EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000200/2022

Heard in Edinburgh on 16, 17, 18, 19, 22 and 23 May 2023

Employment Judge J Young
Tribunal Member Ms L Brown
Tribunal Member MrT Lithgow

Mrs Katherine Murphy	**Claimant** **In Person**
Lothian Health Board	**Respondent** **Represented by:** **Ms E Wood, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is (1) to dismiss the claims presented to it under sections 13,15 and 20 of the Equality Act 2010; and (2) that the claimant was not unfairly (constructively) dismissed in terms of section 98 of the Employment Rights Act 1996.

REASONS

1. In this case the claimant presented a claim to the Employment Tribunal complaining of discrimination because of the protected characteristic of disability and unfair (constructive) dismissal. Those claims were resisted by the respondent.

2. By the final hearing the respondent had accepted that the claimant was a disabled person under section 6 of the Equality Act 2010 (EqA) at the relevant time as a result of stage 4 kidney disease, heart disease and diabetes. It was also accepted that the respondent knew or could reasonably have been expected to know that the claimant had a disability at the relevant time.

3. The issues for the Tribunal had been canvassed prior to the final hearing and set out in the Note of a Preliminary Hearing as follows:-

Issues for the Tribunal

Direct Discrimination because of Disability - s13 EqA

4. Did the respondent subject the claimant to the following treatment:

   (i) limiting her duties solely to scanning when she moved to part time working

   (ii) not supporting her return to work

   (iii) not supporting her redeployment to another role

   (iv) offering the claimant medical retirement when she was fit to return to work and without discussing the potential of her doing so

(v) providing a medical retirement quotation to the claimant which was tailored for someone with one year to live; and/or

(vi) indicating to the claimant that she could not be redeployed as she would not be able to elevate her legs whilst seated at reception in other departments

5. If so was that treatment "less favourable treatment" namely did the respondent treat the claimant less favourably than they treated, or would have treated others ("comparators") in not materially different circumstances. In that respect the claimant identified two comparators (herein identified as HL and CB).

6. If the treatment was "less favourable treatment" was this because the claimant is a disabled person?

Discrimination arising from Disability - s15 EqA

7.

(i) Was the claimant treated unfavourably by the respondent, by her duties being limited solely to scanning?

(ii) If so was this due to something arising in consequence of her disability namely the requirement to reduce her working hours?

(iii) If so was the treatment pursuant to a legitimate aim relied upon by the respondent namely (a) taking measures to protect the health and safety of staff and (b) allocating resources to ensure efficient running of services and to meet patient demand

Reasonable Adjustments s20 and 21 EqA

8.

(i) The provision, criteria or practice "PCP" relied upon by the claimant is: Requiring the claimant to continue to work in Health and Records Department at the Royal Hospital for Children and Young People, carrying out scanning duties only and reporting to Denise MacNeill

(ii) Did the respondent have such a PCP(s)?

(iii) Did such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that the requirement caused immense stress and anxiety which further exacerbated the severe and adverse effects of her disability

(iv) If so did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage

(v) If so would the following steps identified by the claimant have alleviated the identified disadvantage

(a) Extending the claimant's duties to those normally carried out, and not restricting her duties to scanning; or

(b) Redeploying the claimant within the Health and Records Department or to an alternative Department

(vi) If so would it have been reasonable for the respondent to have taken those steps at any relevant time and did they fail to do so

Time Bar/Jurisdiction

9.

(i) Have the claims been presented within the time limit stated in s123 EqA or such other period as the Tribunal thinks just and equitable

Constructive Dismissal

10.

(i) Was the claimant dismissed i.e.

(a) Did the respondent breach the implied duty of trust and confidence namely did it without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant

(b) If so did the claimant affirm the Contract of Employment before resigning

(c) If not did the claimant resign in response to the respondent's conduct

(ii) Was the content and surrounding circumstances of a letter from the respondent dated 25 August 2022 the culmination and final straw of a course of conduct relied upon by the claimant

(iii) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA); and if so was the dismissal fair or unfair in accordance with section 98(4) ERA

11. In the event of any of the claims being upheld the Tribunal would require to consider and determine what monetary award should be made by way of compensation.

12. In correspondence the claimant had advised that in each of the claims for disability arising from disability and failure to make reasonable adjustments the relevant date was 9 August 2022

The hearing

13. At the hearing evidence was given by (i) the claimant who had continuous service with the respondent in the period from 16 July 2018 until her resignation on 16 September 2022. She was employed as a Band 2 Clerical Officer within the Health Records of the Royal Hospital for Children & Young People; (ii) Neil Joshi, the respondent Health Records Manager who had commenced employment in January 2003 as a Clerical Officer and after spells as a Supervisor and Assistant Manager had been in post as Health Records Manager since 2015. He had responsibility for the Royal Hospital for Children & Young People along with the operations conducted within Lauriston Buildings and Woodburn House. He reported to the Head of Health Records namely Maureen Masterton and managed approximately 99 staff; (iii) Denise MacNeill, Assistant Health Records Manager who had responsibility for approximately 20 staff and reported to Neil Joshi. She had commenced employment with the respondent as a Band 2 Clerical Officer in April 1998 and after spending a spell as Supervisor for the Outpatient Team had been appointed Assistant Manager from August 2019; and (iv) Deborah Walker who had service with the respondent for approximately 30 years and since approximately 2013 in the position of Advanced Employment Relations Practitioner.

14. The parties had helpfully liaised in providing a Joint Inventory of Productions and Supplementary Productions being paginated 5-271 (J5-271).

15. From the relevant evidence led, admissions made and documents produced the Tribunal were able to make findings in fact on the issues.

Findings in Fact

16. The respondent provides a range of primary community based and acute health care services for residents of the local authority areas of East Lothian, Edinburgh, Midlothian and West Lothian. It also provides specialist services for people from across Scotland.

17. It has responsibility for the Royal Hospital for Children and Young People (RHCYP) presently situated next to the Royal Infirmary of Edinburgh (RIE) at Little France.

18. When the claimant commenced her employment as a Band 2 Clerical Officer in July 2018 she was based at RHCYP at The Meadows (commonly known as "the Sick Kids hospital") with closure and an anticipated move to a new building at Little France in late 2018. However that was delayed until the new Hospital became fully functional on 23 March 2021. It is useful to refer to "old Hospital" and "new Hospital" for the purpose of identification of the former and present buildings.

Contract of Employment

19. The claimant's offer of employment (J59/78) advised that she was to work part time on 30 hours per week at the old Hospital and that her duties and responsibilities were to be as outlined in the *"previously provided Job Description"* That was stated not to be an *"exhaustive list of your duties and responsibilities and may be varied as appropriate to your appointment and banding following prior consultation with you and your staff side representative"*(J62). Her normal days and hours of work at this time were 11am-5pm Monday to Friday.

20. In the event that she had a grievance relating to her employment this should be discussed with her Manager and if the matter not settled at that level could be pursued in terms of the respondent's Grievance Policy.

21. The Job Description for a Health Records Clerical Officer (J79/84) was described as "generic". The job purpose was to *"provide a high quality support by undertaking all administrative and clerical duties in the daily running of the Department, as an individual and as a team player".* The *"key result areas"* described within the job description contained a number of tasks associated with the Health Records Department. It was also stated that a *"separate job description will need to be signed off by each job holder to whom the job description applies"* but no such description was produced in respect of the claimant

22. There was dispute to the extent of the claimant's job duties. It was explained that the particular duties for applicants would be described to them at interview. There was no dispute that one of the interviewers in 2018 was Scott Moore the then Assistant Manager who has since left the respondent. Denise MacNeill advised that she was also present at interview but the claimant could not recall her attendance. Ms MacNeill was able to give good detail of her involvement in that interview process and the Tribunal accepted that she was there in the role of Supervisor along with the then assistant manager.

23. The evidence from Ms MacNeill was that the claimant was advised that her primary role was to be scanning documents as part of the "document light" initiative within old Hospital which had commenced around 2016. Essentially that would involve scanning patient documents which could then be accessed electronically by the medical staff. In addition the claimant would cover other duties such as reception duties as and when required.

24. The claimant's position was that covering other duties was not "as and when required" but part of her contractual duties.

25. After commencing employment the claimant received training in “prepping notes” and the scanning function. She was also trained on reception duties. The two reception areas in the old Hospital were (i) main reception for outpatients and (ii) for A&E.

26. Ms MacNeill accompanied the claimant on the training exercise for reception duties which would take place over the probationary period of three months and beyond until the claimant was comfortable with the operation of the reception duties. The duties included booking in patients and the booking of any further appointments.

27. The claimant advised that she received a rota at the end of each week which would identify her tasks for the following week. She disputed that the Department was organised into teams for scanning, reception, preparation and filing and the like but that they were “one team” and that all shared duties on the rota. The rotas that were produced and which supported the view that teams were organised for particular tasks (J247/259) related to January-April 2023 in respect of the new Hospital and were not relevant to her experience when she commenced employment.

28. Ms MacNeill agreed that weekly rotas were produced when the claimant commenced employment but there were teams organised and the purpose of the claimant and others being trained in various areas was to ensure that there was cover when necessary on duties such as reception. She confirmed that the claimant would cover reception for tea/lunch breaks and also for sick absence or annual leave. That may mean that the claimant was on a reception duty for a week or two at a time particularly in the summer period to cover annual leave. However her duties were to scan and only cover for reception or other duties as and when required. Her position was that the claimant would appear on a rota for cover for reception areas and other duties as required but not because she had a contractual right to be placed on reception duty. Ms MacNeill explained that if there was a full complement of staff then the rota did not change from week to week.

29. The claimant had requested copies of rotas for the first period of employment but none had been retained by the respondent. Ms MacNeill confirmed that she had been asked about the production of rotas in that early period (between July 2018 and beginning 2020) but they had not been retained.

30. Mr Joshi had not been at the interview. His position was that the role being filled by the claimant was primarily scanning as that was the role that was being funded as part of the "document light" initiative in common with others who were involved in scanning duties. His responsibilities included the operation at Lauriston House and Woodburn House along with the old Hospital and he was not particularly aware of the day to day activities of Clerical Officers. His interest was mainly in ensuring that the work was being done and that targets set down were being met.

Period of Special Leave

31. Come the advent of Covid the claimant was on special leave on full pay due to her underlying health condition. She remained at home "shielding" in the period 17 March 2020-20 November 2020. There was then a period back at work and then again on special leave between 5 January 2021 - 23 April 2021.

32. While the claimant denied that there was contact with her during special leave periods the Tribunal were satisfied that Ms MacNeill did keep in touch with the claimant by monthly telephone call to check on her well being and advise of any developments. However as Ms MacNeill narrated the footfall within the old Hospital was much reduced and the principal activity was cancelling appointments as the Hospital was a "ghost town". The claimant considered that she was unsupported in these periods but there was no evidence to demonstrate what support might have been put in place. She maintained that one other individual had been at home "shielding" but had returned to work in the second period of "shielding" but Ms MacNeill advised that individual "shielded" in the first period due to her age rather than medical condition and was able to continue working over January -April 2021..

33. Some discussion took place with the claimant in August 2020 regarding a possible return to work as "shielding" had been paused. The claimant maintained that she wanted to return to work at this time as she "tried on a regular basis to come back to work" but that "management continued special leave". The evidence from Ms MacNeill was that in August 2020 the claimant was apprehensive about coming back to work and it was decided to leave matters as they were and the claimant continued her special leave on full pay.

34. In November 2020 the claimant was referred to Occupational Health for a Report (J132/135). The Report was sought on the basis that:-

> "*Katherine is a staff member who has been in isolation with health issues due to Covid 19. I am looking to bring Kath back to work, due to Kath's health issues her consultant had thought Kath need a referral to OH before she returned to work. I have been in discussions with ER and they have agreed that Kath needs to be referred to OH".*

35. The Report advised that the claimant had been *"absent from work since March due to health conditions which required her to shield. Shielding was paused at the beginning of August. I understand that Mrs Hume* (former name) *was keen to consider returning to work but wishes to ensure that the area she returns to has suitable risk reduction measures in place".*

36. That statement chimed with the evidence from Ms MacNeill that the claimant was aware of the room, area and conditions to which she would return to work in August 2020 and was reluctant to do so. That was supported by the statement in the OH Report stating:-

> "*Today we had the opportunity to discuss her underlying health condition. I understand that unfortunately during lockdown her condition has deteriorated and therefore this heightens her concerns*

regarding her return to work. She continues to have input from her appropriate specialist team".

37. The Report placed the claimant into the *"highest risk category (very high risk of severe complication of Coronavirus including death)"* and that if there was a return to work then it was essential that *"appropriate control measures are put in place to reduce her risk to as low a level as reasonably practicable".* The Report commented that the current work environment reported by the claimant was *"small (social distancing would be difficult to maintain) with minimal ventilation".* The measures that were considered necessary were outlined (J134) and included within the measures was a *"phased return to work"* of approximately four weeks.

38. At this time the new Hospital had been built but was not fully open. Some staff from Health Records had been transferred which created more space in the old Hospital. While the claimant initially disputed that she had ever returned to the old Hospital in November 2020 she later recalled that she had.

39. While the claimant disputed that she had been shown round her intended accommodation on return in November 2020 the Tribunal accepted the evidence from Ms MacNeill that she had had the opportunity to view the room in which she would be placed on return at the "top end of the office next to the window which could open for ventilation".

40. The claimant agreed that some staff had moved across to the new Hospital including the main reception area and while the A&E reception remained at the old Hospital she had "possibly" not wanted to cover reception as she had "been off - only back for short period and then second lockdown". In that period November 2020-January 2021 the reception desk at A&E was covered by two members of staff and the claimant was engaged in scanning duties.

41. The second period of special leave for the claimant occurred between 4 January 2021 and 26 April 2021. By this stage the new Hospital had been

completed and was functioning. The claimant completed a Covid 19 risk assessment with Denise MacNeill (J136/137) and her Covid age was calculated to be 84 meaning that the claimant was in the high-risk category. A discussion took place with Ms MacNeill as to the hours that the claimant would work on a phased return until achieving normal hours. The discussion related to scanning duties and did not cover reception duties because of the risk. She was to be accommodated within a separate office in the new Hospital in which three scanners were situated. Windows could be opened for ventilation.

42. The note by Ms MacNeill of 26 April 2021 (J137) stated:-

> *"Kath returned back to work, this was a phased return as Kath still falls in the high risk category. Kath and I have sat down to discuss the hours she would work until we worked up to normal hours. Due to Kath falling in the high risk category we discussed her staying in the main office carrying out scanning duties. As Kath was apprehensive about coming back she was happy with this. Kath is aware she needs to wear a face mask when walking around the Department/Hospital. Wipes and hand gel is made available for Kath to keep at her desk beside her".*

43. Initially on return to work from around 26 April 2021 the claimant and others were in a separate room. The occupants of that office were one full time individual whose role was to scan with HL in the morning and two other part time Clerical Officers working morning/afternoon.

44. However that only lasted for a month or so and the claimant was then moved into the main office to accommodate a single office for Ms MacNeill. The claimant was placed next to windows which could open for ventilation purposes; there was still a requirement to wear masks except when sitting at desks; wipes and gels for cleaning/hygiene were available. There was restricted footfall in the main office.

45. The respondent considered that given the high-risk category for the claimant it was appropriate that she was not involved in reception duties but in scanning. The claimant's position was that she was happy to be involved in scanning "until had found my feet and could see how matters were working for a short period - not wish to do all and so do scanning - not say for how long do scanning". The claimant's position was that when she went to the main office "shielding over as far as I was concerned" and so for a "short period accept that not doing reception as shielding but when out of room go to main office ready to do reception".

46. Within the new Hospital there are five reception areas being (i) one on the ground floor (ii) one on the first floor (both for paediatrics); (iii) an A&E reception for paediatrics; (iv) a reception for the Department of Clinical Neurosciences (DCN); and (v) one known as "Ann Rowland" being a small part of DCN where those affected by Parkinson's attend for testing.

47. In April 2021 the ground floor and first floor reception areas were not screened as the appropriate Perspex screen was awaited. That did not occur until around summer of 2021. The screen at A&E reception was also not fixed until summer 2021 but then required to be amended. The screen at DCN was put in April/May 2021.

Compression of Hours

48. By flexible working request of 27 May 2021 (J138/140) the claimant made a request to condense her 30 hours to 4 days a week (Monday, Tuesday, Thursday, Friday) working 9am-5pm on those days rather than five days a week working between 11am-5pm. She stated that the working pattern was requested *"on a personal note I believe that having a rest day on a Wednesday would help me manage my health condition with having a rest day during the week".*

49. After a meeting with Ms MacNeill and Neil Joshi on 10 June 2021 the request was supported. A letter was sent to the claimant of 14 June 2021 (J141) which stated:-

> *"After our discussion we agreed that the only way we could accommodate your request is that you would carry out duties in the scanning team in the main office as this would also keep you within a safer environment which would support you with your current health condition.*
>
> *At the end of the meeting we asked if you were agreeable to what we had proposed to you and you answered that you were happy with this.*
>
> *We then agreed a start date of 21st June 2021 for your new condensed hours".*

50. The claimant stated that she had never received this letter. She advised that she was not as stated in the letter *"happy with this"* namely only performing scanning duties and she had felt *"bullied"* into accepting that position. She considered that it was being put to her that if she did not accept that she only did scanning she would not have had her hours condensed.

51. That was disputed by Ms MacNeill and Mr Joshi. Their position was that because of her health condition, the Occupational Health Reports and assessment of her Covid age at 84 the safest thing for the claimant was not to be on reception duties. Reference was made to scanning in the letter of 14 June 2021 (J141) so the claimant would specifically know that she was not to be used for reception duties and that the claimant was happy to scan on those hours and not cover reception duties. He advised that the claimant had indicated that she had performed reception duties at the old Hospital and he wished to make it clear in the letter of 14 June 2021 that her duties were to be on scanning only. But it was not a condition of the condensed hours but a matter of safety. At that time the Hospital was still working within Covid

stipulations regarding hand gel, masks and distancing. Reception areas were more exposed to public and the risk of infection increased. The recollection of Mr Joshi was the claimant thanked him for the flexibility achieved.

52. The claimant commenced working the condensed hours as from 21 June 2021.There was no evidence of any complaint being raised by the claimant at the time that she felt "bullied" into accepting scanning duties only.

Period of Sick Absence

53. The claimant was then absent from work due to ill health in the period between 19 July 2021 and 27 September 2021 (J104).

Application for Reduced Hours

54. On return to work the claimant sought reduced hours by approaching Ms MacNeill on 29 September 2021 who discussed the matter with Neil Joshi. It was agreed that the claimant be offered a reduction of working hours from 30 to 22.5 hours per week. A part time staff member had left and those hours could be accommodated. That was put to the claimant who agreed to that reduction and her working pattern then became Monday - 11am-5pm; Tuesday - 11am-4.30pm; Thursday - 11am-4.30pm; Friday - 11am-4.30pm. The claimant agreed that position on 1 November 2021 (J142/143). The reduced hours were to commence 1 December 2021 as up to that point the claimant would work on a phased return from her sick absence ending 27 September 2021 and only reached the 22.5 hour working week as at 1 December 2021.

55. The claimant continued on scanning duties only.

Request for Reception Duties by Claimant

56. In her ET1 claim form the claimant stated that between June 2021 and April 2022 she *"regularly asked the respondent if I could perform other tasks as*

opposed to simply carrying out scanning. I was informed that I was only to do scanning of Accident and Emergency sheets; however no reason was provided as to why I was prohibited from carrying out other duties …"

57. In this period there was a lengthy period of sick absence and the Tribunal were satisfied that no such request was made in that period between 13 July 2021 and 27 September 2021. Neither was there any evidence of any requests being made over September /November 2021 when the claimant's hours were reduced. (J142/143) The claimant was not able to specify what approaches she made to Ms MacNeill or others requesting she perform other duties with particular reference to reception duties.

58. Ms MacNeill recalled one instance when the claimant asked if she could go to "A&E Reception" to learn how that operated at the end of 2021. The response from Ms MacNeill was that she could not arrange that as there were two A&E clerks on duty on that desk and due to distancing rules only two could be on the desk. Only be if one was off sick/or on annual leave would any cover be required. She advised that the claimant was happy with that explanation and "left it at that". Beyond that Ms MacNeill indicated there was no other request to cover reception duties. If there had been any other requests then it would have been necessary to obtain a report from Occupational Health regarding the claimant's safety. In any event given the change to the new Hospital further training of the claimant would have been required before being able to undertake any reception duties.

59. The claimant maintained that on requesting a move away from scanning in around January 2022 she was told that it could only be accommodated once any "backlog" of A&E scanning work had been completed and she knew that was a "neverending" task. Ms MacNeill had no recollection of such a request and response. Both Ms MacNeill and Mr Joshi denied that there was any requirement for the claimant to work on a "backlog". It was explained that there was a date given for the move from the old to the new Hospital and in preparation papers were transferred to the new Hospital. However the day before the prospective move it was announced there would be delay and the

papers that had been transferred required to remain in the new Hospital. No work to scan those papers could be undertaken. When the move took place some time later those papers were not scanned and there is no intention that they be scanned. In the event that information is required on those documents then they would be accessed manually. Accordingly the A&E records were up to date and continued to be up to date and no backlog of scanning work existed.

60. It was also stated by the claimant that she was only to do A&E scanning work. Again Ms MacNeill explained that the full time Clerical Officer used one of the scanners as there was a lot of work for In Patient Waiting Lists Office (IPWLO/SCOLI) which dealt with case files and booking appointments for those with scoliosis and there was a legal requirement to have those documents scanned in colour. The full time Clerical Officer started earlier than the claimant and so occupied that scanner. The A&E scanning documents required to be done in black and white. The two comparators of the claimant HL and CB were usually occupied on the "prepping" work for scanning namely putting case notes in order and removing staples and the like in readiness for scanning.

Request for meeting by claimant.

61. On 11 January 2022 the claimant made a request to meet and discuss her role. She sent an email to Ms MacNeill with a copy to Neil Joshi and her union representative Denise Wilson stating that she wished to discuss *"clarification of what my role and health records is going forward".* She stated:-

> *"When I asked to change my hours I was told my hours could only be changed if I agreed to do scanning all the time. I feel I had no choice but to agree to this at the time as my need to reduce my hours was necessary due to health condition which comes under the Disability Act. I have not received anything in writing to confirm these changes.*

I understand that scanning is part of my role which I understand I have to do at times.

Please can you confirm what are the reasons why I am not being allowed to carry out reception duties etc as per my contract' (J145)

62. By email of 12 January 2022 Mr Joshi responded to indicate that *"we are happy to meet you if you would like to give us some diary dates for your availability".* (J144)

63. There then followed a series of emails seeking to arrange a date for a meeting which emails indicated that 8 February 2022 could be arranged but cancelled with an email from the claimant's then union representative indicating that meeting could not take place as she had *"recruitment all afternoon so we will need to look at another date"* (J146/150)

Absence through ill health

64. Before another date could be fixed the claimant was absent through ill health from 15 February 2022. She explained that she was notified by her consultant that her kidney transplant some 21 years previously was failing. She was concerned that there would be rapid deterioration in her condition as had happened prior to that transplant with similar issues affecting her daughter who also had kidney problems. She described this as a "crash landing" when there would be an immediate and urgent need for dialysis. The deterioration of her health meant she required to be absent from work. A series of Statements of Fitness for Work were provided to the respondent advising that absence was due to *"kidney transplant failure and rejection"* or *"chronic renal failure - renal transplant (J157,175,182,193,196,207)* The claimant remained absent due to ill health until her resignation.

Enquiry on Pension Options

65. On or around 18 February the claimant contacted the respondent's Employment Relations (ER) Department to enquire of ill health retirement "given the information she had received regarding the deteriorating kidney function". It was explained that employees can phone or email an "ER box" requesting information and the claimant used that process. Deborah Walker received information from an ER colleague of a subsequent telephone conversation with the claimant. Her colleague understood the information from the claimant was to the effect that this was an "end of life case" and the claimant was looking for a "commuted pension quote which would give a higher lump sum". Deborah Walker telephoned the claimant and confirmed that was the information she sought and had a lengthy conversation with the claimant regarding her deteriorating kidney function who advised she was "back on the list for transplant". Ms Walker advised Ms MacNeill of the call and that the claimant wished a pension quotation. The claimant also phoned Ms MacNeill to say that she had requested a quote and at that time Ms MacNeill sought permission for a reference to be made to Occupational Health which the claimant was happy to give.

66. In the meantime Ms Walker sought a quote from Scottish Public Pensions Agency (SPPA) by email of 21 February 2022 (J156). That email advised that the claimant was *"sadly moving to a palliative care of her treatment and is keen to assess what her options may be"* and sought estimates for *"both medical retirement, commuted and non commuted and death in service with an estimated date of 31/3/2022".* It was necessary to provide an estimated date for the purposes of the quotation.

67. A quotation was received on 28 February 2022 (J158). This provided the information on a total lump sum for a commuted pension and death in service amount but did not provide non commuted amounts. Ms Walker returned to SPPA seeking that information on 3rd March 2022 (J160) and received an email giving that information on 7 March 2022 (J163).

68. Ms Walker was certain that her request for a commuted and non commuted pension was what had been agreed on the call with the claimant as she understood that a commuted pension was only available on anticipated end of life. She knew she was in an "obviously delicate situation" and if that "not what I understood definitely not ask for that quote". Ms Walker confirmed that commuted pension was only available to those not likely to survive within the next 12 months.

69. Ms Walker also received the referral to Employee Relations made by Ms MacNeill who asked for support through the process regarding the claimant's ill health (J153/155).

70. Ms Walker recalled phoning the claimant to say that she had the figures for commuted pension and the claimant advised that she would like to have those figures and she gave them over the phone. She was not sure that she provided the non commuted amount which came later. She recalled having a series of calls with the claimant at this time and that if she had information she would have provided it to her.

71. The claimant was invited to a meeting on the 8th of March 2022 with Denise MacNeill and Deborah Walker. She was provided with a normal sick absence attendance template letter. It was acknowledged that it would have been better to have tailored the letter to suit the purpose of the meeting which was to discuss what was believed to be a meeting regarding the claimant proceeding with ill health retirement.

72. Due to difficulties with her car Ms Walker was unable to attend the meeting on 8 March 2022 in person but attended remotely. Ms MacNeill and the claimant attended in person. A note of the discussion on 8 March 2022 (J173) indicated that the claimant was provided with the estimate of her ill health pension and lump sum. This was provided on the basis that the claimant was *"looking to be medically retired as she can't maintain working"* which it was noted was agreed at the meeting. The claimant also signed a form

AW8/Med-Application for Retirement Benefits for an Active Member to accompany the referral which it was agreed to be made to Occupational Health. Occupational Health were required to assess the claimant's health and would be the arbiter as to whether or not she qualified for ill health retirement. The claimant was given the letter from SPPA of 28 February 2022 (J158). That letter advised that medical evidence should be provided with the application and the case then would be assessed by the SPPA medical advisor.

73. Subsequent to the meeting Ms Walker had reported to Ms MacNeill that the claimant was not happy *"about how the meeting went and has advised she doesn't wish to meet with you again unfortunately. She also states she didn't receive any letter"* and *"she feels she is being pushed out of the door and wants to look at possible redeployment and fewer hours"* (email from Ms Walker to Denise MacNeill of 10 March 2022 at J174). The email advised that there may have been a *"case of crossed wires but she is clear that a commuted pension is not the way she sees things progressing. With this in mind can you amend the OHS request please to enquire about when she might be fit to return to work and if returning to a different post on fewer hours if medical redeployment would be supported by them. She advises she doesn't wish to return to your department due to the way she has been treated".*

74. This came as a shock to Ms Walker who had proceeded with the request for commuted pension on the advice received from the claimant and she was very uncomfortable that there may have been any misunderstanding over the position. She stressed that she would not have requested the commuted pension had she not thought that was what the claimant wanted. The claimant had advised her that her health condition was serious enough for that quote to be obtained.

Comment after meeting of 9 March 2023

75. The claimant advised that at least part of her reasons for not wishing to deal any longer with Ms MacNeill was that she felt unsupported by a comment made in conversation between her and Ms MacNeill after the meeting of 8 March 2023. The claimant advised that she was told to "empty her locker" and so considered she was no longer wanted. Ms Walker advised that in conversation with the claimant this matter was given as a reason why the claimant no longer wished dealings with Ms MacNeill. The evidence from Ms MacNeill was that she did not consider she had offended the claimant in the conversation following the meeting. She did raise with the claimant that she should check her locker in case there was any food which needed to be cleared. There had been some "crackers" in a drawer beside the claimant's desk and so this request was made to ensure there was no other foodstuff remaining. There was also a complaint from the claimant that Ms MacNeill had not asked her how she was feeling at that meeting. Ms MacNeill's evidence was that the claimant had arrived early and the first thing she had asked was how she was faring.

76. The Tribunal accepted evidence from Ms MacNeill on these matters. She spoke with a clear recollection of the issues and we consider that the claimant took the wrong inference out of the conversation that took place at that meeting.

Occupational Health Service request and report

77. Subsequent to the meeting of 8 March 2022 and on receipt of the information that the claimant did not consider that a commuted pension was the way matters should progress the management referral form to Occupational Health Service (OHS) was altered by Ms MacNeill (J177/178). OHS were to ascertain the claimant's fitness for work and any recommended restrictions, modifications and adjustments which might need to be made, future attendance prospects and whether or not the Equality Act 2010 was likely to apply-

78. Thereafter apart from dealing with Statements of Fitness to Work received from the claimant Ms MacNeill was no longer involved in discussions with the claimant.

79. The claimant attended with OHS on 14 April 2022 and a Report was issued to the respondent (J179/180). At that time the claimant had supplied OHS with a letter from her consultant which gave detail of her health condition at that time (J159).

80. The OHS Report (J179) noted that the claimant had been absent from work over the last 2 months due to a decline in her underlying health which resulted in fatigue, breathlessness and swelling in her legs which could impact day to day activities. The Report stated that while the claimant did not *"feel ready to return to work at present she is hopeful this will be the case in the coming weeks".* Certain measures were narrated which would be beneficial to be put in place when the claimant *"feels ready to return to work".* Those measures included a phased return to work; pacing herself throughout the working day with rest breaks; time off to attend health related appointments; meal breaks; suitable resources to store medication It was stated *"due to her underlying health condition she is at increased risk of severe complications from infections including Coronavirus therefore it is essential that appropriate risk reduction measures are implemented to reduce her risk to an acceptable level. She should adhere to stringent hygiene measures, PPE, strict social distancing and should not be required to work with those known or suspected of Coronavirus".* It was also stated that as there appeared to be *"perceived work related stressors"* she should carry out an individual stress risk assessment and agree an Action Plan with her Line Manager or alternative.

81. The OH Report also included a passage stating:-

> *7 understand that prior to her absence her hours were reduced to 22. She is keen to resume these in due course. I also understand that*

her duties have been limited to scanning only. She is uncertain as to the reason for this. She is keen to resume the full remit of her role and it appears that she is fit to do so with the above recommendations. Additionally she is keen to consider working in an alternative location due to perceived workplace stressors. I have suggested that she discuss this further with her employer and HR to see whether this can be accommodated.

Redeployment Issue

82. Subsequent to the OHS Report the claimant contacted Ms Walker. Ms Walker indicated that the claimant seemed to be under the impression that a move to a different location had been recommended by OHS but Ms Walker wished to make it clear that OHS were only indicating that this might be discussed further rather than a recommendation. Ms Walker spoke with the claimant's staff representative at the time because she was aware that the claimant did not agree that the Report only suggested that a discussion might take place on relocation or redeployment. The staff representative agreed that there was no recommendation on that matter.

83. The claimant thought she had sent an email to Ms Walker of 22nd April 2022 (J181) but in the course of the hearing she accepted that this had been sent to the wrong email address for Ms Walker and had not been received by her. She confirmed in the course of the hearing that when checking her records she found that the email had in fact been "returned" and so never received. Accordingly the issues that she raised in that email never came to the attention of the respondent.

84. However Ms Walker confirmed that there had been a telephone conversation with the claimant on redeployment when Ms Walker had indicated that redeployment could not be supported given the terms of the OHS Report.

85. The respondent has in place a "Redeployment Policy and Procedure" (J85/103). This Policy was in force at the relevant time and relates to those who are displaced *"due to disability, ill health and organisational change"* and in exceptional cases may include matters of employee capability, resolution of grievance or disciplinary matters or return from a career break.

86. The claimant was not being displaced due to disability, ill health or organisational change. The respondent policy is to make any reasonable adjustment for a disabled employee and only if that could not be put in place or was ineffective or the individual was unable to perform the work then would redeployment be considered.

87. Ms Walker explained that the redeployment policy could not apply in this case as there had been no opportunity to carry out any of the recommendations made by OHS. Only if recommendations were not successful or not able to be implemented would the policy be to move to redeployment. In that respect a disabled person had priority. However the claimant had not returned to work and reasonable adjustments would require to be implemented before considering redeployment. For that reason redeployment was not available for the claimant.

88. At this point Ms Walker had no indication that the claimant was concerned about any restriction on her duties as that had not been raised specifically with her. She was unaware of that position until a subsequent meeting took place with the claimant and Neil Joshi. While the claimant may have considered that Ms Walker was aware of these issues by email of 22 April 2023 that was not received.

Meeting of May 2022

89. To seek to progress matters with the claimant arrangements were made for a meeting with the claimant. By email of 9 May 2022 Ms Walker advised that the meeting would be under the *"Once for Scotland Attendance Policy"* and that the main remit of the meeting would be to discuss *"how we support you*

back to work given the OHS recommendations and as OHS have suggested to discuss whether your request to be moved can be accommodated and the reasons for this".(J188/189) After various emails were exchanged the meeting was fixed for 26 May 2022 amongst the claimant, Ms Walker and Mr Joshi (J183/190). A letter confirming the date of the meeting was sent to the claimant (J191/192) and it was noted that the meeting would discuss how the claimant's recovery was progressing and any developments that may impact on the timescale for return to work; the OHS recommendations; any workplace alterations which would support return to work; any change to salary or sick pay; and any other relevant points.

90. By email of 18 May 2022 from the claimant's Union representative the respondent was advised that the claimant was *"still not well at the moment and is signed off from her GP until the end of June and therefore I am emailing to let you know she will not be attending. I have advised Katherine to keep in touch and to update you as her sick line is nearing its end date - to further advise if she will be able to return or needs to further contact her GP".* It was also stated that the Union representative had spoken at length to the claimant about her situation and was happy to support her when she was able to return. That email was followed by a response from the respondent of 23 May 2022 (J194) advising that it would be necessary to meet with the claimant prior to any return to work and perhaps a discussion *"via Teams might be a way to manage the position given that the claimant had been off since February 2022".*

91. No word was received from the claimant as to other dates for a meeting or when she might be able to return. She continued to submit Statements of Fitness for Work advising that the she was not fit to work.

Further Arrangements for Meeting

92. On 8 July 2022 the claimant sent an email to Neil Joshi confirming that she had sent in a further Statement of Fitness to Work and was still *"waiting on a response from the Union regarding setting up a meeting to discuss me*

returning to work. I have not heard anything from work and I am in the dark about what the plan is going forward". That resulted in Mr Joshi responding by email of 15 July indicating that he had been out of the office but had picked up the claimant's email of 8 July 2022 and thought that *"Debbie Walker is still waiting to hear back from your Unison rep to arrange a date and time for our meeting. I would suggest that you get in touch with her Unison rep to contact Debbie Walker"* (J200).

93. A series of emails thereafter fixed 9 August 2022 as a date for the intended meeting with the claimant, her Union representative, Ms Walker and Mr Joshi. Also given the issues raised by the claimant in that email exchange over July 2022 it was confirmed by email of 25 July 2022 from Ms Walker that the Agenda for the meeting would discuss more fully:-

> "7 *The possibility of moving to another department as suggested within your OHS Report.*
>
> *2 That you feel you have been discriminated against for asking to reduce your hours given no other staff who work part time have been restricted to scanning duties only and you have been told you cannot help at reception. You advised that these restrictions leave you feeling humiliated, worthless and not part of the team.*
>
> *3 That you feel there was no valid reason for the way you have been treated".*
>
> (J209/218)

Meeting of 9 August 2022

94. The meeting arranged for 9 August 2022 took place with the claimant in attendance along with her Union representative, Ms Walker and Neil Joshi. No immediate response was received by the claimant on the discussion. She asked for minutes of the meeting on 19 August 2022 (J230) and Ms Walker

responded on 25 August to say that there were no minutes and that she had planned to *"clarify the main points in a letter once Neil had confirmed where we are with the vacancies and if any of these could be supported part time. Unfortunately he is unable to support this so I can suggest we meet again to discuss what other options we may have? As you may recall he is on leave until week commencing 29 August 2022. I am currently trying to arrange a meeting to allow us to discuss this further"'* and suggested either 30th or 31st August 2022. That was met by a response from the claimant who advised that she was concerned about the response as it appeared to *"contradict what was discussed in our meeting".* She wanted in writing what it was that had been discussed as she was under the impression that matters had been resolved.

95. By email of 25 August 2022 (J225) Ms Walker attached a letter for the claimant on the outcome of the meeting indicating that she needs to *"clarify this is only my understanding as Neil is now on leave and may disagree with what I have written - hopefully not! We didn't agree anything for definite if you recall Kath as Neil had to go and check things out, I am very clear on that. He has a different proposal for your return and on that basis I think it is important that we meet before your planned date to return if at all possible to allow this to be discussed further. I have detailed this in the attached".*

96. The letter to the claimant (J22/223) explained that it was being written in the absence of Mr Joshi who was at that point still on holiday and based on notes that Ms Walker had taken at the time.

97. The main points were listed in that letter and it was noted:-

- that the claimant wished to move to another area *"within the Service, did not wish to return to your current role and were keen to resume to full duties albeit on part time hours including reception work in a different location".*

- that the claimant had concerns regarding her working relationship with Ms MacNeill explaining that she felt she was unsupported but did not wish to make any formal complaint. However as a consequence she did not wish to return to her current post.

- that discussion took place on whether the claimant could perform reception duties in A&E. This included whether the claimant could have her legs raised within the reception desk in that area because of its construction and the claimant felt that this was simply being used as an excuse as to why Mr Joshi was unable to move her to a job with reception duties.

- that Mr Joshi advised that there were several full time posts but no part time vacancies in the Service and the issue was whether or not those posts could be filled on a part time basis. It was agreed that Mr Joshi would explore the possibility of the claimant returning on a part time basis to one of the vacancies that was discussed.

- in the meantime the claimant would be put on extended holiday leave to allow full pay to be received until 31 August 2022.

98. The letter went on to explain that Mr Joshi had had the opportunity to review the situation and advised that *"all outpatient vacancies had been filled and his colleagues have advised him that they have no vacancies at present. On that basis we cannot accommodate your request to move department although he is happy to support your return to health records in RHCYP with Jean Miller becoming your supervisor. Mr Joshi will arrange training for you in alternative duties to provide cover as and when required, your main duties will remain as scanning. Your hours of work will remain unchanged".* A further meeting was suggested to discuss these matters.

99. The claimant's position was that she considered the meeting had concluded on a far more positive note than simply alternative positions would be considered but that something would be offered to her. Neither did she consider that Jean Miller being supervisor "would work". Neither did she want

to cover reception duties for breaks, sick leave, annual leave absences but *"have her job back and treated the same as everyone else".* In evidence Mr Joshi and Ms Walker were both clear that there was no resolution as described by the claimant but that Mr Joshi would consider what alternative positions might be open. With part time working there would always be a need for others to cover.

100. Mr Joshi advised that after the meeting he had spoken to his "team" to ascertain the position on any vacancies. All were full time and he was advised that there had been candidates shortlisted for those posts and the need was for a full time rather than part time to cover the services. That search also included areas in his responsibility at Woodburn House and the Western General Hospital.

101. So far as raising legs at reception were concerned Mr Joshi was aware that the claimant had rested her legs on a box when scanning and given the reception area at A&E had wooden partitions beneath the desk area he was not sure how the claimant might manage. He explained if the claimant had returned to work with training on reception duties which was the suggestion then he would have asked OHS for a review of possible adjustments or aids that might have been required. In any event he denied indicating that the claimant could not be redeployed because she would be unable to raise her legs whilst seated at reception. None of the vacancies included reception work and there were no vacancies in the A&E reception at that time.

102. The claimant did not consider that she could continue in the employ of the respondent subsequent to receipt of that letter which she regarded as being the "final straw". This was reflected in the email sent to her Union representative of 28 August 2022 advising that the issues were *"affecting my mental health and also my physical health while also dealing with kidney failure and diabetes, and all I ever wanted was to reduce my hours to help me manage my health, and still do the job I was employed to do and which I enjoy doing, but I am being told I can't do this, I am only worthy of scanning as my main job".*

103. Discussion however still took place amongst Ms Walker and the claimant's Union representative in seeking to fix a further meeting with the claimant. The Union representative emailed Ms Walker on 29 August stating that she had *"messaged"* the claimant with the prospective meeting date and appreciated the leave being extended. It was hoped that they could work together *"for a successful return"* and while she appreciated that the service needs fully staffed it may be some *"further out the box thinking would be helpful …".* A prospective date for the meeting was suggested at 6 September 2022 and that Mr Joshi had arranged to free his diary for that date.

104. The claimant submitted a Statement of Fitness for Work dated 30 August 2022 indicating that she would be absent for work for 28 days on account of *"stress and anxiety".* By email of 1st September 2022 the claimant indicated to Ms Walker and Mr Joshi:- *"I have been given another sick line from 30/8/2022 for one month with stress and anxiety. I will no longer be attending our meeting on Tuesday"* (J241)

105. The claimant's Union representative and Ms Walker exchanged messages on 5/6 September 2022 both indicating a desire to progress and support a return for the claimant (J241/242).

Resignation of Claimant

106. By letter of 16 September 2022 (J245) the claimant resigned as Clerical Officer with *"immediate effect'.* She considered that there was no alternative but to resign due to:-

> *"• bullying and harassment in the workplace*
> *• being demoted without good reason*
> *• a failure to make reasonable adjustments for my disability*
> *• being subjected to unreasonable or unfair treatment".*

107. She considered that the employment relationship had broken down and that the respondent's conduct was a *"fundamental breach of employment contract on your part, in particular, not allowing me to do the job I was employed to do, because I asked to reduce my hours due to my health condition".* She considered her resignation *"constitutes constructive dismissal".*

108. Mr Joshi responded by letter of 23rd September 2022 stating that he was surprised to receive her letter as the respondent had been keen to rearrange the cancelled meeting of 6th September 2022 to discuss the claimant's concerns further and how these might be resolved and be supported back to work.

109. So far as the points made by the claimant were concerned Mr Joshi advised:-

- that at the meeting on 9 August 2022 the claimant had raised concerns on her working relationship with her supervisor but clearly advised that she did not wish to make any formal complaint.

- he did not understand how it was that the claimant had been demoted. He referred to the flexible working request to reduce hours submitted in June 2021 and confirmation that those hours could be accommodated within the scanning team in the main office which would also support the recommendations made by OHS with regards to Coronavirus and the claimant's health condition. She retained her current banding and there was no demotion.

- he considered that the measures outlined in the Report of 14th April 2022 could have been put in place but since the claimant had not made a return to work since then there had not been the opportunity to discuss the details.

- he was unaware that the claimant had been subjected to unreasonable or unfair treatment.

- he suggested that they might try to meet again to review options planned to offer at the meeting arranged for 6 September 2022 and if the claimant wished to take that option to let him know no later than 29 September 2022. Meantime he would not act on the resignation.

110. The claimant made no response and there was no further meeting.

Remedy Issues

111. The claimant was paid up to 29 September 2022. The claimant's pay ran at the rate of £249.40 per week gross and £230.09 net. She had not gained any other employment since resignation from the respondent as she had not been able to apply for other posts for health reasons. It was in her mind that she may need to go back to the transplant list and so was reluctant to take on further work.

112. She was in receipt of Employment and Support Allowance which from 13 April 2023 was paid at the rate of £129.50 per week. She also received a Personal Independence Payment of £345.20 per week (J262 and 264/267). She had "come off" diazepam about "a month or so after" the final meeting of 9 August 2022.

113. In terms of the respondent's Sick Leave Policy had she not resigned on 16 September 2022 she would have continued on half pay and then been on no pay from 25 September 2022.

Observations on Evidence

114. The Tribunal considered that the respondent's witnesses gave their evidence freely and candidly to the best of their recollection. Mr Joshi did not have day to day knowledge of the claimant's activities. His main concern in his oversight of the Department was to ensure that the work was being covered and targets met. He would also deal with issues arising such as change of

hours or grievance/discipline matters but lacked the day to day contact with Clerical Officers.

115. There was concern over the claimant's reliability in the evidence given. There were various instances where her recollection or what was stated in her claim form varied markedly from evidence given. Examples were:-

"(i) Initially she denied any knowledge of Denise Wilson being her union representative and who had occasioned the cancellation of the intended meeting of 8 February 2021. She later acknowledged that Denise Wilson had been her union representative at that time.

(ii) The claimant initially denied having made any return to the old Hospital around November 2020 but it was clear in her questioning of Ms MacNeill that she did return at that time until January 2021 when shielding recurred.

(iii) She could not recall any phased return to work after her sick leave absence ended around 28 September 2021 but it was clear from questioning of Ms MacNeill that there was a phased return.

(iv) In her claim form (J21 paragraph 9) she narrated that when her hours were reduced in June 2021 to 22.5 she was *"forced by D MacNeill to reduce her duties".* The reduction of hours took place in September 2021 but there was no suggestion by the claimant in evidence that that reduction in hours was accompanied by any restriction in duties or that Ms MacNeill had been responsible. The matters of concern for her related to the compression of hours in June 2021 in conversation with Mr Joshi.

(v) In the claim form (J21 para 10) the claimant maintained that between June 21 and April 22 she regularly asked if she could perform other tasks. However she was on sick leave between July 2021 and September 2021 and then from 15 February 2022. There

was no evidence of regular requests other than an email of 11 January 2022 requesting a meeting to discuss her role.

(vi) In the claim form (J21 paragraph 12) reference was made to an email to Mr Joshi requesting a meeting which was arranged but was cancelled by Mr Joshi. That was not the case as the meeting was cancelled by her then Union representative because of her continued ill health.

(vii) In the claim form (J21 paragraph 14) reference is made to a meeting in late April 2022 with Ms Walker to discuss a return to work but no such meeting took place.

(viii) In the claim form (J22 paragraph 15) reference is made to a discussion with Ms Walker around 21 May 2022 where she raised concerns about the restriction of her role. No such discussion took place.

(ix) In the claim form (J22 paragraph 16) reference is made to her adjustment request not being supported but instead the respondent offering medical retirement and that she was told by Deborah Walker that if she ever required to *"reduce or amend hours in the future that could not be accommodated'.* That was a markedly different account from the evidence.

(x) In the claim form (J22 paragraph 17) she stated that around 26 May 2022 she had attended a *"second meeting with NJ and DM to discuss my absence the Occupation Health report and any adjustments that could be made to support my return to work" ".* However no such meeting took place. It was stated at this meeting she was provided with a quotation for medical retirement but that discussion took place on 8 March 2022.

(xi) In the claim form (J22 paragraph 18) she stated that on or around 25 July 2022 she requested that she be redeployed within the Health Records Section under a new Manager but no such request was made at that time. The evidence was that on 19 July 2022 she indicated she wished to set up a meeting about a return to work from sick leave.

(xii) In the claim form (J23 paragraph 19) she stated that she attended a *"third meeting"* on 9 August 2022 but the evidence was only of a previous meeting of 8 March 2022.

116. These examples of failures in the claimant's assertions and recollection of events did affect the Tribunal's view of the reliability of the claimant in the evidence which was given and required to be borne in mind by the Tribunal when considering areas of dispute and what evidence should be preferred.

117. This was a material issue in relation to the principal area of dispute namely a finding on the claimant's duties.

Claimant's Duties

118. A central matter in the case was the extent of the claimant's duties.

119. As narrated the contractual documentation provided indicated that the position offered to the claimant was that of *"Clerical Officer''* (J62) and that the duties of the post were as *"outlined in the previously provided job description''* which was not exhaustive and could be varied as appropriate *"following prior consultation with you and your staff side representative".* That is not an uncommon way to proceed and gives an employer a right to require an employee to perform any one of the duties set out. In doing so an employer seeks to envisage what it might want the employee to do in the future and to couch the job description in flexible terms. In this case the job description provided that the claimant was that the role was within the Department of Health Records to *"provide high quality support by undertaking all*

administrative and clerical duties in the daily running of the Department …" (J79). The "key *result areas"* contained a number of matters which might be asked of the claimant but did not include "scanning" as a specific duty but did indicate the provision of a reception service. This generic job description had been last updated October 2004.

120. The evidence was that around 2016 a "document light" initiative was put in place by the respondent and that required various documents including details of A&E admissions and patient treatment to be scanned so that the records could be accessed electronically. To keep the records up to date it was necessary to have a continuous scanning function within the Records Department.

121. The claimant was taken on in 2018. The only individuals present at the interview who gave evidence were the claimant and Ms MacNeill. The claimant did not recollect Ms MacNeill being at the interview but the Tribunal were satisfied from the evidence that she was present along with the then Assistant Manager Scott Moore. The evidence from Ms MacNeill was that the job outlined to the claimant was for scanning and reception "cover" namely covering for lunch/tea breaks, sick absence and absence on account of annual leave. The claimant was trained on reception duties for that purpose and along with others attended reception duties as "cover". The claimant was not trained on taking telephone calls to book appointments which required use of a dedicated phone line for that purpose. She along with others picked up calls in the general office.

122. The difference in the claimant's position was that she considered her role was a guaranteed rolling requirement for reception duties along with scanning and other duties. It was not clear what those "other duties" were other than picking up the telephone to answer calls into the general office. From the tasks which required to be covered within the rota sheets produced for January/February 2023 there was no requirement to cover *"DCN"* or "*IPWLO/SCOLI"* when the claimant was in the old Hospital. The other duties related to telephone and appointments which the claimant conceded she was

not trained on and effectively left the *"prep"* for scanning and *"scanning"* itself along with reception duties.

123. That was consistent with the evidence from Mr Joshi to the effect that funding had been put in place for scanning duties as part of the "document light" initiative. The claimant being employed for scanning duties with cover for reception was in line with that background.

124. So far as the interview itself was concerned the Tribunal did consider that the evidence of Ms MacNeill should be preferred in stating that the claimant's duties were to provide cover for reception duties rather than any guarantee or commitment that her role would include reception duties as a matter of course. Accordingly the Tribunal did not consider that there was an express contractual term orally expressed at interview to the effect that such duties would be guaranteed as part of the claimant's terms.

125. The conduct of the parties can demonstrate that they did agree upon a certain term or that such a term evolved over time. In **Carmichael v National Power PLC** [2000] IRLR 43 it was stated by Lord Hoffman on the issue of conduct demonstrating agreement to a particular term:-

> *7 think it was open to the …. Tribunal to find as a fact that the parties did not intend the letters to be the sole record of their agreement but intended that it should be contained partly in a letter, partly in oral exchanges at the interviews or elsewhere and partly left to evolve by conduct as time went on. This would not be untypical of agreements by which people are engaged to do work whether as employees or not".*

126. The evidence from the claimant was that when she commenced work she was provided with rotas and on a week to week basis there would be provision for her to perform reception duties. Ms MacNeill did not disagree with that the difference again being that the cover for reception was to account for periods of sick leave/annual leave/tea breaks/lunch breaks.

127. The actual rotas for the period following the claimant's employ at the old Sick Children's Hospital (beyond 2018/2020) were not available and so there was no evidence of any particular pattern of working from documents. Neither was there any evidence from colleagues of the claimant who would have been in place at the time as to the working arrangements. It was the case that the claimant could be on reception duties for a week or two at a time if she was covering for annual leave or sick absence. That may have encouraged the claimant to consider that her duties were to be rotated and not reliant on the provision of cover for other absence/breaks.

128. The Tribunal then found that the conduct of putting the claimant on reception duty was consistent with the requirement to perform scanning and cover reception on an as and when required basis for absences. The Tribunal did not consider that the conduct of the respondent subsequent to employment had altered the express oral term of scanning duties with cover on reception for breaks and absences or had the effect of creating a new term.

129. In this assessment the Tribunal did have regard to the letter from Mr Joshi of 14 June 2021 (J141) with reference to the sentence:-

> *"After our discussion we agreed that the only way we could accommodate your request is that you would carry out duties in the scanning team in the main office as this would keep you within a safer environment which would also support you with your current health condition".*

130. It was stated that the claimant was *"happy with this".* The Tribunal did not consider this was inconsistent with the claimant's duties being outlined as scanning and reception cover. The issue may then be whether there was an unreasonable reduction in duties to scanning only at that time with no right to cover for reception duties. However the letter does require to be considered in the context of the claimant's health condition and the impact of Covid. At this time there were still precautions in place in the new Hospital regarding

the need to prevent the transmission of Covid. The last OH report available to the respondent put the claimant in the *"highest risk category".* An assessment of the claimant in April 2021 put her *"Covid age"* at 84. The note accompanying that assessment narrates that because of the high risk the claimant would be *"happf "staying in the main office carrying out scanning duties".*

131. The request for compressed hours of May 2021 was made on the basis that it would help the claimant's health condition. The Tribunal saw the letter of 14 June 2021 as no more than a continuation of the position that in accommodating the claimant her health should continue to be protected by only conducting scanning in the main office. That was not to say that was a permanent arrangement but one which required to be put in place at that time as a result of continuing Covid concerns.

Submissions

132. The Tribunal were grateful for the written submissions presented and no discourtesy is intended in making a summary.

For the Claimant

133. The claimant submitted that she had sought to explain and provide evidence to the Tribunal to the best of her ability in seeking to demonstrate discrimination and constructive dismissal. She had not had the benefit of legal representation in her case and had required to make that presentation on the advice of others and her own researches. She had sought to be accurate in the evidence given but appreciated that at times she had "got mixed up with dates and timelines". However the evidence she had given was a true reflection of events that had taken place.

134. She had not called witnesses as she did not consider it appropriate to ask former colleagues to "go up against" management". She indicated that she regretted making that decision.

135. She considered that she had demonstrated that discrimination was inflicted on her “on many occasions” in the evidence given. The essence was that all she wanted to do was reduce her hours and continue doing the same tasks she had been employed to do and had performed until the Covid pandemic. Due to a decline in her health it was necessary to reduce her hours to help her manage her health condition. She had been told that her kidney transplant was deteriorating and she sought to put measures in place to help manage that condition and continue working with reasonable adjustments being put in place.

136. She stated that when asked to reduce hours she was told the only way this could be accommodated was if she carried out duties in the Scanning Team. She did not consider there was such a thing as a “team/s” when she joined the Department and felt manipulated into agreeing as she believed she had no option. It was vital she changed hours for her health condition.

137. Her contract was not altered regarding her duties to state that she was only required to perform scanning and there was no discussion about other options available.

138. She considered that she had been discriminated against on the basis of:-

- not being allowed to do the job she was employed to do
- being given menial tasks
- being told she could not work in other areas of the hospital as the desks were not designed to accommodate her raising her legs should she need to. No reasonable adjustment was discussed as to what could be done to allow work behind the desk
- not being given a redeployment option or Mr Joshi looking at options outwith the Medical Records Department
- being treated differently to other colleagues in the Department as in allocation of tasks

- being told that all available posts had been filled when in fact they were still at selection stage

139. At no time had she been given a valid reason as to why she was the only member of staff subjected to the most menial tasks.

140. She emphasised that she had been subjected to being referred to as "terminally ill" and in "palliative care" which was extremely distressing to hear. She had no idea where this idea had come from.

141. She stated she was only given one quote about medical retirement namely a commuted pension and followed up the other details herself. While Ms Walker may have asked for those other quotes she did not receive them or have a discussion on other possibilities.

142. She maintained that no-one had taken the time to meet her and go through the issues she had and try and resolve them. She had not put in a complaint about treatment from Ms MacNeill as she believed that this had already been done in raising her concerns with Ms Walker and Mr Joshi on several occasions.

143. She maintained that there had been numerous conversations and meetings and that the "final straw" was the meeting of 9 August 2022. At that meeting she believed the issues had been resolved and that she was being redeployed to another area within the NHS and that Mr Joshi was looking at options outwith the medical records department.

144. On being told that was not the case and the only option was to return to scanning as her main duties and training on other tasks then she was "back to square one".

145. At that stage she was beyond "battling" with her Manager any more and resigned .

For the Respondent

146. In the first instance it was submitted that any claims of discrimination relying on events before 28 July 2022 were out of time unless they could be considered by the Tribunal to be a continuing act. It was submitted that the acts were distinct acts rather than a continuing course of conduct as they involved different people, processes and time periods.

147. It was accepted that the constructive unfair dismissal claim was in time as were some of the complaints of discrimination but for those found to be out of time no extension of time should be allowed on a just and equitable basis.

148. The claimant had given evidence that she considered there was discrimination at play when she stopped covering reception on her return from "shielding" in November 2020 and April 2021. She considered that there was discrimination in the quotes for early retirement in early 2022. In those periods the claimant had advice from her trade union. The claimant did not begin early conciliation until 27 October 2022 and there was no reason why the claimant could not have brought those claims earlier.

149. On the claim of direct disability discrimination it was submitted that less favourable treatment in comparison with an actual or hypothetical comparator would not be sufficient unless there was "something more" from which the Tribunal could conclude that the difference in treatment was because of the claimant's protected characteristic **(Madarassy v Nomura International Pic** [2007] IRLR 246). A Tribunal is required to consider the conscious or subconscious reason for treating the claimant less favourably which was necessarily a subjective process **(Igen Limited and others v Wong** [2005] IRLR 258).

Issues on Direct Discrimination

Limiting duties

150. It was submitted there was no limitation placed on the claimant's duties.

151. The claimant's pleaded case had stated that the majority of her duties were removed and she was limited to scanning only. It was said in her pleadings that in June 2021 after requesting a reduction in working hours she was *"forced"* by Ms MacNeill to reduce her duties. However the evidence was that after return to work from paid special leave as a result of the Covid pandemic on 23 November 2020 there were no reception desks for the claimant to cover on her return as the post of the clerical officer had moved to the new hospital and the A&E desk at the old hospital was manned by 2 people. No other clerical officers were used on reception to meet protective measures. In any event the claimant had confirmed that "quite possibly" she did not want to return to reception cover at that time.

152. After her return to work on 26 April 2021 to the new hospital her Covid age was calculated at 84 and so in a high risk category. Because of that and the previous Occupational Health Report the claimant's duties were limited only in the sense that she was no longer covering reception duties as and when required and that limitation was as a protective measure. Again the claimant confirmed that she did not want to cover reception duties on her return in April 2021 as she was anxious about the return to work.

153. There was no change to this arrangement following the claimant's request to compress her hours on 27 May 2021 nor following her request to reduce her hours on return from a period of sick leave on 29 September 2021. There was no request to return to reception duties at that time.

154. In any event it was submitted this complaint was out of time.

Not supporting return to work

155. It was submitted there was no evidence of such a failure or evidence given as to what support should have been put in place. Meetings were scheduled but cancelled at the claimant's request. It was not until 9 August 2022 that a

meeting did take place and it was clear from the evidence that arrangements were sought to try and get the claimant back to work at that time.

Lack of support on redeployment

156. It was submitted that the respondent's Redeployment policy had to be taken into account and that did not apply to the claimant.

157. Consideration was given to the claimant going to another location within Medical Records. However shortlisting had already taken place and it was not possible to fill the vacancies on a part time basis.

158. In any event the claimant was offered training on reception so that she could continue her role of working in reception as and when required to cover breaks. That was her role albeit the claimant disputed that was the case.

Offering medical retirement when fit to return and without discussing that possibility

159. The evidence demonstrated that it was the claimant who requested that quotes be obtained for medical retirement after she went on sick absence on 15 February 2022. The meeting on 8 March 2022 provided the information requested. There was also discussion about the support required from Occupational Health. The Report from Occupational Health did not support being retired on medical grounds.

160. In any event this complaint was out of time.

Providing medical retirement quote tailored for a person with one year to live

161. It was submitted that Ms Walker had explained in some detail the conversations that had taken place and the clear understanding that the claimant wanted such a quotation. Such a quotation could only be provided if

there was likely to be an "end of life" within a year. When the claimant explained that she was not looking for a commuted pension then very quickly the respondent altered the reference to Occupational Health for an assessment on whether the claimant was fit to return to work.

162. In any event this complaint was out of time.

Not being redeployed as the claimant would be unable to raise her legs at reception

163. It was submitted the evidence did not support this assertion. There was a different configuration of the reception desks in the new Hospital. If it had been the case that the reception duties were requiring cover then it would have been necessary to get advice from Occupational Health on any adjustments or aids that may have been required to return to reception work. In any event the claimant could not be moved to another location because there were no vacancies that could be filled on a part time basis and none of the vacancies included reception work.

164. In any event it was submitted that these matters were not *"less favourable treatment'.* On that aspect it was not agreed that the comparators identified by the claimant (HL and CB) were appropriate. Neither of them required to shield from Covid 19. Additionally they worked on a job share basis working half a day each Monday to Friday which was a very different working pattern. Any hypothetical comparator who like the claimant required to shield due to Covid 19 because they were vulnerable and for whom Occupational Health had advised should not be required to work in a patient facing role due to the risk from Covid 19 would have been treated in the same way as the claimant.

165. In any event none of the treatment of the claimant was *"because of'* her disability.

166. The reason for non cover of reception desks arose because of the risk to the claimant from Covid 19 following her return from shielding and advice from Occupational Health. The evidence was that the respondent sought to support the claimant on her return to work. The request for a medical retirement quote was because the claimant had sought that information. The evidence regarding the claimant being able to raise her legs at reception was due to the lack of space and the need to consider any aids which may be necessary.

Issues on Discrimination arising from disability

167. Reference was made to 15 of EqA and other cases including **Pnaiser v NHS England and another** [2016] IRLR 170 which summarised the proper approach to claims for discrimination arising from disability.

Was *the claimant treated unfavourably by the respondent by her duties being limited solely to scanning?.*

168. Again it was submitted that the limitation to duties was a protective measure having consulted with the claimant on return from shielding in November 2020 and April 2021. There was no unfavourable treatment in this respect. The claimant's position in her email to the Tribunal of 20? March 2023 giving her Further and Better Particulars was that the date of the unfavourable treatment was 9 August 2022 being the meeting with Mr Joshi and Ms Walker. The outcome of that meeting was to propose that training be arranged for the claimant to carry out reception duties in the new hospital. The outcome of that meeting was therefore that the claimant's duties would no longer be limited to scanning only.

169. The claimant's Grounds of Claim indicated that she regularly asked if she could perform other tasks but the evidence did not justify that assertion. She was unable to give dates or refer to documents (other than in January 2022). She had cancelled meetings to discuss working arrangements. The only opportunity the respondent had to discuss the claimant's concerns about her

duties being limited was at the meeting of 9 August 2022 when the respondents indicated that they would provide training so that these duties could resume.

If so was this something arising in consequence of her disability?

170. It had not been established by the claimant that the treatment of working in scanning only was because of the requirement to compress hours. The treatment was because she would be in a safer environment. That was occasioned by her health condition and the risk assessment and the Occupational Health Report.

If so was the treatment pursuant to a legitimate aim.

171. The reason for the treatment was to take measures to protect the health and safety of staff and that was a proportionate means of achieving a legitimate aim.

Duty to make reasonable adjustments

172. Reference was made to s20 of EqA and to the various cases which had considered the duty placed on an employer.

The PCP relied on by claimant that she was required to work in the Health Records Department at the new Hospital carrying out scanning duties only and reporting to Ms MacNeill

173. It was submitted that the PCP put forward by the claimant was not a PCP for the purposes of section 20 of EqA The alleged PCP was a complaint about the claimant's individual circumstances and did not amount to a PCP in the sense of being applied to more than just a claimant. It was submitted this claim failed at this point.

Did the respondent have such a PCP

174. If it did not fail it was accepted that the respondent did have such a PCP and applied it to the claimant between April 21 and the outcome of the meeting on 9 August 2022.

175. In that period there were perfectly good reasons for the PCP namely the fact that the claimant was absent from work either through special paid leave or ill health or that she required to be in a safe environment. The first time the claimant was able to raise concerns about the arrangements after her email of 11 January 22 was on 9 August 2022 at which time it was stated that the claimant could take training on the reception duties in the new hospital.

Did the application of the PCP (if valid) put the claimant at a substantial disadvantage compared to non disabled employees namely that it caused immense stress and anxiety which exacerbated the severe and adverse effects of her disability.

176. It was submitted that the evidence showed that Ms MacNeill was supportive of the claimant in her employment. No grievance was ever raised. It was not credible to suggest that the requirement to report to Ms MacNeill was too stressful. There was no medical or other evidence to suggest that the PCP caused the claimant immense stress and anxiety which exacerbated the effects of her disability. She gave no oral evidence on that matter.

Did the respondent know or could be reasonably expected to know that the PCP had the effect of putting the claimant at a substantial disadvantage.

177. It was submitted there was no evidence to suggest that the claimant or her trade union representative asserted that the effects of her disability were being exacerbated by the stress and anxiety allegedly being caused by the PCP. That was not put to any of the respondent's witnesses. The documentary evidence available to the respondent at the meeting of 9 August

2022 was the Occupational Health Report of 14 April 2022 which suggested that the claimant discuss with the respondent her desire to consider working at an alternative location due to *"perceived workplace stressors".* If the claimant had been suffering severe and adverse effects on her disability the OH Report would have stated that she was not fit to return to her role and would have recommended redeployment. It did not.

Would not restricting of the claimant's duties to scanning have alleviated the disadvantage.

178. This was not a step recommended by Occupational Health. Following the meeting on 9 August 2022 it was proposed that the claimant would receive training in alternative duties to provide cover in reception and not restricting her duties to scanning only. However the claimant resigned suggesting that no adjustment would have alleviated any alleged disadvantage.

Would redeploying the claimant either within the Health Records Department or to an alternative Department have alleviated the disadvantage.

179. It was denied there was any failure to make a reasonable adjustment on redeployment. It was submitted that redeployment was not recommended by OH whose advice was that she return to her existing role. The respondent indicated that the claimant could have a different Manager. Again the claimant was offered training in reception duties at the new Hospital which she refused. In that respect her duties were not being restricted to scanning and the adjustment offered was reasonable.

180. The claimant did not request redeployment to an alternative department outwith Health Records. It was not factually correct that the meeting of 9 August 2022 concluded on the understanding that Mr Joshi would find the claimant a new role on a part time basis in a different department.

Constructive Unfair Dismissal

181. It was submitted that it was necessary for the claimant to establish there was a fundamental breach of contract by her employer entitling her to resign and that she did so by reason of the employer's conduct. It was submitted this was an objective test and it should be determined objectively by the behaviour of the employer that it is abandoning and refusing to perform the contract. In cases relying on the "last straw" that need not of its own be blameworthy or unreasonable but contribute at least something to the breach. An entirely innocuous act could not be the last straw.

182. The claims put forward within the ET1 were not factually correct on the evidence.

183. It was not the case that the respondent removed the majority of the claimant's duties; or that she regularly asked if she could perform other tasks and was refused; that a meeting was cancelled by Neil Joshi and no further meeting arranged to discuss her position; that the adjustment request was not supported and instead the respondent offered medical retirement; that she was informed if she ever required to amend her hours further in the future the respondent would not accommodate this; that at a meeting of 26 May 2022 Denise MacNeill did not ask how she was feeling and instead arranged for Ms Walker to provide her with a medical retirement quotation tailored for someone with one year to live; that Mr Joshi advised he could not offer reception duties because the claimant could not raise her leg; that on her return to work after the meeting of 9 August 2022 the claimant was told she would carry out scanning duties only.

184. In the letter of resignation it was stated that the claimant felt she had been bullied and harassed in the workplace. That was entirely unspecific and there was no evidence that she had raised such treatment.

185. It was stated that the claimant was demoted without good reason. She was not demoted but retained the same salary banding. The duties were changed in respect of reception work for good reason and with the agreement of the claimant. In the letter of 25 August 2022 she was offered training on reception work which she did not accept.

186. It was denied that there was any failure to make reasonable adjustments on account of disability or that she was subjected to unfair treatment.

187. In short it was stated that there was no fundamental breach of the employment contract either on its express or implied terms.

188. Additionally it was stated that the last straw was an innocuous and reasonable action. The respondent wished to continue discussion but this was refused by the claimant. The respondent offered a further meeting even after the resignation letter.

Monetary awards.

189. Comment was made on the claimant's Schedule of Loss indicating that the claimant's figures for gross and net salary were at the rate of £249.40 per week gross and £230.09 per week net as from the payslip produced. If there was to be any basic award it would be in the sum of £1496.40.

190. If there was constructive dismissal then no compensatory award should be made It was contended that there would be no future loss given the claimant continued to be unfit for work from the date of her resignation onwards and did not know when she would be fit to work at any time in the future. If the claimant did not resign on 16 September 2022 she would have continued on half pay and then on no pay from 25 September 2022. The claimant's resignation was not processed until 29 September 2022 to allow the opportunity for a meeting to take place at which time she was already on no pay. It was submitted that the claimant would inevitably have been dismissed or resigned within a short period of time.

191. . In any event it was contended any award ought to be reduced by 25% on account of the claimant's unreasonable failure to comply with the ACAS code. No grievance was ever raised by the claimant prior to resignation.

192. So far as any monetary award on discrimination (if any) was concerned it would be appropriate to use the lower band on the Vento scale.

Conclusions

Relevant Law

Constructive Dismissal

193. The claimant claims that she has been constructively dismissed as described in section 95(1)(c) of the Employment Rights Act 1996 (ERA). This states that there is a dismissal where the employee terminates the contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

194. **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221 makes it clear that the employer's conduct must be a repudiatory breach of contract: "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 terms of the contract".* It is clear that it is not sufficient that the employer's conduct is merely unreasonable. It must amount to a material breach of contract.

195. The employee must then satisfy the Tribunal that it was this breach that led to the decision to resign and not other factors. If there is delay between the conduct and the resignation the employee may be deemed to have affirmed the contract and lost the right to claim constructive dismissal.

196. An implied term of a Contract of Employment that is commonly relied on is that of "trust and confidence". This was defined in **Malik v Bank of Credit and Commerce International SA (in liquidation)** [1997] IRLR 462 where

Lord Steyn said that an employer shall not *"without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

197. In this case the claimant maintains that the letter of 25 August 2022 was the "*last straw*'" for her and led to her resignation. In such cases the Court of Appeal has explained **(Omilaju v Waltham Forest London Borough Council** [2005] ICR 481) that an act constituting the last straw does not have to be of the same character as earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute however slightly to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employer's trust and confidence has been undermined is objective. While it is not a prerequisite of a last straw case that the employer's act should be unreasonable it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test.

Direct Discrimination

198. Section 13(1) of the Equality Act 2010 (EqA) provides that direct discrimination occurs where "*a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

199. Therefore section 13(1) bites if:-

- A treats that person less favourably than it treats or would treat others and
- The difference in treatment is because of a protected characteristic

200. It is not always possible to separate the two issues and in some cases *"the less favourable treatment issue cannot be resolved without at the same time deciding the reason why issue. The two issues are intertwined"* **(Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337).

201. Direct discrimination is rarely blatant. Such claims present special problems of proof. For that reason the burden of proof rules applied to claims of unlawful discrimination in employment are more favourable to the claimant than those that apply to claims brought under most other employment rights and protection. Once a claimant shows *prima facie* evidence from which the Tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination, the employer is obliged to uphold the claim unless the employer can show that it did not discriminate - s136 EqA.

202. Where an employee behaves unreasonably that does not mean that there has been discrimination but it may be evidence supporting that inference if there is nothing else to explain the behaviour **(Anya v University of Oxford** [2001] ICR 847).

203. In order to claim direct discrimination under s13 a claimant must have been treated less favourably than a comparator who was in the same or not materially different circumstances as the claimant. A successful direct discrimination claim depends on a Tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected characteristic. It is for the Tribunal to decide as a matter of fact what is less favourable. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment.

204. A claimant who simply shows that he/she was treated differently than others in a comparable situation will not, without more, succeed with a complaint of unlawful direct discrimination. The EqA outlaws less favourable treatment not different treatment and the two are not synonymous.

205. A complaint of direct discrimination will only succeed where the Tribunal finds that their protected characteristic was a reason for the claimant's less favourable treatment. In that connection a discriminator's motive and intentions are irrelevant when determining whether the elements of a direct discrimination claim have been made out.

206. The Tribunal considered that the best approach in this case to deciding whether allegedly discriminatory treatment was *"because of"* a protected characteristic was to focus on the reason why (in factual terms) the employer acted as it did.

Discrimination arising from Disability

207. Section 15 of EqA advises that "a *person (A) discriminates against a disabled person (B) if -*

> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim"*

208. In this case it was accepted that the respondent knew of the claimant's disability.

209. There is no need for a comparator in a s15 claim. In this claim it is necessary for the claimant to establish that he or she has suffered *"unfavourable treatment"* and that treatment is *"because of something arising in consequence of his or her disability".*

210. If the claimant can establish those matters then the employer will be liable unless it can show that the unfavourable treatment was a *"proportionate means of achieving a legitimate aim".*

211. There is no definition of how an employee is treated *"unfavourably".* The EHRC Employment Code indicates that unfavourable treatment should be construed in the same way as *"disadvantage".*

212. For the claim to succeed the unfavourable treatment must be shown by the claimant to be the result of something arising in consequence of the claimant's disability not the disability itself.

213. Given that the unfavourable treatment has to be shown to have been "*because of*" something arising in consequence of a claimant's disability the relevant enquiry in this context will be to establish *"the reason why".* Again it will not be sufficient for a claimant simply to establish that as a disabled person he or she has been treated unfavourably. It has to be unfavourable treatment (consciously or subconsciously) motivated by something arising in consequence of that disability.

214. Many claims based on section 15 of EqA turn on the issue of justification. An allegation under section 15 will only succeed if the employer is unable to justify the unfavourable treatment by pointing to a valid (non discriminatory) reason.

Failure to make reasonable adjustments

215. Section 20 EqA sets out the scope of the duty to make adjustments. The relevant requirement in this case is *"where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".*

216. Guidance to the approach to be taken in such claims was given in **Royal Bank of Scotland v Ashton** [2011] ICR 632 where it was held that a Tribunal should identify

- the provision, criterion or practice (POP) applied by or on behalf of the employer
- the identity of the non disabled comparators, where appropriate; and
- the nature and extent of the substantial disadvantage suffered by the claimant, in comparison to the non disabled comparators

217. An employer must know or have constructive knowledge that a PCP is likely to put a claimant at a substantial disadvantage in comparison to those who are not disabled (para 20(1) Schedule 8 EqA 2010). The proposed adjustment must be reasonable and the focus is on practical outcomes.

218. A PCP is not defined but the EHRC Employment Code advises the terms should be *"construed widely so as to include for example any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions ..."*

Jurisdiction

219. With regard to discrimination claims (other than equal pay claims) EqA provides that the relevant time limit for starting Employment Tribunal proceedings runs from the *"date of the act to which the complaint relates"* s123(1)(a).

220. In terms of section 123(3) for the purposes of this section -

> *"(a) conduct extending over a period is to be treated as done at the end of the period.*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary a person (P) is to be taken to decide on a failure to do something -*

(a) when P does an act inconsistent with doing it or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it"

221. In this case given the date of approach to ACAS for early conciliation and the presentation of the claim the "cut off" point in assessing the date of the act to which the complaint relates would be 28 July 2022. If the act to which the complaint relates (or failure to act) was prior to that date then the complaint is out of time.

222. Tribunals have a discretion to hear out of time discrimination claims where they consider it *"just and equitable"* to do so - s123(1)(b) EqA. That allows Employment Tribunals a wide discretion to have an extension of time but it does not follow that the exercise of that discretion is a foregone conclusion. It has been said that that a claimant requires to *"convince the Tribunal that it is just and equitable to extend time"* **(Robertson v Bexley Community Centre t/a Leisure Limited** [2003] IRLR 434).

223. Factors which may be relevant in the exercise of that discretion are the extent to which the cogency of the evidence is likely to be affected by delay, whether the party sued has cooperated with any request for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action, and the steps taken to obtain appropriate advice. However the essential ingredients have been stressed as being the length of and reasons for the delay and whether the delay has prejudiced the respondent, for example by preventing or inhibiting it from investigating the claim while matters were fresh **(Adedji v University Hospital Birmingham NHS Trust** [2021] EWCA Civ 23).

224. Before an assessment can be made on jurisdiction it is necessary to consider what acts of discrimination are proven.

Discussion and Conclusions

225. It is appropriate to consider the discrimination claims against the issues for the Tribunal narrated within the Note of the Preliminary Hearing for case management purposes held on 24 February 2023

Direct Discrimination

"Limiting her duties solely to scanning when she moved to part time working"

226. From commencement of her employment the claimant always worked part and so there was no limitation of her duties due to any "move" to part time working.

227. In evidence the real complaint by the claimant related to what saw as her duties being limited to scanning only and not being on a guaranteed regular rota of reception duties following a request to compress hours to a four day working week.

228. This matter requires to be considered against the finding by the Tribunal that the claimant's duties were to scan and provide reception cover as and when that was required (cover for tea break/lunch break and the like and cover for sick absence/annual leave). As explained the Tribunal did not find that there was a term of the claimant's employment which obliged the respondent to include her on regular reception duty as a matter of course.

Period until 20 November 2020

229. The claimant did cover for reception duty in the old Hospital. Until 17 March 2020 there was no limitation of duties. The claimant was on special leave in the period 17 March 2020 - 20 November 2020 to protect her from Covid.

Period 20 November until 5 January 2021

230. The claimant was back at work in the old Hospital between 20 November 2020 and 5 January 2021.In November 2020 the claimant was referred to OHS who reported that the claimant was in the *"highest risk category (very high risk of severe complication of Coronavirus including death)"* and that if there was a return to work it was essential that appropriate control measures were put in place to reduce that risk.

231. As explained at that time the new Hospital had been built but was not fully open. Some staff had transferred and that included the main reception area. At the old Hospital the only reception area was on A&E and was covered by 2 members of staff. The claimant was engaged in scanning duties only in the period 20 November 2020 to 5 January 2021. There was no need for the claimant to cover for A&E reception duty. Her duties were not limited in that period. There was simply no requirement for her to be involved in reception at that time. In any event as was indicated by the claimant she *"possibly"* did not wish to cover reception. She was on a phased return to work at that point having been absent on special leave for some time.

Period between 5 January 2021 and 19 July 2021

232. The second period of special leave lasted between 5 January 2021 and 26 April 2021 by which time the new Hospital was open.

233. At that time an assessment showed her Covid age calculated at 84 being again in the high risk category. The discussion with the claimant at that point related to working on a phased return until achieving normal hours and carrying out scanning duties only within a separate office in the new Hospital. Precautions such as appropriate ventilation; use of hand gel; mask wearing were put in place. The note prepared by Ms MacNeill at that time advised that the claimant would be in the main office carrying out scanning duties and that the claimant was *"happy with this".* The claimant was not to work on reception duty at that time. The Tribunal accepted that position. The evidence indicated she agreed to that position. The reason why she was to conduct scanning duties only in this period was as a matter of protection from

the risk of Covid which would have been enhanced in a patient facing circumstance. In any event there was evidence that no cover for reception duty was required in this period.

234. The claimant made a request for compression of her hours on 27 May 2021. That request was granted but the issue formed a significant complaint for the claimant. That matter has been considered (paras 128/130) in relation to a discussion on the claimant's role and the necessary finding is made in that respect. The Tribunal did not find evidence of manipulation or bullying of the claimant into accepting her role as scanning only as a condition of compression of hours. The Tribunal considered that the respondent granted the request for compression of hours but given the continuing concerns of the possible impact of Covid on the claimant wished to maintain protection in her working arrangements. The Tribunal did not consider that was less favourable treatment. The Tribunal considered that continuing protection was the reason why reception duties at that point were not available for the claimant and that she was not being discriminated against because of her disability.

Period between 19 July 2021 and 27 September 2021

235. The claimant was then absent from work in the period 19 July 2021-27 September 2021.

Period between 27 September 2021 and 15 February 2022

236. On return to work the claimant made a request for reduced working hours on 29 September 2021 which request was granted with effect from 1 December 2021 (after the claimant completed her phased return period).

237. There was no record of any discussion with the claimant on her duties or any complaint that she was being limited to scanning only.

238. There appeared to be one instance at the end of 2021 as recalled by Ms MacNeill when the claimant asked if she could undertake "A&E reception" but there were two A&E clerks on duty on that desk and only if one was off sick/on annual leave would any cover be required. Matters did not go beyond that conversation (para 57).

239. On 11 January 2022 the claimant did make a request to meet and discuss her role. That resulted in a meeting being arranged with the claimant but being cancelled by the claimant's then Union representative. Accordingly the respondent had no opportunity to discuss the claimant's position. This prospective meeting however was in the context of the claimant's belief that she was entitled to be placed on reception duty from time to time not as cover for break but as a contractual right. As indicated the Tribunal was not able to make a finding that a contractual right to be placed on reception duties existed other than covering for breaks when required.

Period between 15 February 2022 and resignation on 16 September 2022

240. The claimant was absent through ill health from 15 February 2022 and from that point till resignation never returned to work.

241. In that period of absence further OHS Report was obtained and a meeting was arranged for 9 August 2022 at which time it was clear that the claimant wished to discuss her view that she had been discriminated against when seeking compressed hours by being restricted to scanning duties only.

242. That meeting resulted in the letter to the claimant of 25 August 2022 which addressed a number of matters but on the issue of duties advised that training would be given to the claimant on *"alternative duties to provide cover as and when required, your main duties will remain as scanning".* The alternative duties upon which training would be addressed for the claimant would include reception duty in the new Hospital. The claimant had not been on reception duties in the new Hospital and so would require training to provide cover. That was in line with the finding by the Tribunal that the

claimant's duties were scanning and cover on reception for breaks, sick absence/annual leave. There was no restriction being applied to the claimant given that finding but an intent to continue arrangements in line with the contractual terms.

243. The claimant was dissatisfied with that response as she was of the view that she had a contractual right to be placed on reception duties on a regular basis along with scanning duties. It was clear that she regarded being placed on scanning duties as menial and humiliating but in the absence of any contractual entitlement to be put on a regular rota for reception work rather than simply as cover there was no less favourable treatment and no discrimination. The claimant was being treated in accord with her contractual terms.

"Not supporting her return to work"

244. On this issue the Tribunal did not find there was any lack of support to the claimant. It was not clear what the claimant expected in relation to a return to work after absences.

245. There was a complaint by the claimant of lack of contact by Ms MacNeill. However the evidence accepted by the Tribunal was that a call was made approximately once per month to the claimant. In the periods of special leave due to Covid restrictions Ms MacNeill explained that the old Hospital was like a "ghost town" and there was no particular matters of note which might be raised. However contact was made. In the evidence the claimant seemed to accept that contact was made.

246. Following return to work arrangements were made with the claimant for her to make a phased return to work. The Tribunal accepted that she had the opportunity to view the room in which she would be placed on return in November 2020 with appropriate protections in place.

247. For the anticipated return in April 2021 a Covid risk assessment was put in place for the claimant a discussion on the hours that would be worked on a phased return and risk reduction arrangements made to minimise Covid infection.

248. After the period of sick absence between 19 July 2021 and 28 September 2021 the claimant returned to work on a phased return and made application for reduced working hours. That request was dealt with in October resulting in an agreement to reduce hours to 22.5 per week which would commence once the claimant had concluded the phased return.

249. Once the claimant indicated that she would wish to return to work during the period of absence commencing 15th February 2022 arrangements were put in place for a meeting and that meeting took place. The arrangements that were indicated at that time was that the claimant would not report directly to Ms MacNeill but to a supervisor to negate any possible conflict and that training would be put in place for her to take up alternative duties in addition to scanning.

250. The Tribunal considered that there was no lack of support for the claimant on making a return to work.

251. Again the root of this complaint seemed to relate to the desire to return to what the claimant regarded as her "old job" namely having a contractual right to be placed on reception duties other than simply covering for breaks/absences. Given the finding by the Tribunal that the claimant did not have that right then there was no lack of support in not providing what the claimant considered was her "old job".

"Not supporting her redeployment to another role"

252. As found the respondent has a Redeployment Policy for redeployment outwith a particular department. That comes into effect in the event that a

person is displaced *"due to disability, ill health or organisational change".*(J87) The claimant was not *"displaced'* as a result of her disability or ill health. To meet that requirement the individual would need to be found unable to carry out his/her role despite reasonable adjustments being put in place.

253. The OHS Report in this case of 14 April 2022 found that the claimant was able to return to work but was at increased risk of severe complications from infections including Coronavirus and therefore it was essential that appropriate risk reduction measures were implemented. Certain measures were listed in that Report. The Report did not recommend redeployment or relocation but advised that the claimant was keen to consider working in an alternative location due to perceived workplace stressors and the report *"suggested that she discuss this further with her employer and HR to see whether this can be accommodated".*

254. Accordingly Redeployment to another area of the hospital was not open to the claimant in terms of the policy as with adjustments the claimant could return to her existing role (as properly understood).

255. Relocating the claimant to another role within the Health Records Department was considered following the meeting of 9 August 2022. However it was not possible to fill any of the vacancies on a part time basis. The Tribunal considered that the request for an alternative location was again dogged by the understanding of the claimant that she had a contractual right to work reception duties whether cover was required or not and it was that alternative that she sought.

256. The Tribunal could not find there was no discriminatory treatment in this matter. The respondent's position was that they were offering her a return to work on her contractual terms. The Tribunal considered that the offer in the letter of 22nd August 2022 was in line with the contractual terms and there was no refusal to relocate or redeploy the claimant because she was a disabled person.

''Offering the claimant medical retirement when she was fit to return to work and without discussing the potential of her doing so"

257. The Tribunal did not find that there was any such treatment.

258. On the evidence the claimant requested information on medical retirement and was provided with it. Her own evidence was that she at that time wished to "consider all options". There was no "offer" on medical retirement to the claimant. The only information provided to her was that if she was medically retired then certain benefits would be paid by way of commuted pension rights. She was absent from work at the time and had given no indication when she made that request that she was fit to return to work. Her position was that she had been told by her consultant that her transplant was failing and due to that deterioration unable to return to work. The series of Statements of Fitness to Work identified that diagnosis in this period. There being no such treatment there could be no discrimination.

"Providing a medical retirement quotation to the claimant which was tailored for someone with one year to live"

259. The evidence was that a condition of medical retirement was life expectancy of the prospective retiree of one year. If that condition was not met there could be no medical retirement.

260. The claimant had asked for a quotation for medical retirement. Her evidence was that she wished to explore "all options". She had been advised that her health was deteriorating. She was certainly concerned about a swift deterioration of her condition. There may have been some misunderstanding between her and Ms Walker and the Employment Relations Department. However the evidence from Ms Walker was certain that she had been told that the claimant's health was such that she wished a quote for medical retirement.

261. The reason why she was provided with that quote was because she had made such a request. The Tribunal did not consider that the reason she was provided with this quotation was for a discriminatory reason.

"Indicating to the claimant that she could not be redeployed as she would not be able to elevate her legs while seated at reception in other departments"

262. The Tribunal did not consider that the claimant was subject to this treatment. The evidence showed that there was a discussion about the possible move to another area or location at the meeting of 9 August 2022. At that time Mr Joshi explained that he was aware that the claimant had previously used a box to raise her legs whilst seated at the scanning desk. She may also have raised her legs occasionally while seated at the reception in the old Hospital. Mr Joshi had explained that the design of the reception desks in the new hospital might limit that possibility. The evidence was not that the claimant could not be redeployed as she would be unable to elevate her legs while seated at reception.

263. It would have been a matter of further OHS advice on that issue but that stage was never reached as the claimant resigned. The essence of the resignation of the claimant was her belief that she was not being offered her "proper job" namely the guaranteed reception duty and not simply cover for absence/breaks.

264. For those reasons the Tribunal considered that the complaint of direct discrimination does not succeed.

Discrimination arising from Disability

"Was the claimant treated unfavourably by the respondent by her duties being limited solely to scanning?"

265. As indicated unfavourable treatment has been defined by the EHRC Code as being put at a disadvantage.

266. In this matter the claimant indicates that such disadvantage arises by her duties being limited solely to scanning.

267. The short answer to this claim is that the Tribunal did not consider that the claimant had been treated unfavourably by her duties being limited to scanning.

268. The reason for restriction of duties to scanning was as outlined to give protection against the risk of Covid infection.

269. The claimant was placed on special leave in two periods to shield her from that possibility.

270. On return to work the evidence was that she accepted limitation of duties to scanning because she herself was apprehensive about a return while Covid prevailed.

271. The OHS advice to the respondent had been that she was in the highest risk category and so it would have been counter to advice being given that the claimant had not been protected as far as possible against the risk of Covid infection.

272. Once the claimant advised that she was fit to return to work and appropriate advice had been taken there was an offer to the claimant in August 2022 to make a return to work with a different supervisor and training for alternative duties.

273. In the correspondence with the Tribunal the claimant fixed the date of the unfavourable treatment as at 9 August 2022. The outcome of that meeting was a proposal that the claimant return to work under a different supervisor and given training on additional duties. That would mean that she would be returning to her original role.

274. Prior to that time when a request was made in January 22 to discuss her role arrangements were made for a meeting to do that but the arranged meeting was cancelled by the claimant's then union representative and shortly thereafter she commenced a period of sick absence.

275. The Tribunal did not consider that it was unfavourable treatment of the claimant in limiting her duties by not asking her to provide cover for reception on breaks/absence due to the need to maintain duty of care to the claimant of the risk of Covid infection. Once that had diminished an offer was made to train her on the processes involved at the new Hospital for alternative duties.

"If so, was this due to something arising in consequence of her disability, namely the requirement to reduce her working hours?"

276. In any event the Tribunal did not consider that the matter relied upon by the claimant was *"something arising in consequence"* of the her disability being the requirement to reduce her working hours. The request to reduce working hours was made on 29 September 2021 and the claimant was offered 22.5 hours in place of the 30 hours per week. That was confirmed in writing. There was no case made out that the requirement to reduce hours brought about the limitation of duties.

277. The evidence was that the claimant's real complaint related to the compression of hours and whether she had been as she maintained "manipulated" into accepting scanning duties only. Her position was that she had to make the request for compressed hours due to her disability. The *"something arising in consequence" of* the claimant's disability was a request to compress her working hours. However the reason why the duties were limited to scanning was not because of that request but because she was in the highest risk category and the respondent desired to protect her from Covid infection.

"If so, was the treatment pursuant to a legitimate aim"

278. In any event the Tribunal considered that the treatment was pursuant to the legitimate aim outlined by the respondent namely taking measures to protect the health and safety of staff.

279. Accordingly the claim of discrimination arising from disability does not succeed.

Failure in duty to make reasonable adjustments

280. In the correspondence with the Tribunal the claimant identified the date that the reasonable adjustment should have been made as 9 August 2022.

281. The POP relied on by the claimant is:-

> *"Requiring the claimant to continue to work in Health and Records Department at the Royal Hospital for Children and Young People, carrying out scanning duties only and reporting to Denise MacNeill."*

282. It was submitted that this was not a PCP properly understood as it essentially involved a complaint about the claimant's individual circumstances rather than being applied across the board to others.

283. However the evidence was that clerical workers within Health Records did do scanning duties only and reported to Denise MacNeill so that there was a PCP which applied to more than just the claimant.

284. The issue then was whether this put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled. The disadvantage alleged was that the claimant was caused *"immense stress and anxiety which further exacerbated the severe and adverse effects of her disability".*

285. The claimant commenced employment at the old Hospital and before the advent of Covid and special leave commencing 17 March 2020 the claimant

carried out scanning duties and covered reception as and when required at the old Hospital. She reported to Denise MacNeill from August 2019. The PCP did not apply in that period.

286. She was on special leave shielding due to the pandemic between 17 March 2020 and 20 November 2020.

287. Between November 2020 and January 2021 the claimant worked at the old Hospital scanning only and reporting to Denise MacNeill.

288. Between 4 January 2021 and 23 April 21 the claimant was on special leave shielding due to the pandemic.

289. Between 26 April 2021 and 16 July 21 the claimant worked at the new Hospital carrying out duties within the scanning team only and reporting to Denise MacNeill.

290. Between 19 July 21 and 27 September 21 the claimant was on sick leave.

291. Between 28 September 2021 and 14 February 2022 the claimant worked at the new Hospital carrying out scanning duties only and reporting to Denise MacNeill.

292. From 15 February 2022 the claimant was on sick leave and did not return to work.

293. Accordingly the PCP applied to the claimant's working periods between 23 November 2020 and1 January 2021; 26 April 2021 and 18 July 2021; and 28 September 2021 and 14 February 2022.

294. The reasonable adjustment identified by the claimant to alleviate any disadvantage was *(j)"extending (her) duties to those normally carried out and not restricting her duties to scanning" or (ii) redeploy the claimant within the Health and Records Department or to an alternative department"*

295. The reasons for the claimant to be on scanning duties only in the periods 23 November - 1 January 2021 and 26 April 2021 - 18 July 2021 have been discussed and were due to mitigating the risk of Covid infection.

296. Given the importance of health and safety considerations and that employers owe a duty of care both to the workforce and the public, adjustments which might have the effect of lowering the standard of health and safety protection could not be considered to be reasonable. In that respect it could not be a reasonable adjustment to put the claimant in increased risk by placing her on reception duties with concomitant increased exposure to public and patients in those periods..

297. In the period 28 September 2021 and 14 February 2021 the claimant worked a phased return on reduced hours to 1 December 2021. She then commenced reduced hours of 22.5 per week. She raised concerns about her role in her email of 11 January 2022 and due to circumstances described within the facts it was not possible to hold a meeting to discuss this matter until 9 August 2022.

298. However beyond that date the respondent indicated to the claimant that she would not report to Denise MacNeill but to an alternative supervisor and that she would be trained on alternative duties so that she was not scanning only.

299. The respondent in advising that as well as scanning she would be trained to carry out additional duties such as reception on an as and when required basis to cover breaks/absences was in fact extending her duties to those *"normally carried out".* That was in accord with the finding on her contractual terms.

300. Again what the claimant intended to seek in this adjustment was guaranteed reception duties on a rota and not on an as and when required basis covering for breaks/absence.

301. It was this aspect of the matter which the claimant maintained caused *"substantial disadvantage".* She considered that she was entitled to reception duties as a matter of course and not on an as and when required basis. That was her issue with the role and which she claimed caused immense stress and anxiety. The Tribunal did not consider that any increase in anxiety was caused by a POP but by the claimant's mistaken belief in her contracted duties.

302. Neither did the Tribunal consider that requiring the claimant to report to Denise MacNeill put the claimant at a substantial disadvantage in comparison with persons who were not disabled.

303. The first time there was any indication that there was any difficulty between the claimant and Ms MacNeill was after the meeting of 8 March 2022. From that point Ms MacNeill had no supervisory responsibilities for the claimant. The claimant never returned to work after that meeting. The person that dealt with the claimant thereafter was Ms Walker. At the meeting of 9 August 2022 the claimant was advised that she would report to another supervisor. There was really no evidence of actions by Denise MacNeill causing the claimant *"immense stress and anxiety which further exacerbated the severe and adverse effects of her disability".* There was no grievance raised against Ms MacNeill. There was an issue regarding the claimant being asked to remove food from a drawer/locker but beyond that time as indicated the claimant had no dealings with Denise MacNeill.

304. The Occupational Health Report referred to *"perceived workplace stressors"* without specifying what those were. If they related to what the claimant considered her job should be then as explained that was a mistaken belief.

305. In those circumstances the Tribunal were not able to find that the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at such a disadvantage as increased stress.

306. So far as redeployment was concerned no recommendation was made by Occupational Health on that issue but rather that the claimant was able to return to the job that she was employed to do with some adjustments. However it was not possible for the respondent to put those adjustments in place as the claimant never returned to work until resignation. In any event the possibility of an alternative position was examined by Mr Joshi and it was stated it was not possible due to the full time nature of the roles available. There was an offer to meet further but that was not taken up by the claimant.

307. In the view of the Tribunal the PCP did not put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; or that the respondent could know or reasonably have been expected to know that was likely to be the case.

308. The Tribunal therefore did not consider that the claimant had been discriminated against because of failure to make reasonable adjustments.

Time bar

309. Given the Tribunal's conclusions on the discrimination claims it is not necessary to consider the issue of time bar.

Constructive Dismissal

310. In her letter of 16 September 2022 the claimant advised that she considered she had no alternative "*but to resign from my position due to:-*

- *Bullying and harassment in the workplace*
- *Being demoted without good reason*
- *A failure to make reasonable adjustments for my disability*

- *Being subjected to unreasonable or unfair treatment*

311. In those circumstances she believed that the employment relationship had broken down *"in particular not allowing me to do the job I was employed to do because I asked to reduce my hours due to my health condition".*

312. As the letter makes clear and as was clear in the evidence at Tribunal the principal issue for the claimant was that she was not allowed to do her "old job". By that she meant that she was to be involved in reception duties as well as scanning on a rota and not on an "as and when required basis" to cover for breaks/absence.

313. As narrated the Tribunal could not make a finding that a term of her contract guaranteed her reception duties on a rota basis. Accordingly the Tribunal did not consider that there was any breach of an express term in that respect and so there could be no constructive dismissal on that basis.

314. There was no demotion of the claimant. She maintained her position as a Clerical Officer Band 2. She had her hours compressed and then reduced at her request. During Covid there were protective measures in place. The Tribunal considered that she had agreed that she would not work reception on a return to work after paid special leave and sick absence. Given her underlying health condition and the advice from OHS that she fell into the highest risk category being *"very high risk of severe complication of Coronavirus including death"* appropriate control measures were put in place. There was no breach of the implied term of trust and confidence in those actings.

315. The claimant at the meeting of 9 August 2022 raised concerns regarding the working relationship between her and Ms. MacNeill who she considered was generally unsupportive.

316. The claimant maintained Ms MacNeill did not keep in touch with her during a period of absence on special leave but the Tribunal found that she did. It was

stated that Ms MacNeill had been unfair towards her in the allocation of duties but again the Tribunal considered that the reason for non reception duties was down to the impact of Covid and a desire to minimise risk for her health and safety and that was not unreasonable.

317. It was stated by the claimant that she had been told she could not return to reception duties until a backlog of A&E scanning work had been completed and that was "never ending" task. However the Tribunal accepted the explanation that while records had been transferred to the new hospital and because not complete at the anticipated time those records had not been scanned, there was no intention to tackle that paperwork but access it manually if required.

318. The claimant complained of an incident regarding being told to "clear her locker" after the meeting of 8 March 2022. This incident appeared to concern a desire to ensure no food was left during the claimant's period of absence through ill health.

319. In so far as a complaint was made that she had regularly raised the issue of her working but no action taken the evidence was that when a request for a meeting had been made by the claimant arrangements were sought to be put in hand for a meeting. No cancellation of a meeting had been made by Mr Joshi as was alleged in the claim form but in fact cancelled by her union representative.

320. The claimant may have thought that she sent an email on 22 April 2022 maintaining that she had been treated unfairly regarding her job role but conceded that email had been sent to the wrong email address and so had not been received. Accordingly the respondent could take no action on the matters raised.

321. A further meeting with the claimant was cancelled in May 2022 again by her union representative indicating that the claimant was *"still not well"* and

"'signed off from her work from her GP until the end of June and therefore I am emailing to let you know she will not be attending".

322. It was maintained that the claimant had been presented with a quote for medical retirement in place of support. However she had requested that quote. Medical retirement could only be considered in the event that an individual had a life expectancy of less than one year. The respondent had not tailored that report in that respect. An Occupational Health assessment was then necessary and a decision would be taken by the pension provider. The claimant herself wanted to know "all her options" following the advice from her consultant that her kidney transplant was failing.

323. It was maintained by the claimant that she had been told she could not be redeployed onto reception duties because she would be unable to raise her legs. That matter has been addressed and it was not found by the Tribunal to be the case that redeployment was declined for that reason. Enquiry was made about the availability of full time posts being suitable on a part time basis but none such positions were available.

324. If there was an uncomfortable relationship between Ms MacNeill and the claimant the outcome of the meeting of 9 August 2022 was that the claimant would report not to Ms MacNeill but to another supervisor who would in turn report any issues to Neil Joshi. The claimant did not think "this would work" but had no compelling reason to give as to why that arrangement would not have been suitable.

325. In those circumstances the Tribunal could not consider that there was any breach of any implied term of trust and confidence in the general assertion that she suffered from *"bullying and harassment in the workplace".*

326. The issue of whether there was a failure to make reasonable adjustments for the claimant's disability has been considered within the claim of discrimination and the Tribunal have found that there was no failure by the respondent to make reasonable adjustment.

327. Neither was it the case that the Tribunal considered there was any unreasonable or unfair treatment of the claimant in the discrimination claims which she could found on to demonstrate a breach of the implied term of trust and confidence.

328. The final straw stated by the claimant was the letter to her of 25 August 2022 being offered training on reception duties in the new Hospital so that she could cover for breaks. Her complaint was that despite making "regular approaches" regarding her working relationship she was "back to square one" meaning that she did not consider that put her in the position of her original role. Again the Tribunal have addressed that issue. In terms of the findings on her contracted position the claimant was being offered a role which conformed to the contracted position. Additionally she was being advised that a different supervisor could be put in place.

329. Even if there were previous matters upon which the claimant could found in her claim of constructive dismissal The Tribunal did not consider that the letter of 25 August was other than innocuous in stating that arrangements would be made for her to continue her role and she would have a change of supervisor. It would therefore not meet the test of a "final straw".

330. In all the circumstances the Tribunal did not consider that there had been a breach of any express or implied term of the Contract of Employment and so the claim of constructive unfair dismissal does not succeed.

Employment Judge: J Young
Date of Judgment: 16 July 2023
Entered in register: 17 July 2023
and copied to parties