EMPLOYMENT TRIBUNALS

Claimant: Mrs T Morgan

Respondent: Stagecoach Group Plc

Heard at: Ashford **On:** 27-28 February & 1-3 March 2023
In chambers: 6 March & 21 April 2023

Before: Employment Judge Corrigan
Mr S Corkerton
Mr S Huggins

Representation
Claimant: In person
Respondent: Ms L Millin, Counsel

RESERVED JUDGMENT

1. The Tribunal has found the Respondent contravened the Equality Act 2010 in respect of the claims of failure to make reasonable adjustments and disability-related harassment, but not in respect of the claim of direct disability discrimination.

2. The claim of direct disability discrimination is dismissed.

3. The Claimant was constructively unfairly dismissed by the Respondent.

REASONS

1. The claims and lists of issues had been partially set down in Case Management Orders but after discussion with the parties and the Tribunal's reading these were amended and agreed between the parties to be as follows. It was agreed that we would deal with liability only at this stage as the parties may wish to produce medical evidence at the remedy stage.

Claims and issues

Time Limits

2. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

The Claimant contacted ACAS on 23 October 2020 so matters from 24 July onwards are in time.

2.2 If not, was there conduct extending over a period?

2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.4.1 Why were the complaints not made to the Tribunal in time?

2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Unfair Dismissal

3. Was the Claimant dismissed?

3.1 Did the Respondent do the following things:

3.1.1 On 24th and 25th February 2020 forced the Claimant to drive two four-hour routes each day for two consecutive days?

3.1.2 Following a medical assessment on 2nd March 2020 did Mr Spratt, one of the Respondent's managers, without good cause, fail to firstly discuss the assessment with the Claimant and secondly fail to make reasonable adjustments to the Claimant's driving routes?

3.1.3 On or about 14th July 2020 did Ms Buckley (relief duty controller) only agree to arrange cover for the Claimant's route reluctantly and indicate she was unlikely to make a similar arrangement in the future?

3.1.4 Did the Respondent ignore the Claimant's report dated 18th July 2020 requesting a discussion as to her medical condition and the impact it was having upon her ability to work?

3.1.5 On 22nd July 2020 did Mr Spratt refuse to discuss, despite the Claimant's request, her health and condition of work?

3.1.6 On or about 29th July 2020 did Mr Trow, one of the Respondent's managers fail to swap the Claimant with a spare driver?

3.1.7 Because the Respondent required the Claimant to drive unsuitable routes (long bumpy rural routes) was the Claimant's health adversely impacted such that she reported sick on or about 31st of July 2020?

3.1.8 Did the Respondent on or about 10th August 2020 allocate a grievance lodged that day by the Claimant to Mr Loftus who the Claimant considered to be named aggressor against her?

3.1.9 Despite the letter from Monaco Solicitors on 22nd September (that requested that correspondence should be sent to them)

did Mr Loftus then send the Claimant a further copy of his letter dated 18th September 2020; did the alternative Operations Manager send the Claimant the letter dated 21 October 2020 and did the Respondent's solicitor send the letter dated 13 November 2020 stating the Respondent's intention to continue to communicate directly with the Claimant?

3.1.10 Did the Respondent fail to implement the recommendations of its own occupational health advisers and Dr Waller?

3.1.11 Did the Respondent request that the Claimant attend meetings at the Folkestone depot?

3.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

3.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

3.2.2 Whether it had reasonable and proper cause for doing so.

3.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

3.4 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

3.5 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

3.6 If the Claimant was dismissed, what was the reason or principal reason for dismissal. The Respondent contended it was capability and/or some other substantial reason.

3.7 Was it a potentially fair reason?

3.8 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

Disability

4. The Respondent accepts that the Claimant had a disability throughout the relevant period. The disability is deep vein thrombosis (DVT).

Section 20 & 21 Equality Act 2010 - Reasonable Adjustments

5. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6. Did the Respondent have the following PCPs: The rostering of bus drivers.

7. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant experienced pain and discomfort without regular breaks and by driving unsuitable routes/lengthy routes?

8. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

9. What steps could have been taken to avoid the disadvantage? The Claimant suggests:
    9.1 The allocation of regular rest periods and to stretch her legs (the Claimant being unable to sit for more that two hours/possibly three hours at a time).
    9.2 The allocation of shorter routes.

    9.3 The allocation of suitable routes particularly with less jarring.

    9.4 Implement the recommendations made by the Respondent's occupational health advisers and Dr Waller.

10. Was it reasonable for the Respondent to have to take those steps and when?

11. Did the Respondent fail to take those steps?

Section 26 Equality Act 2010 – Harassment Related to Disability

12. Did the Respondent do the following things:
    12.1 Did Mr Trow on 25th February instruct the Claimant to cover a "double 10 shift"?
    12.2 On 14th July 2020 did Ms Buckley refuse to swap the Claimant for a spare driver when she complained of pain?
    12.3 Did the Respondent ignore the Claimant's report dated 18th July 2020 requesting a discussion as to her medical condition and the impact it was having upon her ability to work?
    12.4 On 22nd July did Mr Spratt refuse to discuss, despite the Claimant's request, her health and conditions of work?
    12.5 On or about 29th July 2020 did Mr Trow, one of the Respondent's managers fail to swap the Claimant with a spare driver?
    12.6 Because the Respondent required the Claimant to drive unsuitable routes (long bumpy rural routes) was the Claimant's health adversely impacted such that she reported sick on or about 31st July 2020?
    12.7 Did the Respondent on or about 10th August 2020 allocate a grievance lodged that day by the Claimant to Mr Loftus who the Claimant considered to be a named aggressor against her?
    12.8 Despite the letter from Monaco Solicitors on 22nd September (that requested that correspondence should be sent to them) did Mr Loftus then send the Claimant a further copy of his letter dated 18th September 2020; did the alternative Operations Manager send the Claimant the letter dated 21 October 2020 and did the Respondent's solicitor send the letter dated

13 November 2020 stating the Respondent's intention to continue to communicate directly with the Claimant?

12.9 Did the Respondent fail to implement the recommendations of its own occupational health physician Dr Waller?

12.10 Did the Respondent request that the Claimant attend meetings at the Folkestone depot?

13. If so, was that unwanted conduct?

14. Did it relate to disability?

15. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

16. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 13 Equality Act 2010 – Direct Disability Discrimination

17. Did the Respondent do the following things:

17.1 Pursuant to the OH reports on 18 February 2019 and 13 April 2019, provide the Claimant with driving routes that made her sit in her driving cab for up to 5.5 hours on 10 hour shift days? The Tribunal confirmed that this would be considered for the period commencing 24th February 2020, that being the first date in the claim.

17.2 Upon the Claimant's return from furlough leave on 28th June 2020, remove the Claimant from an AR Rota (As Required)?

17.3 Remove the Claimant from the Weekly Driver Sheets on around 30 August 2020.

18. Was that less favourable treatment?

19. If so, was it because of disability?

Hearing

20. The Claimant was initially reluctant to proceed with the hearing due to issues with disclosure and the bundle. The Tribunal dealt with the concerns about disclosure as set out below. The Claimant was able to take the time the Tribunal were reading to continue to prepare for the case. It was agreed that the Tribunal would take the remainder of the first day to read. In the event the Claimant was able to proceed and represent herself.

21. The Tribunal heard evidence from the Claimant on her own behalf. The Tribunal read statements from the following witnesses on the Claimant's behalf: Mrs L Johnston, Mr R Willsher, Mr Mark Blackman and Miss Catherine Longley who were all colleagues at the relevant time and in attendance at the hearing. We did not

hear oral evidence as the Respondent's representative confirmed she did not need to ask any questions in cross examination.

22. On behalf of the Respondent we heard from Mr Mark Spratt (Assistant/Acting Operations Manager at the relevant time), Mr G Trow (Controller), Ms Pippa Buckley (Duty Relief Controller), and Mr Ian Loftus (Acting Operations Manager/Operations Manager at the relevant time). Where other personnel of the Respondent are referred to they are referred to by job role or similar description rather than name as these reasons will be published online and be publicly available.

23. There was a 1087 page bundle. There were some additional documents disclosed by the Respondent during the hearing. These included unredacted versions of emails in the bundle which had been excessively redacted (provided at the Tribunal's request) and Driver Activity Reports which were ordered to be disclosed to the Claimant following her application.

24. The parties made oral submissions.

25. Based on the evidence heard and the documents before us we found the following facts.

Facts

26. The Claimant began working for the Respondent as a Bus Driver on 3 January 2017. The Claimant has a genetic clotting disorder (Factor V Lieden). On 20 January 2019 the Claimant was taken to hospital and was subsequently absent with pneumonia, pulmonary emboli and DVT until 19 February 2019.

27. The Claimant was assessed by OH on 18 February 2019. OH recommended adjustments for up to 12 weeks. Initially this included not driving and reduced hours, and then no overtime for up to 1 month after a phased return (p310).

28. Within the report it does say that the Claimant has the genetic clotting disorder and this increases the risk of occlusive blood clots developing and that she had an appointment with a specialist clinic to consider long-term condition management. It also says that remaining sedentary for long periods will increase the risk of further blood clotting incidents and at that point recommends micro-breaks every 30 minutes. A further meeting was arranged for 4 weeks later. The Claimant then remained off work because the Respondent said they could not find suitable non driving work.

29. The further OH review took place on 13 March 2019 which recommended 8 hour days over 5 days (not 12 hour shifts) and a rotation of activities between driving and other tasks to reduce the time she was sitting. She was to be on the shortest routes available with no more than one hour without the chance to get up and move (p 320). It was anticipated that after 4 weeks she would be able to resume usual hours and duties. However it recommended that to reduce the risk of recurrent DVT or pulmonary embolism, the Respondent consider limiting driving duration to no more than 2 hours without a break whenever this is practicable. We interpret

this as generic ongoing advice and not time limited, due to her ongoing risk of blood clotting. The Respondent was to re-refer if necessary.

30. The Claimant says the advice was not fully complied with and that she was under pressure to return fully to her driving duties and drive a longer route as soon as the phased return ran out. She therefore went to see Mark Spratt and requested to return to Occupational Health which she did on 12 April 2019. Mr Spratt says that he initiated this report prior to putting the Claimant back on full duties. However we prefer the Claimant's evidence on this. She was very clear that she was expected to return to duties without discussion as to whether she was ready until she asked to return to Occupational Health. Mr Spratt did not refer the Claimant back to OH at the end of the next period of adjustments which is more consistent with the Claimant's evidence and does not suggest an approach of checking with Occupational Health before putting the Claimant back on full duties. However the fact that Mr Spratt's statement refers to the need to be prudent and initiate a report prior to putting the Claimant back on full duties is relevant and is referred to as necessary below.

31. The subsequent OH report stated:

> "This report should be read in conjunction with the previous [OH] reports. Sadly, it appears that [the Claimant] has been struggling with her phased return to normal duties and coping with routes that are longer than 3 hours and or routes which do not allow her to have a break from sitting and driving for this length of time. Apart from feeling tired still, her main discomfort is the continued swelling and pain in her legs which remain a complication following her ….[DVT] diagnosis. As you are aware [the Claimant] also suffered from clots in the lungs and pneumonia and it is possible that the combination of complications is leading to a more protracted recovery than initially expected.
> Questions asked:
> Is the employee fit to undertake their current role?
> [the Claimant] does appear to be fit to drive a bus, however I would strongly recommend that where at all possible she continue adjusted shifts and routes for a further 8 weeks.
> Further recommendations are;
> -that she does not drive shifts that are longer than 2-3 hours in length and if she is expected to do more than one in a day that these are split- for instance one in the morning and one in the afternoon.
> - that the routes she is allocated to, allow for her to have short breaks to do gentle walking or taking a short rest to elevate her legs so that this encourages blood flow and reduces the risk of further DVTs forming.
> - after 8 weeks she is likely to be able to resume her 12 hour shifts, but I would then like to recommend that she is allocated one long route in the first week, then slowly the addition of long routes over the following three weeks if this was required.
> - thereafter I would anticipate that she would be fit to resume normal shifts and routes."
> It said no review was necessary unless symptoms progress or worsen.

32. In his statement Mr Spratt said that this report said that the Claimant was ready to return to her duties and that the further phased return was put in at the Claimant's request due to her concerns she would struggle. That's not how we read the report. The report explains that she was not ready and was struggling and strongly recommends further adjustments.

33. Reading this report in isolation does suggest that all the recommendations were time limited and expected to be no longer needed after a further 12 weeks. It did not repeat the previous ongoing recommendation of driving duration limited to 2 hours before a break that was in the previous report (though the time-limited recommendation is the same or similar). It does however also say it should be read in conjunction with the previous report.

34. The parties interpreted this inconsistency between the reports in different ways. The Claimant considered that there was ongoing advice that the Respondent did not comply with. The Respondent provided the phased return requested and then understood the Claimant was fit to resume normal duties.

35. The Respondent therefore did expect the Claimant to resume normal duties from 8 June 2019. They did not initiate a further discussion or refer the Claimant back to occupational health to check she was now ready. Mr Spratt says the Claimant raised no issue. However we accept the Claimant's evidence that on 12 June 2019 she did go and ask him to refer her back to OH again and he did not. Both agree that there was a discussion and there was agreement to continuing an adjustment in respect of avoiding Enviro 400 buses which had the harder suspension. The Claimant accepted this and did not ask again to go back to occupational health at that time. Notably Mr Spratt did not do as he said in his statement it was prudent to have done in April, which was refer the Claimant back to OH before allowing her to return to full duties, or check the inconsistencies between the reports in relation to future advice.

36. For the period from 12 June 2019 the Claimant was expected to do normal duties based on the Respondent's interpretation of the 3rd report. She did still drive the Enviro 400s 20 times in the period up to 4 March 2020, though worked many more shifts than that. She was on the AR rota which meant she was a spare driver and did not always have to drive during a shift.

37. From the Claimant's perspective she viewed this as ignoring the ongoing medical advice about needing breaks and the agreement about the Enviro 400s. She had a further absence for pneumonia in November/December 2019. There were return to work meetings but issues such as adjustments were not discussed. The Respondent's return to work form does not have a section on adjustments or how to support the employee on a return from an absence.

38. We note that the OH reports were not discussed with the Claimant. Up to this point the Respondent had not discussed the Claimant's underlying condition with her with the exception of the enviro 400 discussion.

39. The controllers were aware that the Claimant had DVT and could have pain from driving and that her preference was to avoid the Enviro 400s. The Claimant was

not happy with the situation but put up with it and was continuing to seek to get along with colleagues such as making tea. The Respondent's view that she was not having any problems therefore went unchallenged. The Claimant herself had a tendency to put work above her health needs, working hard and suffering rather than raising an issue.

40. The routes she had particular difficulty with are the 10s, the 17, the 16 and the 102. Routes are assigned to drivers on a rota by an administration member of staff. The controllers are then responsible for managing issues that arise on the day and last minute changes. There are spare drivers on a rota to assist with this (the AR rota).

41. On 25 February 2020 the Claimant was a spare driver. When she attended work she told Mr Trow that she "hurt". Mr Trow told her that the "double 10" driver had called in sick. She showed that she was not happy doing both herself by saying "you are joking". Mr Trow told her she would have to do the first but would try to get someone else to do the second. The Claimant did not expressly articulate her difficulty but there was nevertheless an informal acceptance that the Claimant needed some support that day.

42. When the Claimant returned after doing the first "10" she asked what was happening with the second. Ms Buckley who was the other spare driver said she was not doing it. The Claimant says that Mr Trow the controller then laughed. He asked the Claimant if she was alright and she said "I will be when I take my pills". She says that Mr Trow would know that that meant she was not alright and would not be until she was able to go home at the end of the shift and get her medication, which she could not take whilst driving. Again she did not expressly articulate that she could not do the second "10", and, as he had not swapped the route, the Claimant went out and did the next one.

43. Mr Trow accepted that he could have been more supportive and sent Ms Buckley out on the second route, but Ms Buckley was also potentially needed to cover other routes and to support him with his tasks. He also said that she would have been finishing shift during the second 10 though in fact she was still at work when the Claimant returned. The Claimant did not expressly articulate to Mr Trow that she could not do either of the routes.

44. However, she decided she had tolerated the situation for long enough and did then go to Mr Spratt the next day that she was in work (27 February 2020) and complained about the attitude of the controllers and requested a 4th medical with OH. Mr Spratt then spoke to Mr Trow and said that the behaviour on the 25th had fallen short of what he expected from controllers. Following that Mr Trow went to the Claimant and said if you need help just ask, which she took to be a "dig" following her reporting him. She told him that she had asked.

45. The Claimant's communication generally that she was struggling, and on that day in particular, could have been clearer, however Mr Spratt accepts that the controllers should have been more supportive on that day. He did speak to the controllers and organised the 4th Occupational Health appointment promptly upon this request. Mr Spratt was temporarily covering for Mr Loftus by this time. Mr Loftus was on holiday 24 February 2020 until 2 March 2020.

46. The OH appointment took place on 2 March 2020 and the report is dated 4 March 2020 (pp343-344). This report states that the Claimant suffers constant pain, burning and swelling in both legs aggravated by certain driving conditions, routes with uneven surfaces and routes which do not give opportunity for regular breaks. It said that the Claimant was fit for her role with recommendations. It said she was now diagnosed with post-thrombotic syndrome and had experienced symptoms for over a year now meaning the Respondent should consider reasonable adjustments. It said that she would benefit from routes likely to involve less jarring and uneven surfaces and allow for regular breaks where she can get out of the bus , stretch and elevate the legs. We find this report shows that this had been the situation since the last report and the Claimant had not made the recovery that had been anticipated in the last report.

47. He recommended a meeting with the Claimant and her manager to discuss specific routes. He made clear that these adjustments were necessary for the foreseeable future.

48. Mr Loftus was made aware of the referral upon his return when Mr Spratt handed over to him. We accept Mr Loftus's evidence that even if the report was sent on the 4th he saw it on the 5th. However he had taken no action on it when on 11th March 2020 the Claimant left a shift early with a chest infection (p346). She remained absent on sick leave from 12 March 2020 to 26 March 2020.

49. By this time the Respondent was considering furlough and the Claimant emailed on 27 March 2020 saying she wanted to be on the furlough list as she wanted to prevent her health deteriorating due to having reoccurring pneumonia and covid 19 symptoms. She said she had pulmonary infaction due to pulmonary embolisms. Mr Loftus confirmed he had seen her expression of wish on 28 March 2020. The Claimant's request was granted and she received a standard letter on 31 March 2020. This said her furlough could last up to 31 May 2020 but she could be required to return at short notice. It did not mention a risk of redundancies (pp 351-352).

50. Mr Loftus made further contact with the Claimant on 31 March 2020 and it has been redacted but the return to work form was completed by someone on 1 April 2020 to state the Claimant was furloughed. No steps were taken in relation to the OH report by this stage.

51. We accept that it was an emergency situation as the country went into lockdown at that time and the Respondent was managing a public transport service and needing to respond to the government safety advice and rules. We heard from Mr Loftus that he was managing the situation at the Folkestone depot on his own and working long days to do this. Although the service reduced the Respondent carried on providing a reduced service throughout.

52. The Claimant was sent a further letter relating to furlough on 17 April 2020. Furlough was initially extended to 31 July 2020 but then the Claimant was told it would be ending sooner on 28 June 2020.

53. Mr Loftus himself was furloughed on 27 May 2020 as managers were furloughed on rotation. Mr Spratt was brought in to cover at short notice and instructed to start bringing drivers back. On 24 June 2020 a letter was sent to the Claimant informing her she was to return on 28 June 2020. The letter said that duties would be communicated by phone. The Claimant said that about the same time she received a call from a controller to say that she was to return on 28 June 2020 and would be part of one Big Rota rather than a spare driver on the AR rota as before. Nothing was mentioned about the meeting to discuss the recommendations and the Claimant did not raise it either.

54. The Claimant was given duties on her return without consideration of the medical recommendations. Mr Spratt did not have in mind his referral in February 2020 in the midst of bringing 100 plus staff back from furlough. Mr Loftus was still on furlough himself and there had not been a handover before he left on furlough. The routes the Claimant was given involved 10s, 16s and 17 and 102. She did not have an issue every day, but she was at times given routes that were well over 3 hours without a break and she considers the 10 and 17 also involve uneven rural sections. On three occasions she had to drive the enviro 400. The Claimant's evidence which we accept is that the routes which caused her most pain were the 10s, 16, 17 and 102. She described the town centre routes she did on 21 and 22 July 2020– 70 F and 76 - as being "dream routes" and causing her less pain.

55. On 14 July 2020 the Claimant was piloting a bus with two drivers who were learning the route. She was not required to do so but the Claimant offered additional support to the drivers which meant she sat in what is referred to as "the suicide seat" next to the driver which is even more uncomfortable than the driver's seat. She did not have to sit in that particular seat. The Claimant was trying to be helpful in doing so but was not asked to do so. As a result she was in pain after that journey and asked Ms Buckley who was the controller that day to swap her next route. Ms Buckley asked her why and after resistance agreed to do so but said "I'm not making a habit of it". She did not agree in evidence that she resisted but we accept the Claimant's account and it is more consistent with the comment about not making a habit of it which Ms Buckley accepts she did make.

56. Another member of staff then told Ms Buckley that the Claimant had not actually driven the route that morning. Ms Buckley jumped to the conclusion that the Claimant had lied to her and implied she had driven the route herself to get out of the next route. We find she was not sympathetic to the Claimant and that this sentiment went wider given a member of staff had made this report to her.

57. On 18 July 2020 the Claimant put in a staff report to Mark Spratt stating

> "Could I please request a meeting with you at your convenience with regards to my medical on 2 March 2020 and the recommendations set out by the company doctor….
> I would be grateful for this meeting as I feel certain control staff aren't supporting my medical needs and I don't wish for this to continue as it's left me questioning my position here at Stagecoach, which is regretful but I cannot continue with the uphill battle of understanding when it comes to my health needs…hope to discuss this soon"

58. Mr Spratt did not speak to the Claimant about this. Mr Loftus was due back from furlough on 3 August 2020 and he decided it was preferable to leave this for him as working out permanent adjustments is a complex task. He did not say this to the Claimant. He went to speak to the controllers and told them to look after the Claimant, as far as reasonable, if she was struggling. He did not tell the Claimant he had done this. He expected the Claimant to raise it with the controllers if she was struggling.

59. Mr Spratt says he has an open door and expected that the Claimant would come and see him. In fact, on 22 July 2020 the Claimant went to the "hatch" and asked to speak to Mr Spratt. A controller went in to see him and came back and told the Claimant that he was leaving it until Mr Loftus returned. Mr Spratt said that he had no recollection of the Claimant coming to the hatch but the Claimant is very clear on this and it caused her a lot of distress that he would not speak to her and the answer she was given was consistent with what he did in fact do so we prefer her evidence on this. It is also consistent with her more contemporaneous account in her grievance on p 385. We therefore find that Mr Spratt was informed the Claimant had come to the hatch to see him and he sent the message back that he was leaving it for Mr Loftus to deal with.

60. The Claimant did have a period of pre booked annual leave when she did not drive but had been assigned to do unsuitable routes if she had been at work. After this over the next few days the Claimant informally swapped the harder duties with another driver when she could.

61. On 29 July 2020 the Claimant was running late and getting close to the maximum driving time allowed to the degree that she felt under pressure not to run late. She spent her break persuading Mr Trow that she was at risk of going over the limit. He said he would send a spare driver if needed and would keep an eye on her. She accepts that in the end she was within the limit.

62. On 31 July 2020 the Claimant left shift early as she felt very unwell and was concerned she was too unwell to drive. She was then signed off for 4 weeks. The fit note states "lung problem under investigation". The cover email says that it may be extended if necessary and is a result of multiple persistent symptoms (p377). Mark Spratt replied with a pleasant email.

63. The Claimant was therefore on sick leave when Mr Loftus returned from furlough on 3 August 2020. On Friday 7 August the Claimant asked Lisa Johnston, her colleague and housemate, to ask Mr Loftus to call her. He told Ms Johnston that he would have the Claimant in to meet in a couple of weeks, which was still within her certified absence.

64. The Claimant wrote to the union for advice in the early hours of 8 August 2020. She then forwarded that email as part of a grievance to the Managing Director who responded within approximately 50 minutes asking if she was alright and saying he did not know any of this and asking if Mr Loftus was aware.

65. In her grievance the Claimant said "it has always been in my medicals to only do 1 long route and to avoid less jarring routes and to restrict driving for long periods of

time." This is not correct. The reference to avoiding long routes was only a temporary adjustment in the April 2019 report. The reference to jarring routes was only in the March 2020 report. Although the reference to needing breaks has been consistent across the reports, the April 2019 report can be interpreted as suggesting this was not a longterm requirement (which was how the Respondent interpreted it, see paragraph 34). She ended the email saying "I feel like I cannot continue working for StageCoach and am now pursuing constructive dismissal". The grievance itself was about failing to act on the OH report, the fact it had been left with Ian Loftus and also the behaviours of Ms Buckley and Mr Trow on 25 Feb and 14 July.

66. The Managing Director then replied thanking her for the back ground and saying I will ask Ian (Loftus) to hear the first stage of the grievance ASAP.

67. He then did forward this to Ian Loftus asking him to hear the first stage of the grievance that coming week if possible.

68. Mr Loftus wrote to the Claimant on Monday 10 August 2020 at 10.05 inviting the Claimant to a meeting on 14 August 2020 to discuss her staff report and also the occupational health report. He said that by the time he received that report in March and he was arranging to go through it with the Claimant she reported sick and then went on furlough so they had missed the opportunity to deal with the recommendations. He said he could not fit it in before as he was still on catch up.

69. We find it likely that the invitation to the meeting was done sooner than he intended because of her grievance.

70. The Claimant then wrote to the Managing Director saying that the Union had advised her that as her grievance is with her managers and controllers she should discuss issues with another manager. She requested this be with another specific Operations Manager ("the alternative Operations Manager"). She communicated the same to Mr Loftus.

71. On the 11 August 2020 Mr Loftus emailed the Claimant to ask if she was available to come and be interviewed by the alternative Operations Manager on 18 August 2020. She did not reply so Mr Loftus sent her a message via the blink system (p401).

72. The Claimant then complained to the Managing Director about Mr Loftus emailing her and messaging her on the blink. She said she appreciated the opportunity with the alternative Operations Manager she had requested but she said she was off sick and awaiting legal advice from a solicitor. She said when she had the details she would confirm a date about the meeting with the alternative Operations Manager (p403).

73. Meanwhile on the instruction of the alternative Operations Manager Ian Loftus wrote a further letter to the Claimant confirming the invitation to a meeting about the grievance at the Folkestone bus station (p408). This then had to be rearranged for the Respondent's needs and so Ian Loftus wrote to the Claimant again to inform her and set the meeting up on 25 August 2020 (on 17 August 2020 p412).

74. The Claimant responded directly to the alternative Operations Manager on 17 August 2020 stating she would be unable to attend due to ill health. Within this was a complaint about Mr Loftus continuing to contact her and passing a private and confidential letter via a colleague (Lisa Johnston her house mate) which was the letter rearranging the meeting. He had said to Ms Johnston that the letter was about moving the meeting (which was happening the next day). The Claimant says he also referred to it being a grievance meeting which would have been a potential breach of confidence. The Claimant had already sent a message to Mr Loftus via the same house mate and given Ms Johnston also assisted the Claimant throughout these proceedings we find it likely that Ms Johnston would have known around that time in any event that the Claimant was bringing a grievance.

75. She also told the alternative operations manager that she would be in touch after legal advice. She also referred to the meeting being in "a mutual location" when it took place.

76. The alternative operations manager replied noting she could not attend on 25 August and asking her to let him know as soon as possible when she was well enough to proceed which the Claimant confirmed she would do. The Claimant then was signed off a further two months with work related stress and depression. The GP said he did not need to assess the Claimant again at the end of the period.

77. The Claimant found out on about the 30 August 2020 that her name had been removed from the drivers weekly details for that week (p417). In his written statement Mr Loftus said he had done it because the Claimant was on long term sickness absence. In his oral evidence he said it had not been him but an administrator who we did not hear evidence from. This was not the only inconsistency between the Respondent's side's written statements and their oral evidence.

78. On 18 September 2020 Mr Loftus wrote to the Claimant on the alternative operation manager's behalf to invite the Claimant to an absence review meeting. The letter said the meeting would be in Mr Loftus's office with the alternative operations manager on 24 September 2020.

79. On 22 September 2020 the Claimant's solicitor wrote an email headed VERY URGENT stating she had concerns about the Claimant's capacity to instruct her and that she was very seriously ill and could not cope with any further correspondence. She said the Claimant was not well enough to engage in person or in writing and that her mental health was very fragile and she was under medical treatment. She expressly asked the Respondent not to send any further communication to the Claimant for the time being. She invited the Respondent to contact the solicitor if necessary. It stated that whilst the Claimant had instigated a grievance procedure she was now too ill to participate.

80. The Claimant then received a further copy of the 18 September 2020 letter. It is not clear who actioned this or why.

81. There were internal email discussions between the Managing Director and HR at the Respondent about what to do next, with the Respondent intending to nevertheless continue to communicate with the Claimant and invite her to occupational health. The view was expressed that it was not for a solicitor to tell them how to communicate with their employee and the Claimant was contractually obliged to keep in touch. It was suggested "Maybe also go back to the solicitor and explain that whilst we appreciate she is unwell, we need to continue to support her (thank you very much)" followed by an emoji (page 490). The idea was mooted to invite the Claimant to nominate a family member to communicate with the Respondent. The Claimant and her solicitor were never told of this idea.

82. Mr Loftus had not seen the solicitor's email but knew about it and that it said not to contact the Claimant and he requested direction from the Managing Director. The Managing Director then said "yes, but she's our employee not theirs. Please proceed as you would usually – she needs to attend interviews /medicals and failure to do so will leave her in breach of contract" (p 494). Mr Loftus then said he would instigate a formal interview for failing to report for an absence review, a course of action which was agreed by the Managing Director.

83. The alternative operations manager then suggested inviting the Claimant to a further absence review before instigating a formal interview. He then wrote the letter at page 498 dated 21 October 2020 stating "I am very disappointed that you did not attend this meeting, or inform me that you were unable to do so". He invited the Claimant to a further meeting to discuss her ongoing situation and attempt to establish a return to work date. He said failure to attend or contact to arrange an alternative would lead to instigation of the disciplinary procedure.

84. The Claimant's solicitor also wrote on 21 October 2020 to the Respondent to set out the Claimant's claims and also said "the Claimant feels she has no choice but to resign without notice and to claim constructive dismissal".

85. On 23 October 2020 the Claimant contacted ACAS to commence early conciliation.

86. On 26 October 2020 the Respondent's solicitor replied to the solicitor's letter asking for confirmation as to whether this was a resignation. There is an internal email dated 27 October 2020 which confirms that the Respondent was going to treat the solicitor's letter as a resignation once formal confirmation was received that that was the intention (p518). On 28 October 2020 internal correspondence evidences the Respondent's decision to keep paying statutory sick pay until the situation was confirmed.

87. However, the Claimant then submitted a further sick note on 29 October 2020, signing her off until 29 November 2020. She did not attend a meeting scheduled on 30 October 2020. She said she submitted that sick note because the Respondent takes time to process and she wanted to be covered. The company continued to pay statutory sick pay whilst awaiting confirmation about whether the Claimant had resigned. There were some without prejudice communications.

88. On 9 November 2020 early conciliation ended.

89. The Respondent's solicitor wrote to the Claimant's solicitor on 13 November 2020 stating that the Claimant had put in the further sick note and therefore their view was she had not resigned. The letter set out the Respondent's position but ended with a statement that the Respondent would continue to act in accordance with its Sickness Absence Policy with regards to keeping in contact with the Claimant whilst considering reasonable adjustments in respect of the Claimant's disability.

90. The Claimant submitted her claim form to the Tribunal on 2 December 2020 stating the last day of employment was 21 October 2020 and that she had resigned through her solicitor's letter. The Claimant did not put in a further sick note after 29 November 2020, which is also the date on the P45.

91. The Claimant also sent the communication on page 602 to the Respondent on 2 December 2020. She said she had confirmed to her solicitor that she had intended to resign by their letter of 21 October 2020 and said that she did resign from 21 October 2020 with immediate effect. This was clearly her intention.

92. On 14 December 2020 Mr Loftus then wrote to the Claimant saying the resignation date was 2 December 2020 and the company required the Claimant to work her notice of 2 weeks or provide a fit note. This was not received by the Claimant until 19 December 2020. Therefore she had not agreed to any extension of the contract.

93. We find that everything that took place is consistent with the Claimant's resignation via the solicitor's letter on 21 October 2020 save for the submission of the sick note and the continuation of the sick pay. We find she did not mean for the sick note to undermine the clear statement in her solicitor's letter. The solicitor's letter is clear enough to be an unambiguous resignation and the Claimant has confirmed that was her intention. The Respondent was going to treat that as sufficient. We do not find the submission of a sick note to alter that. We find that the resignation occurred on 21 October 2020 and that is when the contract ended.

94. Other people have been kept on the drivers weekly sheets despite being off due to sickness including sickness up to 12 weeks. There were other members of staff who were assigned routes which fitted their personal needs such as childcare and looking after a horse.

95. We heard evidence and accept that adjustments can be made to assign someone specific routes but this can take about two weeks to organise in consultation with the union and the commercial department which was responsible for fixing the rotas. However the Respondent's witnesses accepted that a Town route such as those the Claimant preferred could have been considered and gave no reason why it would not have been possible to assign her one of those routes.

Relevant law

Constructive dismissal

96. Section 95 of the Employment Rights Act 1996 states:

> **(1)For the purposes of this Part an employee is dismissed by his employer if . . ._**

. . .

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

97. The leading authority is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221. For section 95 (c) to apply the following must be shown:
    97.1 a repudiatory breach of contract by the employer (i.e. a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract and which entitles the employee to leave without notice);
    97.2 the breach caused the resignation; and
    97.3 the employee did not delay so long before resigning that he is regarded as having affirmed the contract and lost the right to treat himself as discharged.

98. There was an implied term in the Claimant's contract of employment as described in *Malik v Bank of Credit & Commerce International* [1997] IRLR 462 that the employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

99. A breach of the implied term involves conduct which seriously damages or destroys the trust and confidence between the employer and employee. Both sides are expected to absorb lesser blows (*Croft v Consignia Plc* [2002] UKEAT 1160_00_3009).

100. A series of actions culminating in a "last straw" can cumulatively amount to a breach of the implied trust and confidence, but the "last straw" must contribute something to the breach, it cannot be entirely innocuous (*Omilaju v Waltham Forest LBC* 2005 ICR 35).

<u>Failure to make reasonable adjustments</u>

101. s20 Equality Act requires "…where a provision, criterion or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" [the employer]… is "to take such steps as it is reasonable to have to take to avoid the disadvantage."

102. *RBS v Ashton* [2011] ICR 632, in particular paragraphs 13 and 24, provides that:
"it is irrelevant…what an employer may or may not have thought in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned….It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

103. The Tribunal does need to consider how effective the adjustment would be in removing or reducing the particular disadvantage, and a prospect of it doing so may make an adjustment reasonable (*Romec Ltd v Rudham* EAT 0069/07 and *Leeds Teaching Hospital NHS Trust v Foster* EAT 0552/10).

104. Whether an adjustment is reasonable depends on the particular circumstances of the case.

105. An employer cannot use his lack of knowledge that would have resulted from a consultation to defend a claim that he has not made reasonable adjustments (*Tarbuck v Sainsbury's Supermarket Ltd* [2006] IRLR 664). A similar premise applies to a failure to make proper enquiries in respect to what would alleviate a substantial disadvantage (*Southampton City College v Randall* UKEAT/0372/05/D).

Direct disability Discrimination

106. Section 13 Equality Act 2010 states that a person (A) discriminates against another (B) if, because of a protected characteristic (including disability) A treats B less favourably than A treats or would treat others.
107. Section 23 Equality Act 2010 provides that on a comparison for the purpose of section 13 there must be no material difference between the circumstances of the Claimant's case and any comparator's case.
108. The burden of proof is set out at section 136 Equality Act. This states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that s 13 has been contravened by A then it must hold the contravention occurred unless A shows that it did not contravene the provision.

Disability- related harassment

109. Section 26 Equality Act 2010 states that a person harasses another if he/she engages in unwanted conduct related to disability and the conduct has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. In deciding whether the conduct has the necessary effect the person's perception must be taken into account along with the other circumstances of the case and whether it is reasonable for the conduct to have that effect. Conversely where the conduct was done with the necessary purpose it is irrelevant whether or not it had the effect.

Discrimination time limits

110. s123 Equality Act 2010 states that the Tribunal does not have jurisdiction to consider a claim submitted more than three months after the act complained of, unless it is just and equitable to extend the time limit.
111. s123(3) states that conduct extending over a period is to be treated as done at the end of the period however a failure to do something is done when the person decides not to do it. In the absence of evidence to the contrary a person is taken to decide on a failure to do something when either they do an act inconsistent with it or on the expiry of the period when they could reasonably

be expected to do it. It is possible for there to be an ongoing duty and a continuing omission to make reasonable adjustments where the evidence suggests the employer is still considering the adjustments and in the absence of the assertion of an intervening act in accordance with s123 (3) (4) Equality Act (Kingston upon Hull City Council v Matuszowicz [2009] ICR 1170).

Conclusions

112. We will address the issue of time limits last. The following are our conclusions in respect of the substantive issues.

Constructive dismissal

Was the Claimant dismissed?

Did the Respondent do the following things:

On 24th and 25th February 2020 forced the Claimant to drive two four-hour routes each day for two consecutive days?

113 The evidence was focused on 25 February 2020 rather than 24 February 2020. On 25 February 2020 the Claimant was a spare driver but the double 10 driver was sick. She was told she would have to cover the first route but that Mr Trow would try to cover the second. In the event he did not and the Claimant felt she had no option but to do it. Mr Trow in evidence confirmed he did expect her to do it and that she should have gone home sick if she was not able to. She did say that she was in pain and did ask what was happening with the second route. She said she would be okay when she had taken her pills which did not clearly communicate that she was not able to drive the route. However Mr Spratt did speak to Mr Trow and say that he did not behave as he expected towards the Claimant on that day and Mr Trow accepts he could with hindsight have used Pippa Buckley to cover the route. As recorded at the relevant paragraphs above Ms Buckley and Mr Trow were flippant and joking in the face of the Claimant's discomfort in doing the double 10 and therefore were not supportive.

Following a medical assessment on 2nd March 2020 did Mr Spratt, one of the Respondent's managers, without good cause, fail to firstly discuss the assessment with the Claimant and secondly fail to make reasonable adjustments to the Claimant's driving routes?

115. The context was that the Claimant was driving routes that caused her significant pain since the 3rd medical report. The 4th medical report was produced 9 or 10 days after 24-25 February 2020 and shows that she was struggling with bumpy/jarring surfaces and routes that did not allow sufficient breaks. We accept that that was the case throughout the period between the 3rd and 4th medical.

116. The medical report itself was not available until 4th or 5th March 2020 by which time the relevant manager was Mr Loftus. Mr Loftus did not discuss this with the Claimant. The first he attempted to discuss was when he invited her to meet on 14 August 2020 following her submitting the grievance.

116. The Claimant was off sick from 12th March 2020 and then did not return due to furlough from 1 April 2020 to 27 June 2020.

117. The Claimant was not spoken to in the week up to her absence. No measures were put in place to ensure the report was not forgotten with the disruption of covid. There was no conversation with the Claimant about it prior to or on the her return. No interim adjustment was communicated to the Claimant. Mr Spratt had spoken to Mr Trow about his lack of support on the 25 February 2020 and that this was not the way he expected the controllers to behave if the Claimant needed support. The Claimant knew he had been spoken to, but not what was said. Mr Trow told her to "just ask" if she needed support in a tone that suggested he resented the Claimant had raised it.

118. Once the Claimant put in a staff report on 18 July 2020, the Respondent's approach, which was not communicated to the Claimant, was that if the Claimant asked or was struggling the controllers were to support her as far as they reasonably could. However whilst some days she may have had suitable routes she remained struggling with unsuitable routes either because they were too long without a break or were too bumpy and caused her pain. The Respondent never had the recommended discussion about specific routes (that was recommended in the OH report). The first attempt was the invitation to meet with Mr Loftus on 14 August 2020 after the grievance was submitted.

On or about 14th July 2020 did Ms Buckley (relief duty controller) only agree to arrange cover for the Claimant's route reluctantly and indicate she was unlikely to make a similar arrangement in the future?

119. On 14 July Ms Buckley was resistant to arranging cover for the Claimant and did say she was not going to make a habit of it.

Did the Respondent ignore the Claimant's report dated 18th July 2020 requesting a discussion as to her medical condition and the impact it was having upon her ability to work?

120. As above, there was no conversation with the Claimant about that staff report. Mr Spratt did communicate to the controllers that if the Claimant asked or was struggling the controllers were to support her as far as they reasonably could but the Claimant was unaware of this. When she went to the hatch to speak with Mr Spratt she was turned away and told that he was leaving it for Mr Loftus. Mr Loftus did not ask to meet the Claimant about it until the invitation to meet on 14 August 2020, following her grievance.

On 22nd July 2020 did Mr Spratt refuse to discuss, despite the Claimant's request, her health and condition of work?

121. The Claimant did come to the hatch to try to discuss her staff report with Mr Spratt. The controller she spoke to did go in to see Mr Spratt and came back and communicated that he was leaving it for Mr Loftus.

On or about 29th July 2020 did Mr Trow, one of the Respondent's managers fail to swap the Claimant with a spare driver?

122. The Claimant was concerned about reaching her maximum driving on this day but accepts that in the end she did not. Mr Trow had said he would send a spare if necessary. In the end it was not necessary.

Because the Respondent required the Claimant to drive unsuitable routes (long bumpy rural routes) was the Claimant's health adversely impacted such that she reported sick on or about 31st of July 2020?

123. Our focus here is on the conduct of the Respondent rather than its effects or whether it was the cause of the Claimant's absence.

124. The Respondent did continue to require the Claimant to drive some unsuitable routes on some occasions. We accept these were the 10s, 17 , 16 and 102, which were unsuitable either because they were too bumpy/jarring or too long without a break and therefore exacerbated her pain. She was still on occasion required to drive the Enviro 400.

125. There were occasions where she was able to swap routes herself but there was no formal adjustment in place and the onus was left to her to raise that she was struggling on each occasion (which in any event was not communicated to her) or organize a swap herself.

126. Although the focus here is the Respondent's conduct we note the following. We do not have sufficient evidence to find that this was what caused the Claimant to have what was described as a lung problem (which was what was on the certificate for the absence commencing 31 July 2020. The parties did not take us to it but we note the medical evidence of 23 June 2020 which shows that after 3 months of furlough the Claimant's chest symptoms were not improving and were very debilitating and there was nothing in that report to show they were caused by driving these routes.

127. To the degree that part of the reason for the 31 July 2020 absence was stress and depression (p799 GP letter) we accept this was contributed to by the lack of adjustments and the failure to discuss the staff report in particular.

Did the Respondent on or about 10th August 2020 allocate a grievance lodged that day by the Claimant to Mr Loftus who the Claimant considered to be named aggressor against her?

128. The grievance was allocated to Mr Loftus. We don't accept Mr Loftus was "an aggressor". We accept the union had told the Claimant to avoid discussing the grievance with those named within it which did include Mr Loftus. As soon as the Claimant requested another manager that was actioned.

Despite the letter from Monaco Solicitors on 22nd September (that requested that correspondence should be sent to them) did Mr Loftus then send the Claimant a further copy of his letter dated 18th September 2020; did the alternative Operations

Manager send the Claimant the letter dated 21 October 2020 and did the Respondent's solicitor send the letter dated 13 November 2020 stating the Respondent's intention to continue to communicate directly with the Claimant?

129. It is not clear why a second copy of the 18 September 2020 letter was sent to the Claimant nor what date it was sent and whether the sender knew of the solicitor's request.

130. However the Respondent did then deliberately adopt the position that, despite what the solicitor said about the Claimant being very unwell and unable to participate in any meetings or deal with any correspondence, that they had the right to communicate with her and expect her to respond. The 21 October letter was not supportive. It referred to it being disappointing that the Claimant had not attended the meeting or communicated about this (whereas via her solicitor she had) and it threatened disciplinary action if she did not attend a meeting or arrange a meeting on a different date. This was an oppressive stance to take when the Claimant's solicitor had said how ill the Claimant was. The Respondent's solicitor also wrote the letter dated 13 November 2020 which ended with a statement that the Respondent would continue to act in accordance with its Sickness Absence Policy with regards to keeping in contact with the Claimant whilst considering reasonable adjustments in respect of the Claimant's disability.

131. However we find that both the 21 October 2020 and 13 November 2020 letters post-dated the decision to resign which must have been communicated to the solicitor prior to the drafting of the solicitor's letter dated 21 October 2020.

Did the Respondent fail to implement the recommendations of its own occupational health advisers and Dr Waller?

132. The Respondent did fail to implement the recommendations and did not begin to address them via a meeting with the Claimant until the invitation to meet on 14 August 2020, after the Claimant submitted her grievance.

Did the Respondent request that the Claimant attend meetings at the Folkestone depot?

133. The Respondent did request the Claimant to attend meetings at Folkestone, including in Mr Loftus's office. The Claimant had not raised an issue with this, save for a reference to the alternative operations manager about meeting in a mutual location once she was fit enough, but she had raised the issue of not wanting emails or other contact from Mr Loftus.

Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and whether it had reasonable and proper cause for doing so.

Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

134. The context is that the report dated 2 March 2020 showed the Claimant had been suffering driving inappropriate routes for a year and that they caused her significant pain. The matter had come to Mr Spratt's attention due to the controller being unsupportive on 25 February 2020 and requiring the Claimant to drive a route when she was in pain. It was accepted the controller should have been more supportive. Although there are a number of allegations in the constructive unfair dismissal claim as set out above we find that essentially the Respondent did not then act when the report was received, and although there was a long period of time when the Claimant was not present due to furlough, she was called back to work and the report was still not addressed. She continued to drive the inappropriate routes that caused significant pain and did not receive a supportive response from Ms Buckley when she asked to swap. Her staff report was also not discussed with her, and she was turned away at the hatch when she tried to approach Mr Spratt to initiate a discussion. We find this was behaviour by the Respondent's controllers and Mr Spratt that was likely (and did) seriously damage trust and confidence.

135. Whilst there were long periods when the Claimant and her managers were not at work due to furlough this does not provide reasonable and proper cause for no provision to have been put in place, at least temporarily at first, to ensure the Claimant was safe and not driving routes that caused or aggravated her pain. Although the controllers were spoken to following the lack of support on 25 February 2020 and again after 18 July 2020, the onus was left on the Claimant to raise it on a day by day basis when she felt she was in difficulty and in any event she was unaware of this instruction to the controllers. As far as she was aware no action had been taken. The instruction that was given was not effective in ensuring she did not drive routes that exacerbated her pain. Moreover the change in managers does not provide reasonable and proper cause for delaying addressing this issue. A handover system should have been in place to ensure something as important as this was not neglected.

136. Given the content of her staff report stated she was questioning her position with the Respondent as she could not continue with the uphill battle of understanding when it came to her health needs, it was likely to seriously damage trust and confidence to turn her away when she tried to discuss it, and say it was being left for Mr Loftus, without both ensuring she was protected and that she understood she was protected in the interim (by having some measure in place to ensure she did not have to drive routes that caused or aggravated her pain).

137. Once the Claimant submitted the grievance Mr Loftus's immediate response to the grievance was to bring forward his meeting with the Claimant. We do not consider Mr Loftus was an aggressor and he was trying to then deal with the issues raised, but accept that the union's advice was to seek that the matter be heard by a different manager and that was not unreasonable. When the Claimant asked the Respondent to change the manager hearing the grievance

this was done. We do not find this response to the Claimant's grievance part of a fundamental breach of contract. By this point the Respondent did want to deal with the situation but the Claimant was then unfit to do so.

138. It is unclear when and by whom the letter of 18 September 2020 was sent and whether the sender was aware of the request to correspond with the solicitor. The 21 October 2020 letter was oppressive, but post-dated the decision to resign, which was communicated via the Claimant's solicitor the same day. The same applies to the November letter.

139. For the avoidance of doubt we do not find the Claimant almost meeting her driving limit on 29 July 2020 to be part of a fundamental breach of contract.

Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

140. The Claimant did resign in response to the cumulative breach as set out at paragraph above by her solicitor's letter dated 21 October 2020.

Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

141. The Claimant started the grievance procedure. The Respondent did respond positively initially and wish to deal with the grievance but then the Claimant could not pursue it due to ill health. This was not an affirmation of the contract. The fact that the Respondent took steps to address the grievance once it was raised does not negate the fact that the failure to act or discuss the need for adjustments with the Claimant was a fundamental breach of contract nor does it amount to affirmation by the Claimant. If the grievance had reached an outcome and the Claimant had then carried on working, then that might have been an affirmation.

If the Claimant was dismissed, what was the reason or principal reason for dismissal. The Respondent contended it was capability and/or some other substantial reason.

142. The Claimant's capability is not the reason for the Respondent's conduct in breach of contract. The reason for the initial failure to act on the report is that the Respondent's management did not give it priority upon receipt, nor ensure that it was not neglected or forgotten over her sickness absence and then furlough, or that it was acted upon prior to her return from furlough.

Was it a potentially fair reason?

143. We do not find that there was a potentially fair reason for neglecting to deal with the report, or discuss it with the Claimant, to ensure she was no longer driving buses/routes which caused her significant pain.

Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

144. There is no need to consider this issue, having found that there was not a potentially fair reason to dismiss.
145. A remedy hearing is required to consider the issues in respect of remedy however we have made decisions in respect of the following:

Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the Claimant unreasonably fail to comply with paragraph 34 by failing to pursue her grievance?

146. The Claimant declined to meet with Mr Loftus immediately following the submission of her grievance, when he invited her to meet on 14 August 2020. We accept Mr Loftus's evidence that he would have discussed the medical report with the Claimant and considered the necessary adjustments at that meeting, though it may have taken a few weeks to have the relevant adjustments put in place. He didn't see any reason why this wouldn't have led to the Claimant having a route she wanted. The Claimant declined that meeting, and then subsequently became too unwell to participate in further meetings before her resignation. It is unfortunate that she did not take this offer to meet up as in reality this was the meeting that she had wanted and attending it might have avoided the further deterioration in relationship which followed.

147. However she says the reason for declining was trade union advice that the matter should be considered by a manager that was not also involved. This is not unusual advice and we do not find it unreasonable for her to have acted on it. It is unfortunate that the Claimant took the view that Mr Loftus was an "aggressor" as we do not agree he was. He had not prioritized the report when he first received it, and unfortunately that meant it was forgotten over furlough, but then by 14 August 2020 he had not long returned from furlough and had not yet been at work on a day that overlapped with the Claimant due to her sickness absence.

Failure to make reasonable adjustments

Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

148. The Respondent accepted knowledge of the disability from February 2019.

Did the Respondent have the following PCP's: The rostering of bus drivers.

149. The Respondent did have a roster in place for bus drivers. The Respondent also had a system of using spare drivers as needed to cover the roster.

Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant experienced pain and discomfort without regular breaks and by driving unsuitable routes/lengthy routes?

150. The Claimant was at a substantial disadvantage by the bus drivers' roster which assigned her and different drivers to different routes as needed, or which she was required to cover as needed as a spare driver, as she did experience pain

and discomfort if she was assigned a lengthier route or was not able to take regular breaks from driving. There were certain routes on the roster which she was rostered to drive or needed to cover as a spare driver which she did find caused more pain and discomfort. We accept this was the case throughout the period from the medical referrals onwards as the later report in March 2020 stated the Claimant had been suffering the symptoms and struggling with certain routes in the way it describes for over a year.

Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

151. We find the Respondent could reasonably have been expected to know that the Claimant suffered the above disadvantage from the time that she was put back on normal duties back in June 2019. The second medical report had indicated that there should be ongoing adjustments to avoid further deterioration in health. Although this advice was not repeated in the 3rd medical report the Claimant raised a continuing need for adjustments with Mr Spratt and asked for a 4th medical referral before going back to normal duties. She also understood the reports taken together to indicate that there should be ongoing adjustments but nevertheless requested a further medical referral. The Respondent did not agree to this at that time despite Mr Spratt's evidence that he had considered it prudent to check she was able to return to normal duties prior to the 3rd medical report, and that he did recognise that further adjustments were needed at least in respect of the Enviro 400 buses. When he finally did get the report in March 2020 it indicated that the Claimant had been suffering ongoing symptoms for over a year. We find the Claimant did not recover as had been anticipated in the 3rd medical report and the symptoms and disadvantage referred to in the 4th medical report would have been identified sooner if there had been an earlier referral prior to her return to normal duties, as she had requested.

152. The Respondent in fact had the requisite knowledge by 5 March 2020 upon receipt of the 4th medical report.

What steps could have been taken to avoid the disadvantage? The Claimant suggests:

The allocation of regular rest periods and to stretch her legs (the Claimant being unable to sit for more than two hours/possibly three hours at a time).

The allocation of shorter routes.

The allocation of suitable routes particularly with less jarring.

Implementation of the recommendations made by the Respondent's occupational health advisers and Dr Waller.

153. We find that the allocation of one of the Claimant's preferred routes (which were shorter routes with more breaks and less jarring) for example one of the town routes could have been taken to avoid the disadvantage.

154. In addition steps could have been taken to ensure the Claimant avoided the routes that she identified as particularly causing her discomfort.

Was it reasonable for the Respondent to have to take those steps and when?

155. It was reasonable for the Respondent to take those steps from when they should have known about the ongoing disadvantage prior to her return to full duties. If we are wrong about that, and in any event, it was reasonable for the Respondent to have to take the above steps promptly on receipt of the report on 5 March 2020.

156. It was reasonable to implement an interim measure upon receipt of the report by instructing the controllers to ensure the Claimant drove her preferred routes and did not drive the most aggravating routes in the short term.

157. It was reasonable to implement a similar permanent measure as soon as practicable after that date. We were told that this would require a 2-3 week process to involve the input of the trade union and those responsible for rostering but that there was no reason to think it could not have been accommodated. It was reasonable for the Respondent to have to implement that process promptly upon receipt of the report and to ensure that it was implemented as soon as possible on her return to work, irrespective of her sick leave and then furlough. If it was not in place by the time she was to return from furlough then the interim measure could have remained in place or she could have remained on furlough whilst a permanent adjustment was put in place (as she has suggested).

158. We acknowledge that there may have been restrictions on discussing matters during furlough because of the rules about what an employee on furlough could do but there was some contact made by the Respondent so there could have been some discussion but in any event it was reasonable for the Respondent to have had a prompt discussion with the Claimant, and to have put interim measures in place, upon receipt of the report and prior to furlough and upon the Claimant's return before requiring her to drive at all. It was reasonable for the Respondent to take measures to ensure that acting on the medical report was a priority despite the intervention of covid and furlough by ensuring it was diarised or similar and handed over between the managers.

Did the Respondent fail to take those steps?

159. The Respondent did fail to take those steps. The report was not discussed with the Claimant until the Claimant was invited to a meeting on 14 August 2020, which only took place because she lodged a grievance. We find it likely that as a result of the grievance the adjustments would then have been put in place as the Respondents' witness evidence was that it could have been put in place fairly swiftly (2-3 weeks). Unfortunately this was far too late to save the relationship and avoid the Claimant's decline in health with stress and depression.

160. In the meantime the only steps that had been taken was that Mr Spratt had told the controllers to help the Claimant if she told them she needed it, though the Claimant was not aware of this. This meant that the Claimant was still being assigned inappropriate routes. We also note that it is not a reasonable step to leave it that the Claimant has to raise whether or not she is struggling on a day to day basis. Generally it puts a disabled person in an uncomfortable and humiliating position to have to keep asking for the same support on a day to day basis rather than putting the requisite support in place as an adjustment.

Disability-related harassment

Did the Respondent do the following things:

Did Mr Trow on 25th February instruct the Claimant to cover a "double 10 shift"?

133. Mr Trow did require the Claimant to cover a double 10 shift on the 25th February despite her saying that she "hurt" , as he required her to do the first route 10 and then despite his having said he would try to get cover for the 2nd route 10 he did not do so. The only available driver to do it said she was not doing it and in response he laughed. He allowed the Claimant to go and do the route. He accepts he expected her to do it as in his view if she couldn't she should have gone home sick. He accepts he could have been more supportive and Mr Spratt spoke to him at the time to say that this fell short of what he expected from his controllers. Mr Trow's response was to say to the Claimant "if you need help, just ask" in a manner which communicated he had not been happy that he had been spoken to by Mr Spratt.

On 14th July 2020 did Ms Buckley refuse to swap the Claimant for a spare driver when she complained of pain?

134. Ms Buckley did not refuse to swap the Claimant for a spare driver on 14th July 2020. She did question the Claimant as to why she required a swap and was initially resistant to doing so but did agree to the swap. She made the comment "I'm not making a habit of it". She also then formed the view that the Claimant had lied to her based on information from another colleague, though she did not tell the Claimant.

Did the Respondent ignore the Claimant's report dated 18th July 2020 requesting a discussion as to her medical condition and the impact it was having upon her ability to work?

135. Mr Spratt decided to leave the matters raised in the Claimant's report dated 18th July 2020 for Mr Loftus's return. In the interim he asked the controllers to assist the Claimant if she needed it but he did not tell her he had done so. Mr Loftus did not prioritise the report until the Claimant submitted a grievance, albeit by the time of his return the Claimant was absent due to sickness.

On 22nd July did Mr Spratt refuse to discuss, despite the Claimant's request, her health and conditions of work?

136. The Claimant came to the hatch to try to speak with Mr Spratt on 22 July 2020. He did not speak with the Claimant himself but instead sent the message back that he had decided to leave the matter for Mr Loftus.

On or about 29th July 2020 did Mr Trow, one of the Respondent's managers fail to swap the Claimant with a spare driver?

137. On 29th July 2020 the Claimant had been concerned she would go over her maximum legal driving hours but Mr Trow did not accept the problem so she had to use up her break seeking to demonstrate this to him. In the end she did not quite meet the maximum and no spare driver was actually required.

Because the Respondent required the Claimant to drive unsuitable routes (long bumpy rural routes) was the Claimant's health adversely impacted such that she reported sick on or about 31st July 2020?

138. The Respondent did continue to require the Claimant to drive unsuitable routes after receipt of the medical report and the Claimant was very concerned for her health. The Claimant did report sick on or about 31st July 2020. We have insufficient evidence to make a finding that the Claimant's sickness at that time was caused by continuing to drive unsuitable routes. The medical certificate for 31 July 2020 (p 378) referred to a lung problem under investigation then the next certificate dated 28 August referred to work related stress and depression. We accept that the way the Respondent had handled the Claimant's needs for adjustments did contribute to the deterioration in her mental health but there is insufficient evidence to find a link to the lung problem.

Did the Respondent on or about 10th August 2020 allocate a grievance lodged that day by the Claimant to Mr Loftus who the Claimant considered to be a named aggressor against her?

139. The Respondent did initially ask Mr Loftus to look at the grievance which was about the fact that he and others had not acted sooner. He was planning to address the Claimant's situation and discuss the necessary adjustments. However when the Claimant raised that she preferred the grievance be handled by another manager that request was granted. We do not consider it reasonable to consider Mr Loftus an "aggressor".

Despite the letter from Monaco Solicitors on 22nd September (that requested that correspondence should be sent to them) did Mr Loftus then send the Claimant a further copy of his letter dated 18th September 2020; did the alternative Operations Manager send the Claimant the letter dated 21 October 2020 and did the Respondent's solicitor send the letter dated 13 November 2020 stating the Respondent's intention to continue to communicate directly with the Claimant?

140. Monaco Solicitors had made it clear on 22nd September that the Claimant was not in a state of health to deal with correspondence from the Respondent and requested that communication be via the solicitor. A further

copy of Mr Loftus's letter of 18 September 2020 was then received by the Claimant. However it is not known when that was sent and by whom. It was not sent by Mr Loftus.

141. The Respondent's internal communications show that the decision was made to ignore the solicitor's request and to continue to require the Claimant to attend meetings, taking the view that her failure to do so would put her in breach of contract. The alternative Operations Manager did send the letter dated 21 October 2020 to the Claimant (p498) in which he stated that he was "very disappointed that you failed to attend [the scheduled meeting] or inform me….". This was incorrect as the Claimant's solicitor had informed the Respondent that she was not fit to participate. He went on to say if the Claimant failed to attend the next meeting or contact him to arrange an alternative he would instigate the company disciplinary procedure.

142. In the Respondent's solicitor's letter dated 13 November 2020 (p528) the Claimant's solicitor was told – at p534 – that "moving forward the employer will continue to act in accordance with its Sickness Absence policy in regards to keeping in contact whilst considering reasonable adjustments".

143. Did the Respondent fail to implement the recommendations of its own occupational health physician Dr Waller?

144. The Respondent had not implemented the recommendations in the March 2020 report by the time the Claimant submitted her grievance.

Did the Respondent request that the Claimant attend meetings at the Folkestone depot?

145. The meetings were all to be at the Folkestone depot in Mr Loftus's office. None of the meetings took place. The Claimant did not expressly object to meeting there but she had objected to meeting Mr Loftus and had said she would contact the relevant Manager to arrange a meeting at a mutually acceptable location.

If so, was that unwanted conduct? Did it relate to disability?

Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

146. We find the incident of 29th July 2020 did not relate to the Claimant's disability. That related to whether the Claimant was going to exceed the maximum legal driving hours and, though the Claimant was not happy that Mr Trow did not agree with her that she was nearing the limit and she had to use her lunchbreak to try to persuade him, in the end she did not exceed the limit and this disagreement had nothing to do with her disability.

147. The treatment of the controllers, Mr Trow and Ms Buckley, on 25th February 2020 and 14th July 2020 was unwanted and did relate to the Claimant's disability as it related to the way they responded to the Claimant's need or request for adjustments on those particular days due to pain related to her disability.

148. The remaining allegations which relate to the period leading up to the Claimant's sick leave dated 31 July 2020 were related to disability as they relate to the Respondent's failure to implement the adjustments recommended in the medical report and the response to the Claimant's attempts to raise this, and the conduct of the controllers, via the staff report and then by trying to speak with Mr Spratt personally.

149. The two incidents with the controllers are some time apart but the first was just shortly before the Claimant's absence which led into furlough. The second was not long after the return from furlough. So although some months apart they were closer together in terms of work time, one shortly before furlough, one shortly after. One pre-dated the medical report but the other post-dated it.

150. Although Mr Spratt spoke to the controllers about supporting the Claimant if she needed it, neither he nor they informed the Claimant so she was not told of any change to the controllers' attitude. He left matters that they were to provide support if she asked and did not discuss her staff report with her, even when she tried to speak with him on 22nd July. Even then the message from the controller was that the issue was being left for Mr Loftus, not that the Claimant could expect support from the controllers in the meantime.

151. The Claimant tried to carry on, arranging her own swaps with colleagues when she could. We note the Claimant was suffering but also was a hard worker and had a tendency to struggle on rather than prioritise her health and request support on a day to day basis.

152. We find that the cumulative effect of the conduct of the controllers and Mr Spratt's response to the Claimant when she did attempt to seek support did have the effect of creating a hostile environment, leaving the Claimant struggling with pain on unsuitable routes without the necessary adjustments or confidence that she had management encouragement to raise her difficulties and support when she did so.

153. She had not been given the confidence that she would have support from the controllers and was organising her own swaps with colleagues, where possible. She described herself in an "uphill struggle" to get the support she needed. We find that it was also a humiliating environment for the Claimant to be left (without having been given the reassurance that she should raise her need for support and could expect support from the controllers), having to keep raising with colleagues, including controllers who had reacted in the way Mr Trow and Ms Buckley had, that she was struggling to do the job without adjustments.

154. We accept it was not Mr Spratt's intention to have that effect. He intended to leave the matter to be dealt with by the incoming manager who was returning from furlough, with the expectation he would do so, and believed he had spoken with the controllers to ensure support in the meantime. He believed this to be enough.

155. The conduct of Mr Trow and Ms Buckley was intentional. Mr Trow knew the Claimant was in pain and reluctant to do a double 10, he did not arrange cover and laughed when Ms Buckley said she was not doing it. His view was that if the Claimant could not do the double 10 she should go home (off sick). When he was spoken to about his lack of support he then spoke to the Claimant in a manner which indicated resentment that she had raised an issue. Ms Buckley's comment on 14 July 2020 was deliberate to discourage the Claimant from asking for a further swap. Although their behaviour was deliberate we do not find overall that they had the purpose of creating a hostile and humiliating environment.

156. It is the cumulative actions of the controllers responding unsympathetically, in the context of management leaving them to deal with requests from the Claimant when she needed support, rather than respond to her requests to meet and make the necessary adjustments, that created the hostile and humiliating environment. It is reasonable for the conduct to have that effect. We find it is humiliating to place a disabled person in a position where she needs to repeatedly request the same support whenever she is in pain or feels she cannot manage a route rather than management put the necessary ongoing adjustments in place. We note that although there were only two incidents with the controllers they were close together in terms of working weeks and the effect was the Claimant was left trying to manage the situation by doing her own swaps, but was still struggling.

157. Turning now to the letters sent after the Claimant's solicitor had requested that the Respondent direct communication to the solicitor. These were unwanted conduct. The solicitor had asked the Respondent not to continue to communicate with the Claimant due to serious concerns about the Claimant's health and ability to manage (p 425).

158. She referred both to chest pain and the Claimant suffering from work related stress and depression because of the Respondent's treatment. The treatment in question was the way the Respondent had responded to the Claimant's disability and need for adjustments. The solicitor expressly linked the stress and depression to the Respondent's treatment in respect of the Claimant's disability on 21 October 2020. We find the above sufficient to find the Claimant's absence and the request to redirect communication to her solicitor to be disability related. We do not agree with the Respondent's representative's argument that this absence was not disability-related and therefore the conduct of the Respondent was not disability-related.

159. The Respondent's internal communications and the subsequent correspondence to the Claimant and her solicitor demonstrate that there was

a deliberate decision to ignore the solicitor's request and continue to communicate directly with the Claimant and to require her to attend interviews or communicate with the Respondent personally, with the threat of disciplinary action if she did not. For example, the message of the Managing Director on page 494 stating "yes but she's our employee not theirs. Please proceed as you would usually – she needs to attend interviews /medicals and failure to do so will leave her in breach of contract."

160. This was a deliberate decision even though they had been warned that continuing to correspond would be considered harassment. This correspondence was not in any way supportive.

161. This did create an intimidating and hostile environment for the Claimant. The Respondent purposefully ignored the solicitor's request based on the Claimant's serious ill health, and the warning that further contact would be considered harassment. Instead the Respondent threatened disciplinary action knowing they had been told that the Claimant was not fit to attend meetings or deal with the correspondence. We find that the conduct had both the necessary purpose and effect.

Direct disability discrimination

Did the Respondent do the following things . if so was that less favourable treatment because of disability?

Pursuant to the OH reports on 18 February 2019 and 13 April 2019, provide the Claimant with driving routes that made her sit in her driving cab for up to 5.5 hours on 10 hour shift days? The Tribunal confirmed that this would be considered for the period commencing 24th February 2020, that being the first date in the claim.

162. The Claimant did not in fact run a direct disability discrimination claim on this point. Her claim in relation to this was the failure to make reasonable adjustments complaint, which we have upheld. She was treated like she did not have a disability rather than less favourably treated because of her disability.

Upon the Claimant's return from furlough leave on 28th June 2020, remove the Claimant from an AR Rota (As Required)?

163. The Claimant was removed from the AR rota as it was being replaced by one big rota meaning she would be expected to drive all duties and routes "like a healthy non disabled driver". Everyone was taken off it as it was no longer used.

164. The Claimant when asked about comparators talked about others who were kept on furlough.

165. She also referred to a reinstatement of the as required rota in August, by which time she was off sick.

166. There is no evidence that the Claimant was removed from the rota because of her disability. Everyone was removed from it.

167. The suggestion that she should have remained on furlough like others relates more to the reasonable adjustments claim and we have covered this point there.

168. There is insufficient evidence about the reinstatement of the rota whilst the Claimant was off sick prior to her resignation to decide either that there was less favourable treatment or that it was because of disability.

Remove the Claimant from the Weekly Driver Sheets on around 30 August 2020.

169. The Claimant was taken off the weekly driver sheets, whereas others on longterm sickness absence have remained on these. She was only aware as she asked her house mate to take a photo. She says as a result she knew something was going on and that they wanted rid of her.

170. Mr Loftus said his understanding was that those on longterm sickness absence are taken off the weekly driver sheets though he did not know why the Claimant had been removed after just a month's sickness (though she had by then been signed off for a further 2 months). He said the person who would have removed her was another named colleague. We note there is correspondence with that colleague and the Claimant on 7 December 2020 that was very amicable.

171. There is no evidence that the Respondent was trying to get rid of the Claimant and that her name was removed for that reason or because of disability. On the contrary the Respondent insisted the Claimant remained employed long after she had intended to resign. Had they been looking for an opportunity to be rid of her as the Claimant suggests then they would have been more ready to accept the resignation much earlier.

172. The likely explanation is that she was by that point likely to be absent for 3 months. There is no evidence that she would not have been put back on the sheets if and when she returned.

173. There is therefore no evidence that this was less favourable to the Claimant. She would not even have been aware of it if her housemate had not taken a photo of it.

Time Limits

Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates? The Claimant contacted ACAS on 23 October 2020 so matters from 24 July 2020 onwards are in time.

174. The correspondence aspect of the harassment claim all occurred after 24 July 2020 and is in time.

175. The unfair dismissal claim is also in time.

If not, was there conduct extending over a period? If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

176. With respect to the failure to make reasonable adjustments, there was more than one moment when the Respondent failed to make the requisite adjustments and indeed their own case is that this is a case where the Respondent was continuing to consider the question of reasonable adjustments following receipt of the medical report until it could be passed to Mr Loftus in August 2020. The Respondent argues that it did not have the opportunity to consider adjustments until then.

177. We have disagreed with the Respondent as we have identified a number of moments when it would have been reasonable to make adjustments and they did not do so. However it is also right that no final decision had been made and the report had still been passed to Mr Loftus for his return. This is a case where there was an ongoing duty to make adjustments from, at the latest, the March 2020 report and an ongoing omission up until at least 14 August 2020. It is therefore a continuing act that is in time. In any event if we are wrong about that it would be just and equitable to extend time for the reason that the decision had been passed to Mr Loftus on his return and for the reasons set out below.

178. We find the necessary environment for the harassment was ongoing once it was created by the combination of actions of Mr Trow and Mr Spratt on 25 & 27 February 2020 (shortly before furlough), the action of Ms Buckley on 14 July 2020 shortly after furlough and how Mr Spratt responded to her staff report and approach to the hatch on 18 and 22 July 2020. As it was ongoing it was therefore in time.

179. The claims are also part of an in time discriminatory constructive dismissal claim.

If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide: Why were the complaints not made to the Tribunal in time? In any event, is it just and equitable in all the circumstances to extend time?

180. Even if we are wrong that the claims are in time, in our view is it is just and equitable to extend time. When adjustments were not in place in relation to her medical report after her return from furlough the Claimant started to embark on an internal process firstly through the staff report on 18 July 2020 and then through the grievance on 8 August 2020 until she was too unwell to pursue it. She resigned via her solicitor's letter dated 21 October 2020. She contacted ACAS promptly on 23 October 2020 and then submitted her claim on 7 December 2020. She was also very unwell from 31 July 2020. There

was about a month when she was too unwell to contact her solicitor. The letter of 21 October 2020 was sent promptly once the solicitor could take instructions.

181. The Respondent has argued that the question of adjustments was not yet decided by 24 July 2020. The Respondent was aware from 18 July of the crux of the Claimant's claim. The Respondent was clear following the involvement of the solicitor that the claim was being pursued.

182. In all the circumstances it would be just and equitable to extend time.

Next steps

183. A remedy hearing has been listed on 5 October 2023 in Ashford Employment Tribunal before the same panel. It will commence at 10am and you should arrive at 9.30 am.

184. The parties should write to inform the Tribunal within 14 days of whether or not they intend to rely on medical evidence at the remedy hearing and whether or not case management orders are required. They should also indicate whether or not a further case management hearing is required in relation to the medical evidence, and whether it will be available by 5 October 2023.

_____
Employment Judge Corrigan
Date: 19 July 2023

Public access to Employment Tribunal Judgments
All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: www.gov.uk/employment-Tribunal-decisions.

.