams. All of the locality teams had created one team, to support hospital discharge and urgent cases only. All of the staff were working from home as the offices were temporarily closed." She then refers to the only two services which were working from an office base (being the IDT and SAPAT teams).

60. On 31 January 2023, during the course of the hearing, the claimant sent to the Tribunal an email with a link to information on the respondent's website about the work undertaken by SAPAT. Although Miss Hashmi had instructions to object to the introduction of this document, the Tribunal ruled that it should be admitted. There cannot be any sensible objection to the Tribunal seeing it. It is the respondent's document and is in the public domain. It assisted the Tribunal in understanding the work of SAPAT. (The team is there to fulfil the respondent's legal duty to provide protection of property for vulnerable adults pursuant to section 47 of the Care Act 2014. The council will step in to do this where no one has been identified as able to protect the property on behalf of the service user. The claimant said that she did not have the skill set or interest to work within SAPAT).

61. On 14 April 2020, the claimant provided Mrs Brown with an occupational health report prepared by Dr Robin Jackson, consultant occupational physician. He referred to ongoing symptoms from Ehlers Danfoss Syndrome and cognitive difficulties. The report (which is dated 5 December 2019 and was therefore prepared as the grievance proceedings referred to above were in train) said that the claimant was unfit for work and would probably remain unfit until satisfactory resolution of the grievance process which she was currently undergoing.

62. He recommended the following long-term adjustments to ameliorate the physical difficulties:

    - A single workstation if feasible from an operational perspective.
    - Refreshing her workstation.
    - Provision of a fully adjustable chair.
    - Provision of a trolley for transporting files or equipment etc.

63. To help to ameliorate difficulties with cognitive memory, Dr Jackson recommended the following:

    - Providing stability/familiarity of job role.
    - Providing clarity of job role and responsibilities.
    - Simplifying tasks where this is feasible.
    - Careful introduction of any changes or new processes.
    - Providing written communication/instruction rather than verbal information.

64. He concluded that*, "the next steps in her occupational management will very much depend on resolution of the outstanding grievance".*

65. The claimant and Mrs Brown spoke again on 16 April 2020. The claimant again asked to work in IDT. She mentioned that she had had a further

consultation with Dr Jackson the previous week. Mrs Brown asked to see the latest report to determine if anything had changed since 5 December 2019.

66. On 20 April 2020 Jill Hill, nurse manager (occupational health) emailed Mrs Brown (page 96). She said that Dr Jackson had undertaken a telephone consultation with the claimant on 9 April 2020. Dr Jackson did not feel that a further report was necessary following the consultation and did not feel there was any additional information he needed to add.

67. Matters were pursued and on 21 April 2020 the claimant met with Louise Shore and Elizabeth Isaac (advanced practitioner). It was agreed that the claimant could return to work in IDT. The meeting took place by Teams. The minutes are at pages 97 to 100. Mrs Shore explained the systems that had been put in place to deal with the challenges of the pandemic.

68. In paragraph 7 of her witness statement Mrs Shore says that the claimant *"shared that she needed structure and repetition of tasks to support her short term memory difficulties and to be able to complete tasks sufficiently."* She was told by the claimant that she had been in touch with a charity for support. The claimant also said that she had not received a chair and computer assessment in her previous team. Mrs Shore said that the respondent was unable to offer a chair and computer assessment in the temporary accommodation which was being occupied as a result of the pandemic.

69. A detailed return to work plan was devised as we can see at pages 102 and 103. The claimant was initially to start working two days a week for six hours a week in total. She would then increase to three days per week (following the initial two weeks of the phased return to work plan). She was to work nine hours in the third week, moving up to 12 hours in the fourth and fifth weeks following her return. A detailed workplan of the tasks that she was expected to undertake was also drawn up.

70. The claimant began working in IDT on 30 April 2020. Mrs Shore explained that during her time there, she was "*an additional member of staff due to IDT being the only office based team."* Mrs Shore gave evidence that the claimant followed the phased return timetable and that this was adapted to suit her circumstances. Her evidence upon this was unchallenged by the claimant. In fact, on the contrary, the claimant was complimentary of the support offered to her by Mrs Shore and Miss Isaac.

71. Mrs Shore says that a catch up meeting took place on 14 May 2020. In paragraph 13 of her witness statement, she refers to the claimant saying that she had feelings of being overwhelmed. Mrs Shore's evidence is credible as the claimant followed up that meeting with an email the following day. This is at pages 110 and 111. She explains why she had a feeling of being overwhelmed. She said that she had spoken to the charity which was supporting her. She recognised that she had a lot to learn. She thanked Mrs Shore and Miss Isaac for their support. For her part, Mrs Shore responded positively and said that she would *"see if there are additional process documents I can pull together to support as well."*

72. In May 2020, the claimant completed a reasonable adjustments agreement and a 'well at work statement'. These are at pages 104 to 109. (It is not clear precisely when during May these documents were completed). It appears from Mrs Brown's witness statement (at paragraph 13) that she contacted

Louise Shore on 18 May 2020 to discuss the claimant's progress. It was this which prompted Louise Shore to send to the claimant a number of documents including the reasonable adjustment agreement and the well at work statement. (In addition, the claimant was sent a stress risk assessment, and health impact statement).

73. These documents were discussed at a meeting held on 3 June 2020 which was attended by the claimant, Louise Shore, Liz Isaac and Sarah Brown. (The claimant had completed the well at work statement and reasonable adjustments agreement and submitted them on 1 June 2020, ahead of the meeting a couple of days later).

74. The claimant outlined her medical conditions in the first box on the first page of the reasonable adjustments agreement. As well as the two conditions found by Employment Judge Maidment to constitute disabilities for the purposes of the 2010 Act, the claimant also recorded: brain aneurysm, cervical and lumbar stenosis of the spine, asthma and dry eyes. The aneurysm and asthma were noted to be *"not applicable regarding reasonable adjustments."* She said that the EDS and the mild cognitive disorder can impact on her memory and cause difficulty with processing information as well as causing fatigue. The symptoms associated with the EDS (causing spinal issues) was likely to cause the claimant pain. There were visual difficulties due to her eye condition. She also attributed brain fog and cognitive difficulties to the EDS and mild cognitive impairment.

75. The claimant set out a number of adjustments which we can see at pages 105 and 106. Amongst other things, she asked for simplification of tasks so that she was only expected to undertake one task at a time and then to be provided with guidelines. She made similar observations in the well at work statement.

76. A record of a meeting of 3 June 2020 is at pages 120 and 121. It was noted that the phased return to work plan was due to end on 25 June 2020. It was agreed that the respondent would supply the claimant with assistance including precedent examples of completed forms and supplying documents in electronic form.

77. Another phased return to work review meeting was held on 2 July 2020. This was attended by the claimant, Claire Warren-Higgs, Louise Shore and Sarah Brown. Notes are at pages 122 and 123.

78. The phased return to work plan was extended by two weeks until 13 July 2020. The claimant acknowledged the positive support which she had experienced. She is recorded as saying *that "everything is going ok and [I am] going on to the wards on my own."* The claimant acknowledged the support given in paragraph 13 of her witness statement.

79. Mrs Warren-Higgs says in paragraph 9 of her witness statement that, *"On 2 July 2020, following the review of the business continuity plan, Victoria was informed that the social work role within the locality teams and IDT would be reverting back to that of pre-pandemic, due to the urgency of work in the community and reduction of work as IDT."*

80. The claimant was therefore given a number of options. These are set out in some detail in the minutes of the meeting of 2 July 2022. In summary they were:

- To work as a temporary social worker in the East Locality Team covering maternity leave.
- To work as a permanent social worker in SAPAT.
- To work as a permanent social worker at PSU ('Positive Step Unit').
- To work as a permanent social worker within IDT.
- To return to her substantial role in North Team.

81. Mrs Warren-Higgs confirmed the claimant's options in a follow up email dated 2 July 2020. This is at pages 124 and 125.

82. Unsurprisingly, the claimant declined to return to her substantive role in the North Team. She chose to cover the maternity leave in the East Team. However, before she commenced that post a permanent post became available in the East Team which she was offered on 5 August 2020. The relevant email is at page 140.

83. Mrs Warren-Higgs was able to offer the claimant a permanent position within the East Locality Team on her current contracted hours of 22.5 per week. She said in her email that, "*This social work post is a generic role working with adults in the East Locality whilst we are now in a recovery stage from Covid, our community work and the need to get out there is increasing.*" Mrs Warren-Higgs copied Mrs Brown and Mrs Shore into the email. Further, Sarah Sones, team leader in the East, was also copied in. Mrs Warren-Higgs told the claimant that Sarah Sones would be in touch with her to discuss her return to the East Team.

84. Around this time, the claimant had initiated contact with Access to Work. On 7 July 2020, Sajida Chowdry contacted Sarah Brown (pages 126 and 127). She introduced herself to Mrs Brown and said that the claimant had given her (Mrs Brown) as the point of contact for Access to Work to arrange for a workplace assessment. Miss Chowdry attached the *proforma* information for employers that we see at pages 126 to 131.

85. Mrs Brown spoke to the DWP and an Access to Work assessment was arranged. The claimant's unchallenged account in paragraph 15 of her witness statement is that she received the DWP recommendation via email on 21 July 2020 and then received a further email on 19 August 2020 confirming that the respondent may now purchase the items recommended.

86. The email addressed to the claimant from Miss Chowdry of 21 July 2020 is at pages 133 to 138. This sets out the DWP's recommendations for the purchase of a number of items. The claimant was asked to sign and return a declaration to Access to Work whereupon an information pack would be sent to the employer to explain the procedure for reimbursement. Receipt of the declaration was acknowledged by the DWP on 19 August 2020 (page 139). The claimant was advised that the respondent could go ahead and purchase the agreed items if that had not already been done. (It is not the responsibility of Access to Work to purchase the items).

87. The claimant explained in paragraph 16 of her witness statement that her decision to take what was at the time initially thought to be a temporary post in the East Team was influenced by parking restrictions at the Doncaster Royal Infirmary. The respondent of course was not the owner or manager of

the DRI's property and was therefore very much in the DRI's hands. In evidence given under cross-examination the claimant said that she understood there to be a five years' waiting list for a parking space.

88. The claimant's account was that her decision to take the temporary post in the East Team was influenced by the parking restrictions at the DRI. To her credit, she said working in the East Team was her preferred option in any case.

89. After the claimant returned to the East Team, she found out from a work colleague that there was an opportunity to park at a nearby public house for a modest daily fee. This presented a solution to the car parking issue which arose at the DRI. The pub was only about a five minutes' walk away. In contrast, the arrangement to work at the IDT (before the claimant knew of the pub car parking) would have entailed her parking at the racecourse and then getting a minibus to work. This was not a practical proposition for the claimant.

90. The claimant mentioned (during the course of a grievance meeting held on 10 March 2021 before Kathryn Anderson-Bratt, head of quality and safeguarding) that she had identified a resolution to the car parking issue which had presented a barrier to her working within IDT at the Doncaster Royal Infirmary. (For clarity, this was in connection with a second grievance brought by the claimant as we shall see).

91. The claimant says in paragraph 16 of her witness statement that Mrs Warren-Higgs had told her that by taking a temporary post at the East Team (before the permanent role became available) she would lose her permanent employment status and she would be at risk of redundancy at the end of the temporary contract. The claimant said that that had not been the case when she undertook a temporary post in 2013 after which she reverted to her substantive post. There was no evidence from the respondent (particularly from Mrs Brown) to explain their policy should a permanent employee take a temporary post.

92. On 23 September 2020 Mrs McKenzie emailed the claimant about arrangements for her return to the East Team (page 143). The claimant commenced working in the East Team on 28 September 2020. She was working there three days a week.

93. Mrs McKenzie met with the claimant on her first day. The claimant forwarded to her the DWP report dated 21 July 2020 on her first day in the East Team. It is evident from Mrs McKenzie's email to Sarah Brown and Amy Todd of the respondent dated 29 September 2020 (at page 153) that Mrs McKenzie hitherto had been unaware of the DWP report. Mrs McKenzie forwarded to Amy Todd and Sarah Brown the claimant's email to her (Mrs McKenzie) of the previous day with the attached DWP report. Mrs McKenzie asked them what she needed to do about the matter.

94. The Tribunal agrees with the claimant's evidence given in paragraph 19 of her witness statement that this material contradicts the respondent's assertion that a thorough and comprehensive handover took place. Had such a meeting taken place it may be expected that Mrs McKenzie would have been made aware of the DWP report.

95. The Tribunal considers that the claimant also makes a good point that the handling of her transfer back to the East Team at the end of September 2020 was not in compliance with the third recommendation within the grievance outcome report of 17 January 2020 to which the Tribunal referred earlier in paragraph 54.

96. The meeting of 28 September was attended by the claimant, Mrs McKenzie and Kate Robinson (advanced practitioner). This was described by Faye McKenzie as a *"chat"* in the email which was sent to the claimant on 23 September 2020 to arrange the meeting. There is no contemporaneous record of the meeting. Further, it was described Mrs McKenzie as a welcome/induction meeting when Mrs McKenzie was interviewed by Miss Scott on 27 May 2021. (This interview was in connection with Miss Scott's investigations when she was hearing the claimant's appeal against Kathryn Anderson-Bratt Stage 1 grievance decision of 22 April 2021).

97. Mrs McKenzie was cross-examined by the claimant to the effect that pursuant to the third recommendation of the grievance outcome of 17 January 2020 (referred to in paragraph 54) a formal handover should have taken place accompanied by a proper transfer plan. Mrs McKenzie replied, *"I don't know".* It is clear from this that she was unaware of the January 2020 recommendation. She was also unaware of the reasonable adjustments agreement and well at work statement.

98. In fairness to Mrs McKenzie, it would of course be for others to inform her of the claimant's needs and requirements and of any matters arising out of any prior processes involving the claimant. When the claimant cross-examined her, Mrs Brown was asked why a formal handover as recommended in the January 2020 grievance outcome was not implemented. Mrs Brown said, *"you could ask Faye McKenzie."*

99. Mrs Brown was in fact absent from work from 20 August to 8 October 2020. It was at around this time that arrangements were being made for the claimant to move to the East Team. The claimant properly asked Mrs Brown whether Amy Todd should not have picked the matter up. Mrs Brown said, *"I can't say what she did."*

100. From all of this (in paragraphs 92 to 99), the Tribunal concludes that no formal handover was carried out when the claimant moved to the East Team in September 2020. The recommendations made in the January 2020 grievance outcome were not followed by the respondent. There was no formal transfer plan. There was a failure of communication about the Access to Work issue.

101. Against that, the Tribunal finds that at meeting of 28 September 2020 was discussed the respondent's expectations of the claimant in her new role. This is corroborated as on 8 October 2020 Faye McKenzie emailed the claimant (pages 156 to 157) confirming what had been discussed on 28 September 2020. (Unfortunately, Mrs McKenzie thought this had been sent shortly after the meeting. She then realised that it was sitting in her drafts. When Mrs McKenzie said this when giving evidence before the Tribunal, the claimant fairly accepted this explanation).

102. There is nothing in the bundle or within the claimant's witness statement questioning Mrs McKenzie's record in the email of 8 October 2020 of what

was discussed on 28 September. Further, it is against the probabilities that the parties would have met on 28 September 2020 and not discussed the expectations of the claimant in role and her job content. Upon this basis, therefore the Tribunal finds that the parties did have a meeting at which matters were discussed. However, this fell short of the formal handover contemplated by the respondent in the January 2020 recommendations recorded in paragraph 54 above.

103. The email of 8 October 2020 records the following:

- That the claimant would work three days a week (on a Monday, Tuesday and Friday).
- Mrs McKenzie was making enquiries about obtaining the equipment recommended by the DWP.
- Mrs McKenzie arranged for the claimant to have two buddies by way of peer support. (She arranged for two buddies upon the basis that one may not be sufficient given Covid restrictions).
- The claimant was provided with Claire Henderson as supervisor with effect from 12 October 2020. In the meantime, Mrs McKenzie and Kate Robinson were to supervise the claimant.

104. In paragraph 20 of her witness statement, the claimant says that she was allocated five outstanding review cases on her second day. She complains that "*the cases were not up to date on the electronic recording system and did not reflect service users' current needs or circumstances, leading to more social work involvement than would have been necessary.*" In paragraph 21 of her witness statement the claimant says that Claire Henderson informed her that she would be allocated a further nine review cases to be completed by mid-January 2021. She was concerned about the expectation upon her to hold between 16 and 19 cases. She says in paragraph 21 that *"had a transfer meeting taken place to establish cases, workloads and expectations prior to my move, I would have immediately realised that this would have put me at the same disadvantages as when I transferred to the North Team."*

105. The claimant was not challenged about the evidence which she gave in paragraphs 20 and 21 of her witness statement. Her point was made well for her by the fact that in her email sent on 8 October 2020 Faye McKenzie did not refer to any expectation of the claimant picking up five outstanding review cases on only her second day in the East Team. Therefore, there is much force in the claimant's point that a formal and detailed handover accompanied by a transfer plan would have alerted her to this expectation. The Tribunal accepts her account of matters upon this issue.

106. On 1 October 2020 the claimant emailed Faye McKenzie and Kate Robinson (page 145). She asked whether she could undertake "*DST reviews to start with as they are on Teams?"* ('DST' stands for Discharge Support Tool). The claimant's evidence is that there was no response to this request. There is nothing within the bundle to suggest that her email of 1 October 2020 received a response.

107. In paragraph 22 of her witness statement the claimant gave evidence that the disregard of her request of 1 October 2020 coupled with what she had been told by Claire Henderson (about the expectation to carry around 16 cases) left

her feeling very anxious. This is credible evidence in the absence of any record of a reply to the claimant's request to undertake DST reviews and the Tribunal therefore accepts the claimant's account.

108. The claimant was on annual leave between 5 and 15 November 2020. When she returned, she discovered that she was placed upon the duty rota. We can see this at pages 168 and 169. She was down to undertake duty work each week between 27 November and 21 December 2020. In the new year, she was scheduled to be on duty on 7 January 2021 and then not until 21 January. She was rostered to do duty on 29 January 2021 in addition.

109. The claimant emailed Faye McKenzie (copying in Claire Henderson) on 17 November 2020. This email is at pages 145 and 146. She asked for a review of her move as she was finding the transition to be difficult. She recorded what she had been told by Claire Henderson prior to going on annual leave about the expectation to hold around 16 cases and in addition to do duty work. Her concern about the latter was that this involved undertaking additional assessments. It meant that she was expected to undertake the full range of tasks. She described herself as feeling *"overwhelmed"* given that she *"was already struggling with her working and navigating around some Carefirst processes that I've either not undertaken before or not undertaken for a long time."* She acknowledges that Claire Henderson was supportive and understanding of her and it was agreed that she would only "*initially be allocated two further cases."* She goes on to say that upon her return from annual leave on 16 November 2020 she, *"experienced the same overwhelming feelings with the administrative processes, despite the fantastic support from the team (one of the reasons for my request to return to the East, the other being the D2A role as it negated most of the issues)."* She then lists issues which she had around her work in the East Team. In summary, these were unfamiliarity with the processes, isolation due to homeworking, the diversity of the work and processes associated with participating in the duty scheme and the number of allocated cases within the time frame giving by Claire Henderson. The claimant again acknowledged the support that she had been given by management.

110. The claimant came up with a number of solutions. These were:

- That she should complete cases upon which she was already actively working and there be a re-allocation (to others) of "*unworked cases until familiar with full processes."*
- That her duty rota be re-allocated, to reduce multi-tasking difficulties. She contemplated the possibility of swapping duty with other members of staff including those working at the Doncaster Royal Infirmary.
- That the equipment recommended by Access to Work be provided to her.
- That she may apply for flexi-retirement to reduce to two days working and utilise annual leave pending approval.
- As a last resort, taking time out (presumably unpaid) or taking ill health retirement.

111. The claimant concluded her email by saying that, "*I know everyone is busy and I do not want to put additional pressure on anyone, however, I also*

recognise that I cannot continue as I am, and I would welcome your thoughts and advice."

112. On 20 November 2020 Mrs McKenzie responded to the claimant. Her email is at pages 146 and 147. She welcomed the claimant having alerted her to the issues to give the respondent the opportunity of supporting her. She said that "*As a social worker in the team it is expected that your role includes and is not exclusive to the following duty, hub cover, Care Act assessments, reviews, care assessments, Court of Protection cases, safeguarding*." She said that adjustments had been made to the role in that the claimant had been asked to do the Covid reviews upon the basis that they *"would be easier on you … so that you had more time to be able to complete them and ask that you complete them by the middle of January which was thought to be acceptable. Initially, these were given to you as one but you explained to Claire that this was too much so it was agreed that these would be allocated to you gradually of two per fortnight, so that these could be completed in the time frame that was set."*

113. Mrs McKenzie said that she was going to refer the claimant back to occupational health to explore the issue of ill health retirement and re-deployment. She also proposed to ask occupational health about the claimant's equipment needs. She raised an enquiry of the claimant as to the equipment which she already had in her possession (whether provided by the respondent or already in the claimant's possession at home). Mrs McKenzie also proposed that a meeting take place to discuss the matter further. She proposed that this should involve Sarah Brown.

114. On any view, the claimant's email of 17 November 2020 was measured and reasonable. It was also responsible. She demonstrated insight of her difficulties. The claimant fairly recognised the support which she had been given when she moved to the East Team. However, plainly, it was right for her to raise her concerns given how she felt at the time. Similarly, Faye McKenzie's response of 20 November 2020 was very reasonable and supportive.

115. The claimant spoke to Mrs Brown on 26 November 2020 (page 174). This is a record of a telephone call. Mrs Brown told the claimant that, "*Each individual has different reasonable adjustments, this may be tasks, duties, role etc and I asked Victoria at this stage to write down all the tasks she needs to undertake for a case, then within each element to write down what she is confident with and able to undertake that task, then identify the things she is needing further support with, and is that further support, equipment or written processes or just time to learn the role."* This request was labelled the *"task analysis."*

116. An occupational health consultation took place on 9 December 2020. Due to Covid restrictions this was by telephone. The report is dated 9 December 2020 and is at pages 175 to 178. It was prepared by Pauline Highton, occupational health manager. Her opinion was that the claimant was temporarily unfit for work and required a review by the occupational health physician. The claimant in fact went on sick leave the next day, 10 December 2020.

117. Paula Highton went through the claimant's medical background and the impact of her several conditions upon her health and day to day functioning.

About impact on work, Paula Highton said that the claimant had "*difficulty adapting to new systems of work and requires one to one training support with written instructions to report retention and provide an ongoing guide, difficulty multi-tasking and managing multiple caseloads with strict deadlines, requires additional time to complete complex reports."*

118. Paula Highton said that the issues in the claimant's case were very complex. She made the following recommendations should the claimant return to work:

- That the adjustments offered by Access to Work be implemented where operationally feasible.
- That the claimant would benefit from working part time hours with the option of flexible working.
- That a task analysis be completed in conjunction with the claimant to help determine which activities she can and cannot complete due to her disability
- That the *respondent "may wish to consider re-deployment to a role which Miss Woodhouse is able to complete with the least amount of impact on her health. Miss Woodhouse has suggested IDT and D2A as being two possible alternatives to her current practice if this is operationally feasible."*

119. It was put to the claimant by Miss Hashmi that the suggestion of re-deployment to IDT or D2A had emanated from the claimant and not from Paula Highton. Effectively, it was suggested that the occupational health manager was simply repeating back to the respondent a suggestion made by the claimant. While there may be some merit in Miss Hashmi's point, a recommendation such as that made here by occupational health for re-deployment will usually emanate from either the employer or the employee. It is difficult to see how occupational health can have such a detailed knowledge of the employer's organisation to be able to suggest such a matter themselves. Further, Paula Highton did not say that a move to IDT or D2A was medically contraindicated. In the Tribunal's judgment, therefore, there is merit in the claimant's suggestion that re-deployment had the imprimatur of occupational health support. This was of course qualified by the need for the re-deployment to be operationally feasible.

120. A meeting took place on 11 December 2020 which involved the claimant, Faye McKenzie, Claire Henderson and Sarah Brown. The occupational health report of 9 December 2020 was tabled at the meeting. It was agreed that the parties would meet again on 29 January 2021. In between times, the claimant was discharged from the haematology clinic on 13 January 2021 and was fit for work. She gave unchallenged evidence that she was fit to work from that date in paragraph 29 of her witness statement.

121. On 22 January 2021 Mrs Brown wrote to the claimant to record what was discussed at the meeting of 11 December 2020 (pages 182 and 183). It was recorded that the claimant would work with Claire Henderson to put together the task analysis which had been discussed on 26 November 2020 and which had been recommended by occupational health in the report of 9 December 2020.

122. Sarah Brown said (at page 182) that, *"Following the completion of the task analysis (if you are able to provide during the meeting on 29 January 2021) and together with the latest occupational health report of 9 December 2020 and the DWP recommendations, we can then consider any more reasonable adjustments we can support and offer you."*

123. In paragraph 32 of her witness statement Sarah Brown says that she spoke with Claire Warren-Higgs on 7 January 2021. This was to ascertain any potential vacancies within IDT. Mrs Warren-Higgs confirmed that there were no suitable vacancies.

124. Mrs Brown was unable to give any explanation for the delay in making this enquiry between 11 December 2020 and 7 January 2021. Likewise, there was no explanation for the six weeks' delay between 11 December 2020 and 22 January 2021 in sending to the claimant a record of the 11 December meeting.

125. The respondent's evidence was that a move back to working in IDT would not be beneficial for the claimant. In essence, the respondent's position was that the IDT role undertaken by the claimant between April and July 2020 was fundamentally different to that which she would be carrying out were she to move back to IDT. Claire Warren-Higgs says in paragraph 12 of her witness statement that the claimant's *"experience of working [in IDT] had been unrealistic and not the true role as a social worker, due to the changes resulting from the Covid-19 pandemic that were in place at the time. Whilst there were no permanent vacancies available in IDT at that time in any event, the role in IDT now mirrored that of a locality social worker in the fact that all of the documentation was recorded on the newly implemented case management system "Mosaic" and the pace and complexity had increased. If Victoria had returned to IDT in a permanent position the role would be significantly different to the role that she completed whilst on a phased return to work, and therefore there were concerns about the negative impact on Victoria's health and well-being if she were to transfer to IDT."*

126. Mrs Shore (who, it will be recalled, is the team leader of IDT team) gives a similar account to that of Mrs Warren-Higgs. In paragraphs 22 to 25 of her witness statement she gives a detailed account of changes in the workload in IDT from September 2020. She says that *"The emergency department returned to pre-pandemic levels of demand, elective surgery was reinstated and the hospital returned to usual practice and demands. This resulted in an increased demand on the staff in IDT, with around a 150% increase in workload compared to pre-pandemic levels, and balancing post discharge work with that of patients needing assessments for discharge."* She also mentions the new database system Mosaic and then referred to IDT as a "*very pressured, fast paced, stressful work environment where each day can't be planned as responses to demands in the emergency department, duty tasks and varied requests and questions for assessments from the ward staff require juggling of cases and responses being able to multi-task and separate one case from another when recording and planning actions for discharge."*

127. Mrs Shore says that, "*As Victoria responds best to repetition of tasks and routine to support her cognitive difficulties, I believe this environment would create additional pressure for her to manage, along with the very stressful and constantly changing caseload as people become unwell or pass away and*

plans change very quickly. I therefore believe that this could have a negative effect on Victoria's well-being. I do not feel it would be fair or honest not to highlight these areas I believe would create significant challenges to Victoria and possibly affect her well-being."

128. Mrs Shore also gave evidence about the claimant's time in IDT between April and July 2020. She spoke about the support offered to the claimant. The claimant acknowledged the support given to her by Mrs Shore when she [Mrs Shore] gave evidence. The claimant commented when she was asking Mrs Shore questions that she had felt really well supported in terms of the adjustments made to the role and emotionally. The claimant did not challenge the evidence of Mrs Warren-Higgs and Mrs Shore about the nature of the IDT work in late 2020 and early 2021. There was no realistic basis on which she could do so. The Tribunal accepts the respondent's evidence upon this issue.

129. The claimant asked Mrs Shore if she felt that she could develop into the IDT role as it had evolved after September 2020. Mrs Shore said that it was hard to say until the claimant undertook the role. The claimant asked her if there was anything during her time within IDT that led Mrs Shore to think that the claimant was not able to do the IDT role. Mrs Shore fairly accepted that there was nothing to indicate that the claimant was unable to fulfil the role *"otherwise she wouldn't have been offered the permanent position."* (This is of course a reference to the claimant having been offered a post in IDT upon a permanent basis at the meeting of 2 July 2020).

130. The claimant was concerned that she was not given the opportunity of moving from the East Team to IDT at any stage during 2021. She put it to Mrs Shore that IDT was struggling for staff and was having to have recourse to agency workers for cover.

131. Mrs Shore gave evidence about the recruitment of agency social workers in paragraphs 26 to 31 of her witness statement. She says that in December 2020 she contacted an agency to recruit two temporary social workers for a three months' period to provide support with the additional winter pressures and the continued outbreaks of Covid-19. They were funded via the additional resources made available from the government. In the event, the posts were only filled between 12 April and 7 May 2021. Mrs Shore observed that, *"there have been very few agency workers available as they have been in such high demand."*

132. In paragraph 27 of her witness statement, she then makes reference to contacting the agency again in January 2021. One of the respondent's employees was due to go on maternity leave in February 2021. Her return date was unclear. The assignment was for three months cover initially but extended for a further three months *"due to the pressure of workload at that time."*

133. In June 2021 a further advertisement was submitted for three months' cover to support the continued increases in demand on hospital and IDT. A further advertisement was placed in August 2021. An agency worker was appointed on 23 August. Their assignment has been extended twice to cover winter pressures until March 2022. Two further agency workers were recruited in October 2021 to cover winter pressures.

134. Mrs Shore says in paragraph 30 of her witness statement that, *"We have advertised for agency workers during most of 2021 due to winter pressures, lockdowns, implementation of new computer system, staff sickness and volume of work."* She again alludes in this paragraph to a shortage of agency workers.

135. Finally, she says that the respondent placed an advertisement for a permanent social worker vacancy in IDT on 16 August 2021. The candidate withdraw. No permanent appointment has been made.

136. The Tribunal accepts Mrs Shore's evidence in paragraph 26 to 31 of her witness statement about efforts made by the respondent to recruit for posts within IDT. These efforts were noted in the agreed chronology of events in any case and accordingly were accepted by the claimant as accurate.

137. That said, the position was a little confused as it was put to the claimant by Miss Hashmi that on 12 April 2021 only one of the agency worker posts was filled. Mrs Shore refers to the <u>posts</u> being filled between 12 April and 7 May 2021 (in paragraph 26 of her witness statement). It was then put to the claimant by Miss Hashmi that the second agency role was filled in May 2021. At all events, there is merit to the claimant's answer when she said in response that the respondent was unable to get anyone at all until April 2021 where the claimant was sitting at home not working.

138. Returning now to the chronology, the next significant event was the meeting which took place between the claimant, Mr Whitehouse, Mrs McKenzie, Claire Henderson and Sarah Brown on 29 January 2021. A record of this meeting is at pages 188 and 189. In anticipation of the meeting, on 24 January 2021, the claimant emailed Claire Henderson, Faye McKenzie and Sarah Brown with her well at work statement and reasonable adjustments agreement. She also (amongst other things) attached a copy of the DWP recommendations following the assessment of 17 July 2020 (pages 149 and 150). As we have seen, all three of those from the respondent had already received a copy of this assessment in any case at the end of September 2020.

139. On 28 January 2021, the claimant emailed Mrs Brown (page 150). She was concerned about undertaking the task analysis. She said that she had spoken with Claire Henderson on 14 January 2020. The claimant said that it had been agreed with Claire Henderson that the task analysis *"would not reflect the issues that I struggle with; it is the level of multi-tasking, diversity of role and volume of processes within a locality team that overwhelms me."* She went on to say that *"I had overlooked that I had completed a well at work statement and a reasonable adjustments agreement in May 2020 that outlines my limitations and how to manage them."*

140. In the same email of 28 January 2021 at page 150 the claimant made reference to emailing a copy of the care plan which she had received from her memory clinic. This is at pages 184 to 186. A diagnosis was given of *"FO 67 mild cognitive disorder."* More detailed neuropsychological assessment was recommended. The nurse consultant reported that from the claimant's *"description today it would appear that if she has a fairly planned systematic office based role she is able to perform this quite well but feels that in other social work environments it can be difficult for her to perform as effectively due to persistent difficulties with aspects of mild cognitive impairment. This*

in turn can understandably have some level of negative impact on mood or increased anxiety levels."

141. Unfortunately but understandably, the letter from the memory clinic does not set out the symptoms of mild cognitive impairment. Such a description appears nowhere in any of the bundles with which the Tribunal was presented (or at any rate, the Tribunal was not taken to such).

142. The Tribunal referred the parties to a description of mild cognitive impairment which appears on the *Alzheimer's Society* website. This says that a person with mild cognitive impairment may have mild problems with one or more of the following:

- *Memory – for example forgetting recent events or repeating the same question.*
- *Reasoning, planning or problem solving – for example struggling with thinking things through.*
- *Attention – for example, being very easily distracted.*
- *Language – for example, taking much longer than usual to find the right word for something.*

143. The Tribunal now turns to the meeting of 29 January 2021. Notes of this are at pages 188 and 189. It was noted that the claimant said she was "*right back where she was two years ago, that she is not overcoming the issues that have presented themselves in terms of the role and looking at what support she requires to do her job."* The claimant acknowledged that *"the team are lovely and have supported her which has meant that she has stayed in the team longer before going off sick again, however she is struggling to multi-task with the diversity in the role in terms of completing duty, the community hub and the different assessments within that role."* She said that within her role as IDT she did not have to complete these tasks and she considered that DST and D2A were best suited to her in terms of processing.

144. She went on to say that IDT did not have duty rota, a high level of cases and the same number of cases to complete. She said that she was struggling within the role in the East Team *"to remember the sequencing of the processes, finds it hard to focus and keeps getting distracted due to having to go from one thing to another"* whereas in IDT she "*knew what her role was and how to execute this within the team."* The Tribunal observes that some of the difficulties reported by the claimant in her role in the East Team reflect the symptoms of mild cognitive impairment on the Alzheimer's Society website.

145. Mrs McKenzie said that adjustments had been made to the claimant's role within the East Team to avoid difficulties and fatigue. It is recorded that Mrs *McKenzie "stated that Victoria had seven cases, to have been completed in two months."*

146. The claimant says that Mrs McKenzie said during the meeting that the claimant's completion rate, *"having only completed two cases … just isn't good enough."*

147. Upon this issue, at paragraph 20 of her witness statement, Mrs McKenzie says that she was unable to *"remember the exact words that I used. I did*

discuss the concerns around the low number of cases completed, however we were also discussing the task analysis and how this would support [the claimant] and therefore her performance. The completion of two cases in three months is not acceptable, in comparison to the expected four cases a month as a minimum for a part time worker."

148. When asked about this in cross-examination, Mrs McKenzie said that she had not used the words *"it's not good enough*". "I would not have thought I would have used those words" is how she put it.

149. There is merit in the claimant's point that the words "*it's just not good enough"* are unlikely to feature in the respondent's record of the meeting. This is not a verbatim account. However, on balance, the Tribunal prefers the respondent's account upon this issue. The claimant has throughout, to her credit, acknowledged the support given to her by Faye McKenzie and others within the East Team. It would therefore, in the Tribunal's judgment, be out of character for Mrs McKenzie to say something so unsupportive. The Tribunal accepts that the claimant may have subjectively interpreted what was being said to her in that way. However, on balance, the Tribunal finds it against the probabilities that Mrs McKenzie would have expressed herself in such a way in circumstances where she has been consistent in giving the claimant support.

150. Mrs McKenzie pointed out, during the course of the meeting, that the IDT role was different to that which the claimant had experienced when she was there between April and July 2020. Mr Whitehouse asked why the claimant could not return to work in IDT or do D2A work if she considered that that would be a better work environment for her. Mr Whitehouse also raised the point that agency roles are being advertised within IDT in any case. Mrs Brown is recorded as saying that there were no roles for the claimant to go into and the roles that were being advertised were short term new staff shortages. Mrs Brown is recorded as saying that she would check what the agency roles are.

151. The claimant said that she was unable to return to the East Team due to the complexities of the work there. A return to the East Team was listed as one of the options made available to the claimant nonetheless. The other options were for the claimant to work in IDT on the basis of *"three months agency if available",* re-deployment or *"managed attendance".* Other options canvassed at the meeting were re-deployment into a different role altogether or ill health retirement.

152. Mrs Brown followed up the meeting with an email which she sent to the claimant on 29 January 2021 (page 190). Despite other options being canvassed at the meeting, it appeared that the options offered to the claimant in the email had narrowed to a return to working in the East Team (with continued support for her to complete the task analysis, the DWP assessment and to undergo further occupational health assessment), re-deployment or the following of the managing attendance procedure, moving to an attendance hearing.

153. Mrs Brown said that she had contacted Louise Shore and Amanda Greenhalgh (head of Home First) about posts in IDT around this time. It was confirmed that there were only two agency vacancies offering short term cover until 31 March 2022 and that these had been offered to agency workers.

We know from Louise Shore's evidence that these were not in fact filled until April 2021.

154. In cross-examination, Mrs Brown was asked by the claimant about the issue of the task analysis. The claimant took her to page 177 (being the extract of the occupational health report of 9 December 2020 where it was recommended that one be completed). Mrs Brown acknowledged in evidence that the claimant did not refuse to complete the task analysis after the occupational health recommendation was made. It was simply a question of how the claimant would go about it and the support which the respondent would offer to her. Mrs Brown acknowledged that the completion of a task analysis falls outside any of the respondent's formal policies.

155. On 2 February 2021, the claimant emailed Amy Todd (page 150). She identified there to be a vacancy within IDT. She said that *"This remains the most suitable option as there were no performance issues [when she was there] due to the level of physical support within the hospital team and it was a role and an environment in which I was able to manage and function within. I have been in a position to return to IDT since 13 January 2021, therefore, rather than remain on sick leave, would it be beneficial to both work and myself to return to IDT where there is a clear need and one that I feel able to undertake with the right support."* Amy Todd responded the same day (page 151). She said that these were agency posts and are effectively an additional resource being brought in to support winter pressure and anticipated only to be in place until March 2021.

156. The claimant replied in turn at 16:26 the same day (also page 151). She said that she was aware that the role was to last only until the end of March 2021. She went on to say that "*I would have hoped that I would be supported to return to work in a role that is clearly in need of staff and one that I clearly feel comfortable in undertaking, irrespective of the reason for the post being advertised."* She mentioned that she was aware of vacancies within IDT "*despite several advertisements on recruitment websites."* She was concerned that a return to the East Team would bring with it the prospect of her being dismissed ultimately for incapacity. Plainly, the claimant wished to avoid the prospect of finding herself within the managing attendance procedure. She also complained that the Access to Work recommendations had still not been implemented. This now presented a further difficulty because there the *"three month timescale [to implement the Access to Work recommendations] has… therefore expired."* The claimant said that she feared that the respondent was *"trying to manage me out and the recommendation of the union is to submit a further grievance."* She considered there to be a lack of understanding of her conditions and that trust and confidence was being adversely affected.

157. The claimant's position was supported by Mr Whitehouse. He emailed on 5 February 2021 (page 152). This was sent to Amy Todd and Sarah Brown. Mr Whitehouse said that he was *"finding it very confusing and difficult to understand that we are not supporting Victoria in her request to come back to work."* He said that "*with the disability that Victoria has been diagnosed with I would have thought that a place with IDT where Victoria feels confident and supported would have been the best temporary solution to get the ball rolling and Victoria back into work."* In her email of 2 February 2021 at 16:26 the claimant had alluded to the possibility of resigning. Mr Whitehouse made it

clear in his email that he had not told her that this was the only option available to her but rather to lodge a grievance.

158. The claimant underwent a telephone consultation with Dr Jackson on 4 February 2021. His report is at pages 191 and 192. He said that the claimant had provided him with the report from the memory clinic to which the Tribunal referred earlier (and which was within the bundle at pages 184 to 186). He said that the claimant *“continues to have problem with working memory and multi-tasking in particular and has associated fatigue, which is possibly exacerbated by stress also. Long term adjustments still apply with regards to physical and cognitive difficulties.”*

159. Dr Jackson said that it was possible that the claimant would qualify for an ill health retirement *“most likely at Tier 3 level”.* However, that would depend upon the outcome of the further investigations from the neuropsychologist recommended by the memory clinic. He did not arrange for a further review of the claimant to take place.

160. The claimant submitted a grievance at stage 1 of the respondent’s grievance procedure. This is at pages 193 to 195 and is dated 5 February 2021. The grievance was about the following:

- That there was no transfer meeting or transfer plan undertaken to identify the claimant’s expectations in her role, training needs or her reasonable adjustments. (This was a reference to her transfer to the East Team).
- Her well at work statement, reasonable adjustments agreement and the Access to Work recommendations were not actioned or reviewed.
- The claimant had an unfamiliarity with the processes in the East Team. There was a lack of written instructions and a lack of recommended aids to support her.
- There was a diversity of roles, multiple processes and home working which the claimant found to be overwhelming.
- The claimant requested a return to the IDT team as the most suitable option following her discharge from the haematology clinic on 11 January 2021 (after which she was fit to return to work).
- That she had been informed there were no vacancies in IDT notwithstanding that agency posts had been advertised at least since 8 January 2021.

161. The claimant then identified six possible solutions:

- For her to complete the cases upon which she was already actively working and then reallocate the two cases which she had been given and upon which she had not yet undertaken any work until she was familiar with the processes.
- That there be a re-allocation of some of her duties to reduce the multi-tasking difficulties which she faced.
- That the equipment recommended by Access to Work be provided.
- That she may apply for flexible retirement to reduce to a two day working week and use annual leave until provided.

- That she may take time out (including sick leave as a last resort).
- Also as a last resort, that she contemplate ill health retirement.

162. Upon the *pro forma* grievance document, she indicated that her preferred option was for a return to the hospital IDT team. She also asked for clear policies and procedures to support with her mild cognitive impairment and that reasonable adjustments be implemented.

163. Mrs Brown was asked by the Tribunal whether, following receipt of the claimant's email of 2 February 2021 addressed to Amy Todd about the vacancy in IDT, she or Amy Todd had made any further enquiries about job vacancies. Mrs Brown drew attention to the email at page 151 showing that Amy Todd did make such enquiries on 2 February 2021. However, Mrs Brown's evidence was that no further enquiries were made after the claimant had submitted her grievance on 5 February 2021. The Tribunal asked Mrs Brown why that stopped her from making enquiries about vacancies. Mrs Brown accepted that it did not. Further, the claimant made a reasonable point that there was an inconsistency of approach as the claimant was going through her first grievance process (which had commenced on 26 October 2019 and only ended on 19 June 2020) when she returned to work in April 2020, moving from the North to the East Team. That a grievance process had been running then had not stopped enquiries about vacancies.

164. The grievance of 5 February 2020 was dealt with Kathryn Anderson Bratt. Her involvement has been mentioned already: see paragraph 90. The Tribunal did not have the benefit of hearing evidence from her. She met with the claimant on 10 March 2021. The minutes of that meeting are in the supplemental bundle at pages 370 to 374. It was at this meeting, it will be recalled (from paragraph 90), that the claimant mentioned that she had found out about the public house car parking for the DRI.

165. Kathryn Anderson-Bratt's conclusions upon the claimant's grievance was sent to her on 22 April 2021 (pages 234 to 236).

166. Mrs Anderson-Bratt held that a satisfactory transfer took place from the IDT to the East Team together with reasonable adjustments. These included a significant reduced caseload. In addition, the claimant had been relieved of the obligation to carry out duty cover (least until the end of November 2020) to enable her to become familiar in the role.

167. It was accepted that the Access to Work recommendations had not been actioned. This was upon the basis that the claimant was requested to complete a task analysis *"to support consideration of the recommendations and establish which tools would benefit you the most prior to agreement and purchase."* Mrs Anderson-Bratt held that the claimant had been offered support to complete the task analysis. She did however make a recommendation that any future Access to Work reports are considered in a more timely manner to ensure that any agreed elements can be put in place as soon as possible.

168. Upon the question of a transfer to IDT, Mrs Anderson-Bratt held that the role which the claimant was carrying out there in the spring and early summer of 2020 was a significantly reduced one due to the Covid-19 pandemic. She was satisfied that the roles now available within IDT mirror those within the locality teams and the requirements and pressures were at a similar level if

not higher. She was therefore concerned about the impact upon the claimant of her health and well-being were she to transfer to IDT. In any case, she determined there to be no vacancies other than short term temporary positions.

169. Kathryn Anderson-Bratt concluded that, *"Following the outcome of this grievance, I have asked the HR officer and the East Locality team leader to discuss your future options in a follow up managing attendance meeting, to be arranged as soon as possible. This will provide you with an opportunity to explore and discuss a possible return to work or alternative options such as re-deployment and flexible retirement."*

170. The claimant invoked her right to appeal. She submitted a stage 2 grievance appeal which is in the bundle at pages 242 to 245. This is dated 4 May 2021.

171. The claimant's grounds of appeal were, in summary:

    (1) That the claimant had not received a transfer plan or any written documentation outlining the expectations of her in the East Team.

    (2) That reasonable adjustments are not conditional upon an employee undertaking a task analysis. The notion of a task analysis did not arise until it was recommended by the occupational health practitioner on 9 December 2020 in circumstances where the Access to Work recommendations had been made much earlier on 21 July 2020. *(The Tribunal observes that the claimant may be factually incorrect upon this as the issue of a task analysis was raised by Sarah Brown with her in the conversation of 26 November 2020. Nonetheless, her point remains a good one).*

    (3) The claimant felt that a move to IDT would be beneficial for her. She said that she had performed well in the role in 2020 and occupational health had recommended that consideration be given to transferring her there.

    (4) The claimant said that agency posts continued to be advertised.

    (5) She also placed reliance upon a witness statement provided by Claire Warren-Higgs to Employment Judge Deeley's Tribunal where Mrs Warren-Higgs said that "*With the correct levels of support Victoria was able to learn and retain the new systems and processes, including working with different paperwork and within an acute trust, working with health partners and the demands this poses."* (This is a reference to the claimant working within the East Team from September 2020).

172. The claimant emailed Paula Highton on 11 May 2021. The email exchanges are at pages 246 to 248. It was the claimant's position that Kathryn Anderson- Bratt had overlooked her recommendations in the report of 9 December 2020 and that those recommendations were not dependent upon the undertaking of a task analysis. Paula Highton responded to the effect that occupational health is only there to provide advice and it is incumbent upon the employer to *"gather the opinions, advice and information from often multiple sources to help them make an informed decision."* It was for management to complete the task analysis in conjunction with the claimant and then for the employer to determine what adjustments are operationally feasible and can be accommodated.

173. On 14 May 2021, Faye McKenzie wrote to the claimant (page 249). The claimant was informed that the respondent's *"records show that you've hit a trigger point under the council's sickness absence procedure having had 67 days absence over one occasion during the last 12 month period."* The claimant was invited to attend an absence review meeting to be held on 21 May 2021. The purpose of the sickness absence review was to identify any support which would assist the claimant to return and to enable the respondent to formulate a plan to improve her attendance. The claimant was informed of her right to be accompanied by a trade union representative. The claimant had expressed concern about being put on a performance improvement plan at a sickness review meeting held on 4 May 2021. She was becoming concerned about her position.

174. The claimant met with Claire Scott on 19 May 2021. Claire Scott was the appeals officer responsible for hearing the claimant's appeal against Kathryn Anderson-Bratt's stage 1 grievance outcome.

175. The claimant went through several points raised in her grievance appeal. Claire Scott asked her what she wanted from the process. The claimant replied, *"why can't I go back to IDT? What is stopping them? Why can't I go back to where I functioned rather than looking at managing attendance, re-deployment and flexible retirement."*

176. The claimant told Claire Scott that she would be better working within a hospital environment. This would reduce the risks to her of lone working in the event of a collapse. The claimant said that she was aware that there were still vacancies within IDT.

177. Miss Scott then said to the claimant, *"Let's say that IDT doesn't have the vacancies … if IDT is not an option do you think SAPAT could be, as I understand they are in the office, and it is more routine work."* The claimant replied that, *"I don't have an interest in it. My interest is outcomes for people. It is where I have knowledge and experience, with vulnerable people as I can fight their corner. The money side is immaterial. I have had a safeguarding case and I find it frustrating."*

178. The claimant went on to say that, "*In IDT I pick up a case, only one at a time, go to a ward, speak to colleagues and patient, come back and they are either medically fit or not, and you do the assessment. Pick next one up. Only have 10 to 15 maximum for three days. It is an intense small case load, rather than multiple cases that you dip in and out of. I know every assessment on the ward, know what I'm looking for and know what to do. In the community it could be a carer, family member, hospital, it is the medical social model …"* She complained that working in the East Locality Team she felt *"isolated and lost."* She acknowledged that the work that she had done within IDT the previous summer *"wasn't a normal IDT team and there were reduced processes in place."* This corroborates the Tribunal's finding in paragraph 128 that the IDT work was of a different complexion to that undertaken by the claimant in 2020. The claimant then asked about covering the maternity vacancy within IDT. She knew that IDT were short staffed. She said that they were *"still wanting workers on 7/10 June, as I get alerts all the time."* Miss Scott concluded by saying that she wished to speak to others before reaching her decision.

179. Miss Scott met with Louise Shore on 26 May 2021. They were accompanied by Esther Latham of HR. The minutes of that meeting are at pages 259 to 262.

180. Louise Shore was asked whether she felt that the claimant would be able to fulfil the IDT role as it had now evolved. Louise Shore said, *"I don't think so; it is hard to say, as she did not fulfil the full remit with us. Thought I was seeing [the claimant] had improved and developed. She has familiarised herself with what she was doing at that time and what we needed to do. But when carrying out the full role in IDT there is a need to juggle one case to another, fast pace in the setting we work in. [The claimant] likes routine/process to do something of the same nature and same format."* She then went on to say that there was a diversity of work and the role required multi-tasking. The Tribunal observes that this contrasts with Mrs Shore's views when giving evidence that the claimant was capable of work in IDT.

181. Louise Shore acknowledged that in the area teams the social workers will work with individuals potentially for several months in order to build a relationship. In contrast, in IDT, the turnover is quicker with a much shorter turnover of around 48 hours. Mrs Shore said that the IDT team was different in terms of demand, pace and diversity than working in an area locality team. She said that the claimant *"likes routine, our setting doesn't provide routine."* In contrast, in an area team "*the case load is your case load, it is easier to manage."*

182. Louise Shore alluded to a further issue being the claimant's part time status. Miss Scott asked whether she had any part time staff. Mrs Shore said that a specialist social worker was within the team who worked Tuesday, Wednesday and Thursday of each week. There is also an assessment officer who works four and a half days a week and who takes a lower level of case. She said that part time work generates a need for more frequent handovers. There was no prospect of the claimant undertaking the IDT role in the restricted way in which it had been done the previous year. (The claimant never suggested that she return to work in IDT on this basis).

183. Miss Scott met with Faye McKenzie on 27 May 2021. The notes of that meeting are at pages 263 and 264. She was again accompanied by Esther Latham.

184. Mrs McKenzie went through the history of matters. It was observed that the claimant had worked for just 19 days in total within the East Team between September 2020 and December 2020. Faye McKenzie went through the support which had been offered to the claimant.

185. Miss Scott wrote to the claimant on 28 May 2021 with the stage 2 grievance outcome. This letter is at page 265 to 267.

186. Miss Scott concluded that a significant amount of information was given to the claimant when she moved into the East Team on 28 September 2020. However, she was able to uphold the claimant's grievance in part in that no *"transfer plan or written documentation collating the plan information*" had been provided to the claimant.

187. Miss Scott concluded that it was a reasonable step for the respondent to take to require a task analysis. Miss Scott recommended the claimant to engage with the process.

188. Upon the question of a move back to IDT, Miss Scott concluded that the role in IDT is now far more demanding than was the case when the claimant worked there. Upon the basis of her findings, she held that the work in IDT mirrors the social work roles in the locality teams. She was therefore unable to support the claimant's request for a transfer to IDT because of concerns about the impact upon her health and well-being as well as the needs and demands of the service.

189. The managing attendance meeting duly took place on 21 May 2021. The claimant was accompanied by Mr Whitehouse. A number of options were canvassed at the meeting.

190. On 14 June 2021 the claimant sent an email to Mrs Brown and Mrs McKenzie to say that she had not received written confirmation of the options discussed that day. Mrs McKenzie emailed her on 14 June 2021 (pages 268 and 269). The following options were offered to her:

- Returning to the East Team in her social work post.
- Flexi retirement entailing her reducing to a 22.5 hour working week as a community care officer based in the East Team.
- Working as a social worker within SAPAT.
- Re-deployment within the respondent. This entailed the possibility of the claimant having to undergo a competitive interview. Mrs McKenzie said that as a reasonable adjustment the time scale for this would be extended to 16 weeks.
- For the claimant to remain on sick leave and continue down the managing attendance process "*to a hearing.*"

191. The claimant replied to Mrs McKenzie's email the same day (page 268). She tendered her resignation.

192. The claimant's resignation letter attached to her email at page 268 is at page 270. It reads:

> "*Unfortunately, in view of [Mrs McKenzie's email of 14 June 2021] and in addition to the comments made at my grievance appeal meeting and the subsequent outcome, together with the workplace issues I have experienced since disclosing my cognitive symptoms back in October 2018, it is clear that I do not have the support to enable me to remain in employment with Doncaster Council. I have had the opportunity to meet/work with some lovely colleagues, however, I have also experienced intimidation and punitive practice towards me by others in management roles and continue to experience a lack of understanding in respect of managing cognitive difficulties in the workplace. As such, I feel that I have no alternative but to tender my resignation due to a complete breakdown in my trust and confidence in Doncaster Council to provide the necessary support identified by occupational health, DWP and my memory clinic consultant, to enable me to remain in work.*"

193. The claimant gave two months' notice to resign her position. In the event, she was only required to give one month's notice. The parties agreed therefore to curtail the notice given by the claimant. The effective date of termination was therefore 13 July 2021.

194. This concludes the Tribunal's findings of fact.

The issues in the case

195. We now turn to consider the issues to which this case gives rise. The matter benefited from a private preliminary hearing which came before Employment Judge Buckley on 20 January 2022.

196. She identified the unfair dismissal complaint in the following terms:

"2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

2.1.1.1 Failed to implement and review reasonable adjustments recommended by Occupational Health from December 2019 onwards and the DWP from an assessment in July 2020.

2.1.1.2 In January 2021, the Council advertised for agency Social Workers to support with Covid. The claimant requested to return to the hospital team but was told there were no vacancies.

2.1.1.3 The respondent was still advertising for agency staff but chose to proceed with the tribunal rather than allow the claimant to return to the hospital in about March 2021. The claimant says that the respondent was aware that she would not have proceeded with the tribunal claim if she had been allowed to return to work.

2.1.1.4 Faye McKenzie said something along the lines of 'you've completed two cases it's just not good enough' in a meeting on 29 January 2021 with Faye McKenzie, Claire Henderson and the claimant's union representative. This made the claimant feel unsupported and worried about performance management.

2.1.1.5 There was a lack of communication both internally and with the claimant and a lack of understanding regarding reasonable adjustments when the claimant returned to work in the East Team September 2020 and until 9 December 2020. No transfer meeting took place and the claimant was not given a written plan or information regarding the role, training needs, reasonable adjustment or caseloads. The claimant's manager, Faye McKenzie, thought that the claimant had been provided with equipment to meet her physical needs, when in fact the claimant had provided most of it yourself.

Faye McKenzie arranged for telephone support from colleagues assuming that this would be suitable because she had not communicated properly with the claimant, by for example, having a transfer meeting.

2.1.1.6 *In January 2021 after the claimant contacted HR to negotiate a return to work:*

2.1.1.6.1 *The respondent did not consider offering the claimant the position of maternity cover when a colleague went on maternity leave in about January 2021*

2.1.1.6.2 *The respondent continued to advertise agency posts at £30 per hour, rather than allow the claimant to return to work.'*

2.1.1.7 *The grievance appeal outcome in May 2021 did not support the claimant's request to return to work, when the respondent could have allowed her to return to one of the vacancies.*

2.1.1.8 *The Access to Work recommendations from July 2020 were not actioned because the grievance appeal outcome stated the claimant was requested to undertake a task analysis. The task analysis was not a requirement for the RA policy and had not been requested until December 2020 after the OH review.'*

2.1.1.9 *In June 2021, HR said the claimant could not return because there were no vacancies at the hospital, despite them still advertising. This conflicted with the grievance outcome, which had said that it was related on the impact of the claimant's disability rather than because of a lack of vacancies. The claimant felt they were unable or unwilling to support her to remain in work.*

2.1.2 *What was the most recent act (or omission) on the part of the respondent which the claimant says caused, or triggered, her resignation? This must be some action taken by the employer which is capable of contributing, however slightly, to the breach of the implied term of trust and confidence.*

2.1.3 *Has she affirmed the contract since that act? The Tribunal will need to decide whether the claimant's words or actions*

showed that she chose to keep the contract alive even after the breach.

2.1.4 If not, was that act (or omission) by itself a breach of the implied term of trust and confidence?

2.1.5 If not, was it nevertheless a part (applying the approach explained in **Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation).*

2.1.6 If not, the tribunal will consider the above questions (2.1.2 - 2.1.5) in relation to the next most recent act (or omission) on the part of the respondent.

2.1.7 In determining whether the respondent breached the implied term of trust and confidence the Tribunal will need to decide:

2.1.7.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.7.2 whether it had reasonable and proper cause for doing so.

2.1.8 Did the claimant resign in response (or partly in response) to that breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?"

197. Employment Judge Buckley's case management minute then goes on to consider the issues which arise upon remedy. By consent, it was agreed that remedy issues would be put to one side pending the outcome of the case save for any issue arising out of the claimant's conduct.

Further considerations of the relevant law

198. This case has an unusual feature in that the claimant has not brought a complaint that the respondent was in breach of the duty to make reasonable adjustments as obliged to do pursuant to the Equality Act 2010. Nonetheless,

the Tribunal's judgment is that the Tribunal will need to consider whether there was such a failure given the way in which the alleged breaches of the implied term of mutual trust and confidence has been identified. The claimant's case is that the respondent was in breach of the duty to make reasonable adjustments which can only be assessed by reference to the legal obligations upon the respondent in the relevant sections of the Equality Act 2010.

199. The relevant law as it pertains to the implied term of mutual trust and confidence has been considered already by the Tribunal. It is however necessary to say a little more about the relevant law.

200. The reference in **Omilaju** in the list of issues is to the case of **Omilaju v Waltham Forest London Borough Council** [2004] EWCA Civ 1491. This is authority for the proposition that even if the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract, the employee may be able to rely upon the employer's course of conduct considered as a whole in establishing that they were constructively dismissed. The *"last straw"* (as it is often referred to) must contribute, however slightly, to the breach of trust and confidence.

201. In **Lewis v Motorworld Garages Limited** [1986] ICR 157, Neill LJ said:

> *"It is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

Reference was made in that case to **Woods** (referred to above in paragraph 16) where it was held that upon a consideration of whether the employer is in repudiatory breach of contract of employment it is necessary to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and objectively, is such that the employee cannot be expected to put up with it.

202. In **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978, Underhill LJ considered the last straw doctrine. He said that in an ordinary case of constructive unfair dismissal tribunals should ask themselves the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the [implied term]?

(5) Did the employee resign in response (or partly in response) to that breach?

203. The Tribunal will now turn to a consideration of the law as it relates to reasonable adjustments. Employers are required to take reasonable steps to avoid a substantial disadvantage where a provision, criterion or practice applied to a disabled person puts that disabled person at a substantial disadvantage compared to those who are not disabled. A duty also arises where the provision of an auxiliary aid may ameliorate a substantial disadvantage caused by disability. The obligation to make reasonable adjustments or provide auxiliary aids in such cases in sections 20 and 21 of the Equality Act 2010 applies to the workplace pursuant to section 39(5).

204. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that the particular provision, criterion or practice disadvantages the disabled person. The comparison is to be made with non-disabled people generally.

205. The phrase *"provision, criterion or practice"* is not defined by the 2010 Act. It broadly encompasses requirements placed upon employees by employers. It can extend to formal or informal policies, rules, practices or arrangements.

206. An employer only has a duty to make adjustments if they know or could reasonably be expected to know both that the affected worker is disabled and that they are placed at a substantial disadvantage by the application to them of the relevant provision, criterion or practice. The words *"could not reasonably be expected to know"* encompass the concept of constructive knowledge. The question of whether the employer had or ought to have knowledge of the disability in question is one of fact for the Tribunal.

207. The duty to make reasonable adjustments requires employers to take such steps as is reasonable to have to take in order to make the adjustments. There is no onus upon the disabled person to suggest what adjustments should be made. However, by the time that the matter comes before the Employment Tribunal, the disabled person ought to be able to identify the adjustments which they say would be of benefit.

208. There is no requirement for the disabled person to show that on balance the adjustment would ameliorate the disadvantage. There merely has to be a prospect that the adjustment may benefit the disabled person.

209. The Tribunal drew the parties' attention to the Equality and Human Rights Commission's *Code of Practice on Employment*. In particular, paragraph 6.28 identifies some of the factors which might be taken into account when deciding what is a reasonable step for the employer to have to take. These include:

- *Whether taking any particular step would be effective in preventing the substantial disadvantage.*
- *The practicability of such step.*
- *The financial and other costs of making the adjustment, and the extent of any disruption caused.*
- *The extent of the employer's financial or other resources.*
- *The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *The type and size of the employer.*

210. As is said by the EHRC in paragraph 6.29 of the *Code*, the test of the *"reasonableness"* of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

211. Adjustments may include transferring the disabled person to fill an existing vacancy, altering the disabled person's working hours, providing them with training, assigning a disabled person to a different place of work or arranging home working. A list of possible reasonable adjustments is at 6.32 of the EHRC's *Code.*

212. **Noor v Foreign and Commonwealth Office** [UK EAT/470/10] is authority for the proposition that there is no requirement that, in order for an adjustment to be reasonable, it has to be shown that the making of it would prevent the disadvantage. As was said in **HM Prison Service v Beart** [EAT/650] (at paragraph 29), "*There would be many steps of the kind described in section 6(3) [of the Disability Discrimination Act 1995] which, ahead of their being taken, could not be guaranteed to work in the sense of totalling removing the disadvantage which the disabled person is encountering but that, of itself, is no reason to absolve the employer from the duty to take it or is such, without more, to deny the step the appellation 'reasonable'.".* (The steps of the kinds described in section 6(3) of the 1995 Act were not carried forward into the 2010 Act. However, they are very much of the same order as those in paragraph 6.28 of the EHRC's *Code of Practice*. The same principle therefore pertains). The EAT's ruling in **Beart** was upheld by the Court of Appeal – [2003] EWCA Civ 119.

213. In this case, the Tribunal has already determined that the claimant is a disabled person for the purposes of the 2010 Act. This was the ruling of Employment Judge Maidment on 23 September 2020. No argument was advanced on behalf of the respondent that the claimant was not a disabled person at the material time with which this Tribunal is concerned (nor realistically could such an argument have been run).

214. Miss Hashmi also made no submissions to the effect that the respondent did not know and could not reasonably have been expected to know of the claimant's disability and the disadvantage caused to her by it. It was right and proper for the respondent not to seek such an argument before this Tribunal. There is ample evidence that the respondent was at all material times aware in particular of the claimant's mild cognitive impairment and the problems which it was creating for her in the workplace. The claimant was quite explicit in relaying these issues to the respondent and to occupational health. The Tribunal refers in particular to the claimant's email of 17 November 2020 at pages 159 to 160.

Discussion and conclusions

215. The Tribunal now turns to the conclusions reached upon each of the issues in the case (as set out in paragraph 2.1 of Employment Judge Buckley's case management order of 20 January 2022 recited in paragraph 196 above). The first of these (at paragraph 196, 2.1.1.1) is the claimant's contention that the respondent failed to implement and review reasonable adjustments recommended by occupational health from December 2019 onwards and the DWP following the assessment in July 2020.

216. The reference here to occupational health recommendations from December 2019 is to the report of Dr Jackson dated 5 December 2019 (pages 92 and 93) and then the subsequent occupational health reports. To adjudicate on this issue, the Tribunal need to look at the history of matters after December 2019.

217. In the Tribunal's judgment, there was no failure on the part of the respondent to implement and review reasonable adjustments during the period when the claimant was unfit to work between March 2019 and April 2020. The Tribunal was not taken to her GP's sick notes. However, page 233 of the supplemental bundle is a copy of a fit note whereby the claimant is certified as unfit for work between 29 January 2020 and 28 March 2020 for a number of reasons including undergoing foot surgery, neurological issues and work-related problems.

218. There can be no failure to make reasonable adjustments in circumstances where the disabled person is simply unfit for work. The aim of the reasonable adjustments legislation in the 2010 Act is to enable the participation of disabled people within the workplace. The aim of reasonable adjustments is to encourage that objective. If the disabled person is simply unfit to work, then it will not be reasonable to expect the employer to make adjustments if they will not ameliorate the inability to work. There was no evidence before the Tribunal that the claimant was fit for work between March 2019 and April 2020. It inexorably follows therefore that there was no breach of the duty to make reasonable adjustments from December 2019 (the start of the period with which allegation 2.1.1. is concerned) to April 2020.

219. The Tribunal also holds that the respondent did comply with the duty to make reasonable adjustments when arranging for the claimant to return to work between April 2020 and July 2020 as part of the IDT team at the Doncaster Royal Infirmary. Plainly, this was an adjustment as it was a move from her substantive role in the North Team into the IDT team. It was a role specifically created for the claimant as she was supernumerary within IDT. In the Tribunal's judgment, the respondent took reasonable steps to provide her with a stable and familiar role which was within her capabilities. The claimant was appreciative of this and plainly enjoyed the IDT role.

220. The next issue to be addressed therefore is the question of whether reasonable adjustments were made on or after 2 July 2020. It will be recalled that a review meeting took place that day to discuss the social care model moving forward. The locality teams and IDT were to revert back to their pre-pandemic operations.

221. The claimant was given a number of options. She chose to work in the East Team. The barrier to her continuing in IDT centred upon the parking difficulties. These difficulties arise from her disability. However, there was little that the respondent could do as they were not the owners or operators of the Doncaster Royal Infirmary and had no control over parking arrangements. In any case, the claimant to her credit said in evidence that her preferred option was to return to the East Team.

222. The Tribunal accepts of course that the claimant felt overwhelmed by the demands of working in the East Team. This is what led to her raising her concerns (quite properly) on 17 November 2020. That said, the Tribunal accepts that a number of adjustments were put in place which carried a

prospect of ameliorating the difficulties faced by the claimant in taking up a new role within the locality East team. The claimant was relieved of doing duty work until the end of November 2020. She was provided with two buddies and a supervisor. Her working days were altered. The claimant herself acknowledged the support given to her particularly by Faye McKenzie and Kate Robinson. Upon being alerted to the fact that she had too many cases to undertake, it was agreed with Claire Henderson that the claimant would be allocated two cases per fortnight thus reducing her workload.

223. In the Tribunal's judgment, the respondent did all that may be reasonably expected until alerted to her issues by the claimant on 17 November 2020. The parties were then engaged in dialogue as to how to resolve matters.

224. The Tribunal accepts that the respondent did not comply with the recommendation in the first grievance outcome of 17 January 2020 to provide the claimant with a formal handover when she moved to the East Team in September 2020. Claire Scott also determined that the claimant's second grievance should be upheld upon this point s the claimant did not have a transfer plan document to assist her when she transferred to the East Team.

225. The test upon a failure to make reasonable adjustments is objective. The Tribunal will look at the substance of what happened rather than the form. Although matters were far from perfectly handled by the respondent, the Tribunal is satisfied that the respondent did adhere to Dr Jackson's recommendations of 5 December 2019 when taken in the round. Given the support available to the claimant, the reduction in her working hours, the reduction in the caseload and the simplification of the job content (at least initially by removing duty work from her until the end of November 2020) the respondent did comply with the spirit of Dr Jackson's recommendations of 5 December 2019. There was therefore no failure to make reasonable adjustments until the time that the claimant went on sick leave on 10 December 2020. This is the case notwithstanding a failure to do a formal handover.

226. In the Tribunal's judgment, the claimant is on firmer ground in relation to events after 10 December 2020. This essentially centres upon the question of moving to the IDT team. Transferring a disabled person to fill an existing vacancy is one the adjustments contemplated by the ECHR in paragraph 6.32 of the *Code of Practic*e. Paula Highton, in her report of 9 December 2020 (pages 175 to 178) was not unsupportive of the suggestion that the claimant move to a different role (in particular, IDT or D2A). As has been said, there was no suggestion from occupational health that this was contra-indicated medically.

227. The clamant was unable to contemplate returning to work in the East Team. She feared that to do so would be detrimental to her health and may result ultimately in the application to her of the respondent's capability of managing ill health procedure.

228. There was a prospect that a move to the IDT team would ameliorate the substantial disadvantage caused to the claimant by the requirement for her to work in her substantive role in the East Team. The claimant does not have to show that the disadvantage would have been ameliorated but merely that there was a prospect that such an adjustment would have worked.

229. Taking account of the factors in the ECHR's *Code of Practice* (at paragraph 6.28) it is difficult to see why it was not practicable to move the claimant to the IDT claim. It was not in dispute that the IDT team was at least one member down due to an employee being on maternity leave. The claimant also mentioned that a different colleague had left in September 2020 and that colleague undertook part time work (of 18.5 hours per week). Further, the respondent was advertising for agency workers from December 2020 and into the new year (2021).

230. On any view, there was scope to re-deploy the claimant into the IDT team. Even if it were to be accepted that this was not practicable initially because the need was only short term, by the spring of 2021 matters had moved on. The posts were not filled by agency workers until April 2021. Even after hat month, the respondent continued to recruit for additional workers in IDT. The situation pertained to the end of the claimant's employment. Essentially, Mrs Shore's evidence in paragraphs 26 to 31 of her witness statement is that efforts to recruit into IDT have continued effectively throughout 2021. It follows therefore that on any view there was a vacancy which the claimant could have filled.

231. The issue, therefore, is not so much whether there was a vacancy at all but whether it would have been a reasonable step for the respondent to have allowed the claimant to move there and whether she could have fulfilled the requirements of the role. The respondent's position was essentially that it was not in the claimant's interest to do so.

232. The Tribunal has little doubt that the respondent's witnesses were all genuinely concerned for the claimant's welfare. Looking at matters objectively however the Tribunal determines that the respondent's failure to allow the claimant to move to the IDT team after the middle of January 2021 and certainly by the late spring and early summer of that year (when the claimant was fit for work) was a failure to make reasonable adjustments.

233. Firstly, for the reasons given, it was practicable as there was a vacancy and there was work to do that the claimant could have undertaken which would have benefited the respondent. Louise Shore's account to the Tribunal was that the claimant was capable. She would hardly have been offered the post in August 2020 were this not the case. Secondly, work within the IDT team was not medically contra-indicated by occupational health. True it is that the suggestion of working in IDT emanated from the claimant and not from occupational health but that is in the nature of things. The fact remains that Paula Highton (who is an occupational health manager employed by the respondent) did not say that it would be medically ill advised for the claimant to take up the IDT role.

234. Thirdly, the move to IDT would not be disruptive to the respondent. On the contrary, it would be beneficial for them as they would then at least be getting the benefit of some work from the claimant. The claimant was on long term sick leave from the East Team. She was not working there in any case. Thus, the respondent was shorthanded both in IDT and the East Team. Moving her to IDT would help to resolve one of these problems. Refusing her move to IDT where she was unfit to work in the East team solved neither. There can be no suggestion that the financial cost of allowing the claimant to work in IDT was prohibitive. The respondent would be paying the claimant her salary

wherever she worked. Further, the respondent has significant financial resources.

235. Furthermore, the respondent had offered the claimant a permanent position in the IDT team in August 2020. The claimant chose to work in the East locality team. However, the respondent would hardly have offered the claimant a permanent position in IDT had they not taken the view that she was able to do it. As the claimant herself recognised, the IDT had evolved from that which she herself was undertaking between April and July 2020. However, that was the position in August 2020 as well as in the early part of 2021. The only difference during the latter period was that the claimant had found work in the East locality team to be too much for her. She was looking for an alternative. In addition, the car parking issue which had troubled the claimant in August 2020 had been resolved. She had found out about the pub car parking. She informed Kathryn Anderson-Bratt of this at the Stage 1 grievance hearing. The respondent was therefore aware that the car parking difficulties which had beset the claimant in August 2020 no longer pertained.

236. The claimant gave what were, in the Tribunal's judgment good explanations as to why the IDT role may be better suited for her. These are summarised in paragraphs 177 and 178. She explained these to Claire Scott during the course of the stage 2 grievance hearing. When giving evidence, the claimant did not shy away from the fact that the pace of work within IDT may if anything be quicker than in the locality teams. However, working in a hospital setting rather than doing lone working and the hospital environment providing more prompts for her in her opinion made the work more suitable.

237. It is difficult to understand why the respondent did not at least allow the claimant the opportunity of working within the IDT team on a trial basis. As has been said, while it is the case that the respondent was genuinely concerned for the welfare of the claimant the medical opinion was not against the suggestion of working in IDT. There was also an inconsistency in the respondent's approach as, notwithstanding concerns about the impact upon her health of working in IDT they were happy to countenance the claimant's return to the East Team after January 2021 where the evidence was that this was detrimental for her mental health and the claimant did not wish to return to work there.

238. The respondent's witnesses were also concerned about the impact upon service users of the claimant being moved to IDT. Again, the tribunal has little doubt that subjectively these were genuinely held concerns. However, objectively, this cannot be a good reason not to transfer the claimant to IDT. Firstly, the claimant was an untried commodity in IDT (when they returned to working as normal) when she was offered the post there in August 2020. Secondly, the claimant fairly recognised her own limitations working in the East team and alerted Mrs McKenzie of these. There is no reason to suppose that she would not behave equally responsibly in IDT should she have concerns about her own performance there.

239. The second limb of the first allegation in paragraph 196, 2.1.1.1 of the list of issues is that the respondent failed to implement and review the reasonable adjustments recommended by the DWP. In the Tribunal's judgment, there is much merit in the claimant's case upon this issue. The respondent was certainly aware of the DWP's recommendations. They were sent to the

respondent by the DWP. Further, the claimant emailed Faye McKenzie and Kate Robinson with them on 28 September 2020 (page 154) and again in January 2021 ahead of the meeting on 29 January 2021 (pages 149 and 150).

240. The conclusion which the Tribunal reaches on this issue is that the purchase of equipment as recommended by the DWP slipped through the net. The Tribunal never got a sense that anybody within the respondent took charge of the matter and took responsibility for the acquisition of the equipment recommended for the claimant. The availability to the employer of financial or other assistance to help make an adjustment such as advice through Access to Work is one of the factors which the EHRC recommend (in paragraph 6.28 of their *Code of Practice*) be taken into account when deciding what is a reasonable step for the employer to have to take. As the claimant said, the failure to deal with this led to the Access to Work report in fact becoming obsolete after 14 weeks.

241. The Tribunal's conclusion therefore is that the respondent did fail to implement and review reasonable adjustments recommended by occupational health from around January 2021 onwards by failing to allow the transfer to IDT and failed properly to deal with the acquisition of the equipment recommended by DWP. There can be no suggestion that the acquisition of that equipment was not a reasonable thing for the employer to do given that the DWP would be funding most of the cost. The DWP would hardly have recommended equipment which would not be of utility for the claimant. This was a failure to make reasonable adjustments by the provision of auxiliary aids.

242. The second complaint (at paragraph 196, 2.1.1.2) raised by the claimant is the respondent's decision to advertise for agency social workers to support with Covid in January 2021 and the failure to allow the claimant to return to IDT with her being told there were no vacancies. This has been dealt with to a large degree upon the Tribunal's consideration of the first limb of the constructive dismissal complaint in paragraph 2.1.1.1. It is also closely linked to the issues in paragraphs 196 2.1.1.3 (subject to what is said below in paragraph 244), 2.1.1.6, 2.1.1.7 and 2.1.1.9 all of which may be viewed as a continuation of the position in January 2021.

243. The Tribunal concludes that there was no breach of the implied term by the decision taken by the respondent to advertise for agency social workers in January 2021 in and of itself. The respondent had the need for temporary cover to the end of March 2021 to cover the winter pressures. However, the difficulty for the respondent, as has been said, is that the need for agency workers to help within the IDT team continued throughout 2021 at the very time when the claimant was suggesting that she ought to be allowed to return there. While she may have been correctly told there were no vacancies initially, the respondent's position became unsustainable given the difficulties which the respondent had with recruitment. It is not hyperbolic to say that the respondent was facing a recruitment crisis in IDT hence the need for repeated advertisements to try to attract agency workers. Objectively, it is difficult to understood why the respondent so set their face against at the very least giving the claimant a trial period working with in IDT. They had seen something in her to offer her the post upon a permanent basis in IDT the previous August. Of course, she was an unknown quantity in that it was uncertain how she would cope with working in IDT. However, that was the

case in 2021 as much as it was in August 2020. Further, in any case she was unable to cope with the role in the East team and returning her to work there would hardly be conducive to her mental health. An additional factor in favour of allowing her to move was her having demonstrated a responsible approach in November 2020 when admitting to her issues in the East Team. It was unlikely that she would not behave similarly if she should encounter issues in IDT. The respondent's confidence in her ought to have been enhanced as a consequence. It would also be counterproductive for the respondent to hae her return to the East Team as significant management time would have to be spent in supervising and monitoring her It is curious as to why the respondent did not pursue the practicable solution of allowing her to move to the IDT. It is not a case of the claimant being unrealistic in asking the respondent to create a job for her. Vacancies existed in IDT.

244. The third allegation (paragraph 196 2.1.1.3) is that the respondent was still advertising for agency staff but chose to proceed with the Tribunal proceedings before Employment Judge Deeley's panel rather than allow the claimant to return to the hospital in or around March 2021. This was a difficult allegation to understand. It appears to be founded upon without prejudice negotiations between the parties. The respondent was not prepared (as is their entitlement) to waive without prejudice privilege. Upon this basis, the third contention is unsustainable.

245. The fourth issue (paragraph 196 2.1.1.4) is the comment allegedly made by Faye McKenzie at the meeting of 29 January 2021. This fails upon the facts for the reasons already given in paragraphs 146 to 149.

246. The fifth allegation (paragraph 196 2.1.1.5) in summary centres upon the lack of communication when the claimant returned to work in the East Team in September 2020 and in particular, the absence of a transfer meeting or written transfer plan. While objectively such was not a failure to make reasonable adjustments for the reasons given by the Tribunal (as reasonable adjustments were made in any case) the allegation succeeds upon the facts. The plain fact of the matter is that the recommendation made in the grievance outcome of January 2020 was not adhered to in September 2020. Claire Scott upheld the claimant's subsequent grievance about the lack of a formal handover and transfer plan.

247. The sixth allegation (2.1.1.6) again centres upon the question of the claimant going to work in IDT. To that extent, it is simply repetitious of the matters already considered around the first and second allegations dealt with in paragraphs 215 to 241.

248. Similarly, the seventh allegation (2.1.1.7) covers much the same ground as in paragraphs 215 to 241. This is that the respondent did not support the claimant's request to return to work when they could have allowed her to return to work within IDT, there being vacancies there. Again, this is repetitious and has already been upheld.

249. The eighth allegation (paragraph 196 2.1.1.8) is a complaint that the Access to Work recommendations of July 2020 were not actioned because the grievance appeal outcome said the claimant was requested to undertake a task analysis. By the time the notion of a task analysis arose in late November 2020, the Access to Work recommendations had been outstanding for around three months and were (or were about to become) obsolete due to the

passage of time. The Tribunal has already upheld the claimant's complaint upon the respondent's failure to implement the Access to Work recommendations (paragraphs 239 to 241).

250. The Tribunal sees nothing wrong in and of itself with the request for the claimant to undertake a task analysis in conjunction with the respondent. This was recommended by occupational health. While falling outside any of the respondent's formal procedures, the Tribunal can see no real downside to the request for the claimant to undertake the task analysis. That said, the claimant is correct when she says that the acquisition of the auxiliary aids was not conditional upon first completing the task analysis.

251. The ninth contention (paragraph 196 2.1.1.9) centres upon the claimant being told that no vacancies were available at the Doncaster Royal Infirmary. Again, this is repetitious, the Tribunal having found that there was a vacancy within IDT (or at any rate one could have been found for the claimant because of the availability of work) up to the date of her resignation.

252. In summary, therefore, the Tribunal concludes that:

(1) The respondent failed to comply with the duty to make reasonable adjustments from around and after January 2021 by refusing to allow the claimant to work in IDT (paragraph 196 2.1.1.1 of the list of issues. The failure to make reasonable adjustments by refusing the IDT transfer also extend to paragraphs 196 2.1.1.2, 2.1.1.6, 2.1.1.7 and 2.1.1.9).

(2) The respondent failed to comply with the duty to make reasonable adjustments by failing to acquire the auxiliary aids recommended by Access to Work. (A failure to acquire auxiliary aids may of course be a breach of the duty to make reasonable adjustments as much as by the imposition of a disadvantaging provision, criterion or practice) (paragraphs 196 2.1.1.1 and 2.1.1.8 of the list of issues).

(3) Regardless of the obligation to make reasonable adjustments, the respondent refused to allow the claimant the opportunity to work in IDT notwithstanding there were vacancies there across the piece from the end of January 2021 (paragraphs 196 2.1.1.2, 2.1.1.6, 2.1.1.7, and 2.1.1.9).

(4) The respondent failed to implement the first grievance procedure recommendations (recorded in paragraph 54 above) to implement a formal handover and written transfer plan (paragraph 2.1.1.5). This departure was without reasonable and proper cause and objectively was seriously damaging of trust and confidence.

253. Miss Hashmi was right to say that discriminatory conduct is not necessarily a breach of the implied term of trust and confidence. It is possible for there to be reasonable and proper cause for an act of discrimination. We have seen a good example of this in the **Amnesty International** case.

254. However, in the Tribunal's judgment, there was no reasonable and proper cause to fail to make reasonable adjustments by allowing the claimant the opportunity of working in IDT or in the failure to acquire the auxiliary equipment which the claimant needed. The respondent had a number of opportunities to offer the claimant the opportunity of working in IDT and did

not take them. The respondent failed to heed occupational health advice that this was not medically contraindicated. There was a failure to acquire the auxiliary aids. In contrast to **Amnesty International**, this was not a case where the employer had reasonable and proper cause to act against the employee's wishes to save her from herself. On the contrary, there was no good reason to refuse the claimant's wishes in the circumstances.

255. These breaches of duty to make reasonable adjustments in paragraph 252 (1) and (2) continued to the point of the claimant's resignation. It follows therefore upon the authorities of **Meikle** and **Greenhof** that the failure to make reasonable adjustments and acquire auxiliary aids is a breach of the implied term of mutual trust and confidence.

256. Furthermore, and independently of any breach of duty under the Equality Act 2010, the failure to relocate the claimant to IDT was without reasonable and proper cause and seriously damaging of trust and confidence.

257. These matters could have been revisited by the respondent's managers and by Kathryn Anderson-Bratt and Claire Scott during the grievance process. In her meeting with Miss Scott, the claimant was quite explicit in asking the rationale for the respondent's refusal to move her to IDT. The claimant raised the issue of the auxiliary aids as late as the end of January 2021, but no steps were taken by the respondent to address her needs. The claimant raised her concerns about the lack of auxiliary aids and transferring to IDT in her grievance and grievance appeal.

258. This being the case, the claimant has no need to rely upon a *"final straw" per* **Omilaju.** The repudiatory breach continued up to the point of her resignation.

259. This also renders academic the question of whether the claimant waived the breach which arose from the failure to act upon the grievance recommendations when she started work in the East Team at the end of September 2020. If this was a stand-alone issue, then the Tribunal would have found that the claimant had waived her right to resign in response to that breach. The failure to properly organise the transfer to the East Team in accordance with the grievance recommendations was effectively a one-off failure which took place around the end of September and early October 2020. The claimant did not resign her position until 14 June 2021. In the meantime, she had engaged with the grievance processes and the sickness review meetings which were held after the turn of the year 2020/21. The Tribunal's judgment therefore upon that breach is that she has affirmed the contract and waived her right to resign in response to it. She was engaging with the respondent pursuant to the contract and not did not accept the respondent's breach in this respect for many months.

260. However, as has been said, that is otiose in any case given that the claimant has succeeded in establishing a continuing breach up to the point of her resignation for the other reasons in any case (these being the continuing course of conduct in breaching the obligations under the 2010 Act and not allowing a transfer to IDT despite repeated requests by the claimant and her trade union). There can be no question of the claimant having waived her right to resign in response to those breaches. The claimant resigned upon the very day upon which she was informed that a return to IDT still was not in the respondent's contemplation.

261. The letter of resignation does not say in terms that this is the reason why the claimant was resigning. It does not of course have to be the sole reason but must be a material reason. The Tribunal has little doubt that the refusal to allow the claimant to work in the IDT was at the very least a material reason for her decision to resign. As has been said, her pleas to Claire Scott fell upon deaf ears. Faye McKenzie said in her email of 14 June 2021 (at pages 268 and 269) that there is no availability to return to the Integrated Discharge Team at Doncaster Royal Infirmary. It is clear that it was this that prompted the claimant's resignation. She gave evidence in her witness statement (in paragraph 43) that she was hoping to be given a supportive return to work at IDT. There was no challenge to this evidence (nor realistically could there be).

262. The Tribunal has already observed that subjectively there can be little doubt that the respondent acted with what it perceived to be the claimant's best interests. The Tribunal's task in this case in determining the issues between the parties has not been an easy one, the Tribunal forming the view that all from whom evidence was received (including the claimant) were genuine and credible.

263. As was said at the outset, the subjective intentions of the parties are irrelevant. It is not for the Tribunal to explore what was in the recesses of their minds. The question is whether, considered objectively from the perspective of the reasonable person in the claimant's position, the conduct of the respondent's management was likely without reasonable and proper cause to destroy or seriously damage the relationship of trust and confidence. It is for Tribunal to carry out an objective assessment of their true intentions.

264. It is clear that the respondent's intentions were for the claimant not to return to work in IDT. Whilst subjectively they may have thought this was in her best interests and in the interests of service users that is not the test. In this case, in the Tribunal's judgment, the employer acted in such a way, considered objectively, that the conduct was likely to destroy or seriously damage the relationship of trust and confidence in failing to allow the claimant the opportunity of working in IDT and to acquire the auxiliary equipment needed by the claimant. Viewed objectively, this was a repudiatory breach without reasonable and proper cause. The claimant was entitled to accept the repudiatory breach. It was a material for her resignation. She accepted the breach. She did so without first having affirmed the contract and waived her right to do so. It follows therefore that she was constructively dismissed.

265. It is difficult to see why the respondent would not accede to the claimant's request to move to the IDT. It ran counter to occupational health advice. She was capable as otherwise she would not have been offered the role in August 2020. Her well-being was adversely impacted by her work in the East team. Her car parking issues had resolved. Having the claimant work neither in the East team or IDT served no one's interests. There was a recruitment crisis in IDT. The respondent was unable to recruit in sufficient numbers to meet the needs of the service.

266. From the perspective of a reasonable person in the claimant's position, it is perplexing that she was not asked to work in IDT given these circumstances. The respondent's conduct was not conducive to the preservation of the employment contract per **Tullett Prebon**. The Tribunal does not find the

respondent's conduct to be as destructive of trust and confidence as that of the employer in **Bliss**. Nonetheless, the steadfast refusal to redeploy her to a role for which the employer in this case had considered her to be suitable just several months prior may reasonably and objectively viewed as soul destroying. Objectively, from the perspective of the reasonable onlooker, refusing the claimant's request where there were vacancies in IDT was without rational or reasonable explanation. There was no reasonable and proper cause for the respondent's conduct.

267. Miss Hashmi confirmed that her instructions were not to advance a potentially fair reason for the claimant's constructive dismissal. It follows therefore that the claimant was constructively unfairly dismissed.

268. The Tribunal will now list the matter for a remedy hearing. The only remedy issue to be determined now is that of any fault on the part of the claimant.

269. The claimant does not seek reinstatement or reengagement. She therefore only seeks monetary remedies arising from her unfair dismissal. The monetary remedy consists of the basic award. This is calculated in much the same way as a redundancy award. It is to compensate essentially for the loss of the job.

270. The compensatory award is in such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

271. Both the basic award and the compensatory award are liable to reduction on account of conduct on the part of the complainant. In the case of the compensatory award, a reduction for conduct may only be made in circumstances where the dismissal was to any extent caused or contributed to by any action on the part of the complainant. (The need for a causal link does not arise with the basic award).

272. In both cases, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or a tort, it was foolish or perverse or unreasonable in the circumstances (**Nelson v BBC** (No 2) [1980] ICR 110).

273. It is possible to make a reduction for contributory conduct upon a complaint of constructive dismissal. For an example, the Tribunal refers to **Polentarutti v Autokraft Limited** [1991] IRLR 457. There was a causal link between the employee's shoddy work (which had caused the employer significant expense) and the employer's breach of contract in refusing to pay him for the overtime that he had worked. That said in, in **Frith Accountants Limited v Law** [2014] IRLR 510 the EAT (Langstaff P) noted that such a finding will be unusual in a case concerning a breach of the implied term of trust and confidence as there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term.

274. In closing submissions, Miss Hashmi said that the impugned conduct on the part of the claimant was her failure to engage with the task analysis and her rejection of work in SAPAT. The Tribunal shall consider each in turn.

275. Mrs Brown accepted that the claimant had not refused to engage with the requirement to do the task analysis. Upon this basis, it cannot be said that

she was guilty of any kind of misconduct let alone such as to be categorised as foolish, perverse or unreasonable. It is true that the claimant needed guidance and assistance with completing the task analysis. However, that is not the same thing as an outright refusal to undertake it.

276. In any case, the task analysis was irrelevant to the respondent's breach of the implied term of trust and confidence. As has been said, the notion of the task analysis did not arise until well after the Access to Work report had been received by the respondent in July 2020. There was then a continued failure to acquire the auxiliary equipment required by the claimant. it is difficult to see any connection between that on the one hand and the undertaking of the task analysis on the other (in contrast to **Autokraft** where the employer's repudiatory conduct had a clear causal link with the employee's poor work).

277. Moreover, the task analysis was simply irrelevant to the question of the claimant moving into IDT. Even if the Tribunal is wrong upon both of these matters and that the task analysis was required, there was no suggestion in any case that the claimant was unwilling to undertake it should the respondent have made the adjustment of moving her or proposing to move her to IDT.

278. There can be no suggestion that the claimant was guilty of culpable or blameworthy behaviour by refusing to contemplate working in SAPAT. The claimant said that she had no interest in that kind of work. She was not employed to do it in the workplace. She had no aptitude for it. If anything, it may be considered to be an unwise move (if not a foolish move) for her to have undertaken a role within the respondent for which she was simply unsuited simply to stay in employment. That would be out of character for the claimant whose responsibility and conscientiousness was demonstrated by her emailing on 17 November 2020 to inform Faye McKenzie of her difficulties.

279. The Tribunal will therefore make no reduction to either the basic or compensatory awards on account of the claimant's conduct.

280. The matter shall now be listed for a remedy hearing. The parties are directed to file their dates of availability over the forthcoming four months. The Tribunal considers that a one-day time allocation will be sufficient to deal with remedy.

If the parties differ, they must write to the Tribunal within 14 days of the date of promulgation of this Reserved Judgment to that effect. Within the same period, the parties may apply for there to be a telephone case management preliminary hearing for the purposes of the giving of case management directions for the good conduct of the remedy hearing.

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Employment Judge Brain

21 February 2023

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