EMPLOYMENT TRIBUNALS

Claimant: Mrs S Walton

Respondent: Bradford District Care NHS Foundation Trust

Heard at: Leeds **On:** 26, 27, 28 June 2023.
29 June 2023 (in chambers).

Before: Employment Judge D N Jones
Ms J Lee
Mr L Priestley

REPRESENTATION:
Claimant: Mr M Walton, husband
Respondent: Mr G Price, counsel

JUDGMENT

Corrected under rule 69, due to a clerical error, in paragraph 1.

1. The respondent breached its duty to the claimant as a disabled person to make reasonable adjustments in respect of allowing support by attendance of a family member at a stage ~~2~~ **1** sickness absence review meeting on 15 September 2021. Although that claim was presented more than 3 months later, it was presented within a further period the Tribunal find was just and equitable.

2. The claims for an unfair and discriminatory dismissal and a further complaint of breach of the duty to make adjustments are dismissed.

3. The decision is unanimous.

REASONS

Introduction and issues

1. The complaints are for two breaches of the duty to make reasonable adjustments for the claimant as a disabled person and an unfair or discriminatory constructive dismissal. The claims and issues were considered at a preliminary hearing before Employment Judge Brain on 19 December 2022, as contained in a Case Management Order sent to the parties on 22 December 2022 (the CMO).

2. They are:

   2.1 Did the respondent act as summarised in paragraph 22.2 of the CMO?

   2.2 If so, were such actions calculated or likely to destroy or seriously undermine the trust and confidence between the parties?

   2.3 If so, did the respondent act without reasonable and proper cause?

   2.4 Did the claimant resign as a consequence?

   2.5 If so, did the claimant otherwise affirm the contract by delaying her resignation between the last act which constituted a breach and evincing an intention to keep the contract in existence?

   2.6 Did the provision, criterion or practice (PCP) of allowing only a work colleague or trade union representative to be present at a sickness review meeting on 15 September 2021 place the claimant at a substantial disadvantage?

   2.7 If so, did the respondent know or could it reasonably have been expected to know of the substantial disadvantage?

   2.8 If so, did the respondent fail to make reasonable adjustments to permit the claimant to be accompanied by her husband or another carer to support her?

   2.9 Did the respondent apply a PCP of requiring the claimant to work no less than three days per week or discharge the duties from the clinic in Settle, other GP practices in the region and by domiciliary visits?

   2.10 If so, did that place the claimant at a substantial disadvantage?

   2.11 If so, did the respondent know or ought reasonably to have known that the claimant was placed at this disadvantage?

2.12 If so, did the respondent fail to make reasonable adjustments to enable the claimant to discharge the duties within a radius of 7 miles from her home? 3 By its amended response the respondent admitted the claimant had two disabilities in respect a cardiac condition for the period relating to the claim and a partial foot amputation from November 2021.

Evidence

4 The Tribunal heard evidence from the claimant and her husband, Mr Matthew Walton. The respondent called Mr Gavin Henderson, Podiatry Team Leader, Mr Arron James, Management Investigator and Ms Jane Kennedy Interim Community Lead for Podiatry Services.

5 A bundle of documents of 606 pages was submitted. There was some dispute as to whether documents which had been submitted late by the respondent should be admitted. The Tribunal ruled that they might be relevant and neither party was disadvantaged by their late submission. In the event they were of little assistance.

Background/Facts

6 The respondent is a public health service. It employs 300 staff and operates 53 sites. It services the regions of Bradford, Airedale, Wharfedale and Craven.

7 The claimant is a podiatrist. She was employed by the respondent from 19 October 1992 to 30 July 2020. She resigned by letter of 28 June 2022. It was taken as termination with notice, but the claimant was off sick at the time and not in receipt of pay. She was employed to work 22.5 hours per week. She had worked three days per week prior to her sickness absence which had commenced 16 months previously.

8 In her resignation letter the claimant stated she believed there had been a breach of patient privacy and data security because documents she received pursuant to a subject access request included an email which referred to a diagnosis, for when she was admitted to hospital on 21 November 2021. She believed the managers could not have known of this without accessing her patient data. She listed eight other concerns in bullet point form. In summary they were that the respondent had failed to make adjustments following a request to Ms Kennedy and then in the outcome to her grievance, had sought to justify the outcome to the grievance by submitting it to the occupational health department three months later, had not provided appropriate documentation on request and had delayed her return to work following her sickness absence.

9 The claimant is a disabled person. She has ischaemic heart disease. Her cardiac function is significantly reduced. In February 2021 the claimant had a myocardial infarction caused by three blocked arteries in the heart. She was admitted to hospital on 22 February 2021 and underwent angioplasty and stenting. She had further admissions to hospital during the year for further treatment. She had low blood pressure, could become breathless and pass out quite easily. By February 2022 the function of the heart had improved and the

opinion of the claimant's cardiologist was that, from then, she would be able to return to work provided it was not physically exhausting.

10 The claimant has had amputation of a number of toes in one foot following her admission to hospital with an infection on 21 November 2021.

11 An occupational health report was prepared and sent to Mr Henderson on 23 July 2021. It summarised the claimant's state of health since 22 February 2021, the date when she commenced a period of sick leave following her heart attack. The claimant was not fit to work pending further cardiac surgery which was scheduled in September 2021.

12 On 24 August 2021 the claimant's salary was reduced to half pay under the respondent's Sickness Absence Policy.

13 On 25 August 2021 Mr Walton contacted Ms Kennedy, the manager of Mr Henderson. He asked for a meeting on behalf of the claimant. He said it was of a serious nature. He suggested a representative of the human resources department (HR) be present. Ms Kennedy replied and asked about the purpose of the meeting. There followed a 25 minute telephone call on 27 August 2021 between Mr Walton and Ms Kennedy.

14 During this discussion Mr Walton explained that there were ongoing investigations into improper access to his medical records by the District Nursing Team at Kilmeny. The respondent accepted that a number of unauthorised access breaches had been committed by one nurse in that team who was the sister of Mr Walton. Mr Walton suspected the breaches were more widespread with other parties involved. He was aggrieved about the slow progress of the investigation. Ms Kennedy recalls him saying he was to involve solicitors because he was being ignored and, although Mr Walton denied this comment, we consider it likely he did make it because of his frustration at the time.

15 Mr Walton then said that his wife did not wish to work with members of the Kilmeny team who had accessed his records. He said some of his medical records contained information about his wife.

16 In respect of any meeting with the claimant, although none had been scheduled at that time, he asked if he could be present to support his wife. Ms Kennedy knew she had a heart condition because of the content of the fit to work notes. He said the claimant had collapsed twice and this had prevented her coming back to work. He said Mrs Walton was stressed.

17 Because of the reference to involving solicitors, Ms Kennedy took advice from Mr Cooke, one of the respondent general managers, and a human resources adviser. She then wrote to Mr Walton to inform him that the concerns about the claimant returning to work because of unauthorised access to Mr Walton's records and those further investigations were being dealt with elsewhere and she could not therefore comment. In respect of attendance at any meeting, she informed Mr Walton that, pursuant to the Supporting Attendance Policy, the

meeting would be with the claimant and she could be accompanied by a union or society representative. She added "*the Trust has said that unless Susan is unable to communicate for herself and that there is a letter to support this, then Susan is the only person that the Trust can discuss any absence with and the meeting will be with Susan and not with yourself".*

18 On 15 September 2021 Mr Henderson held a remote video meeting with the claimant. She was at home. Her union representative attended from other premises. Her union representative raised the issue of her concern about working with nurses who had accessed Mr Walton's records. The human resources advisor said that was the subject of a different investigation and not therefore a matter for this meeting. The claimant also said that her representative raised her request for her husband to attend and support her. Mr Henderson disputed this. We did not have the advantage of hearing from the union representative or having any note of what was said at the meeting. On balance, we are not satisfied the issue of Mr Walton's attendance was raised. Mr Henderson had not been told of the decision of Ms Kennedy. The meeting was brief. The claimant was upset and so Mr Henderson ended the meeting. There was nothing which could be decided in respect of a return to work at that stage pending the further surgery later that month and a report from the cardiologist.

19 Mr Henderson wrote to the claimant on 15 September 2021 to confirm the discussion and update the claimant on the position in respect of sick pay which he said would reduce to zero on 22 February 2022.

20 The claimant wrote to Mr Henderson on 23 September 2021. She attached a complaint she had submitted. The claimant observed that its content was not mentioned in the letter Mr Henderson had sent on 15 September 2021. In his reply, Mr Henderson said he would forward the statement of complaint to the human resources officer and that he had not referred to the matter included in that complaint because he had not believed the claimant wished to talk about it.

21 The written complaint was part of a formal grievance dated 22 September 2021. It was that her health condition had not been considered and that Ms Kennedy had bluntly rejected a proposal made by her husband. In the narrative attached to the grievance, the claimant referred to her concern about working with those who had accessed her husband's data improperly at the Kilmeny surgery and her wish to know the identity of those individuals. In respect of support at meetings, she stated that with her dysfunctional heart, if left on her own in a room, she would have no means to summons assistance. She added that she felt she had not been supported, not having access to policies to which Ms Kennedy had referred. She complained of disability discrimination.

22 The grievance was considered with the claimant at a meeting with Mr James on 7 October 2021. Mr James is a Management Investigator who is independent of the claimant's line management. The claimant asked him to speak to Ms Kennedy and he did so.

23 Mr James wrote his decision in respect of the grievance in a letter dated 1 November 2021. This was not sent out until 17 November 2021. That was due to the absence from work of a senior HR business partner who had to review the letter in accordance with the respondent's practices. He informed the claimant of the reason for the delay on 8 November 2021, following a concern she had expressed by email that there had been more than a month's delay since she had submitted her complaint. Mr James did not redate the letter to 17 November 2021. The time for appealing of 10 days would have then expired, as the letter referred to time running from its date.

24 The claimant was admitted to hospital with an infection on 21 November 2021. On 24 November 2021 Mr James sent an email to the senior HR partner who had reviewed the letter to inform him that an update had been received from Mr Henderson and passed to HR that the claimant was at the BRI and had an antibiotic resistant infection, was very unwell and would remain in hospital for some time.

25 Mr James identified the grievance in the outcome letter. It was that Ms Kennedy had failed to consider the claimant's current health condition and disability for hearings which were held remotely. His enquiries revealed that Ms Kennedy had sought advice from HR and she had repeated that advice. He recorded his understanding of the claimant's request for her husband to be present at meetings. That was that because Mr Walton had knowledge of the claimant's health needs and would be able to offer medical assistance in the event she suffered an adverse health episode during any meeting. Those were presently taking place remotely.

26 He concluded that Ms Kennedy had misunderstood the reason for the request for Mr Walton's presence at meetings. He made the following proposals: "*A referral to the Trust's Occupational Health department, to determine the suitability of your attendance at any future meetings between you and the trust. Following which, and in the event, you are advised that meetings with the Trust are appropriate;*

* *Matthew remains on hand for the duration of any meetings but does not attend the meeting (i.e., Matthew would wait nearby, in another room for the duration of the meeting)*

* *Prior to the commencement of any meetings, the staff member conducting the meeting is provided with a suitable contact number for Matthew, to enable contact to be made with him immediately should it become apparent you require medical assistance or support.*

* *The staff member conducting the meeting is provided with details of your current location (address), in the event Matthew cannot be reached and in order for emergency assistance to be directed to your location if required.*

* *Any meeting between you and the Trust is stopped immediately if either party has concerns that you are unable to continue, due to your health concerns.*"

27 On 22 November 2021 Mr Walton wrote to Mr James and informed him that the claimant had been admitted to hospital. He informed Mr James that the claimant

did not accept his response to the grievance. Mr Walton asked to be forwarded the occupational health report and risk assessment that took place for him to formulate his proposals for attendance at meetings. He stated that must be why it had taken two months to respond. Mr Walton's letter contained disobliging remarks: he anticipated that Mr Walton's first thoughts would be that the claimant's admission to hospital was nothing to do with him, that he would probably require the claimant's handwritten authority to correspond with Mr James in blood and that Mr James required disability awareness training. Mr James did not reply.

28 On 21 January 2022 Mr Walton forwarded a copy of this email to Mr Henderson. He stated they were not happy with the proposal for support and that they had requested an occupational health report and risk assessment upon which Mr James had made his recommendation but they had not had a response.

29 On 21 January 2022 Mr Henderson contacted the claimant by text. It was in familiar terms as they were friends as well as work colleagues. Having asked how the claimant was, he asked if it would be possible to refer her to occupational health for them to consider whether a meeting by phone or video could take place to discuss her long-term sickness absence. The claimant replied by text. She said she was a little confused. She stated that Mr Walton had previously requested the risk assessment and occupational health report but they had heard nothing and she wondered why another referral was therefore necessary. In response, Mr Henderson said that the grievance was a separate matter and not to do with her absence. He repeated that this referral to occupational health was to ensure the meeting could take place without any undue stress. He said this was supportive. He added that such a referral would not be necessary if the claimant felt she was able to chat to him. The claimant agreed, in response, to an informal chat.

30 On 1 February 2022 Mr Henderson wrote to the claimant to invite her to attend a stage 2 sickness absence review meeting by Teams on 16 March 2022. He informed the claimant she could be accompanied by a work colleague or trade union representative. He stated that her pay would be reduced to nil under the Occupational Sick Pay policy on 22 February 2022.

31 On 14 February 2022 the claimant sent an email to Mr Henderson confirming she would have to arrange for union representation for the proposed meeting. She requested to take her annual leave from 22 February 2022. She stated that a staged return to work could then commence after her annual leave.

32 On 15 February 2022 Mr Henderson replied by email. He thanked the claimant for agreeing to attend a stage 2 absence meeting. He said he would forward her annual leave request to HR. He stated that the request for documents concerning the grievance was a separate process. The claimant responded to say her request for documents was nothing to do with any grievance because, in her view, Mr James spent two months preparing his proposal for reasonable

adjustments and therefore must have had a risk assessment and occupational health report. She said she was entitled to the documents. In response, on 15 February 2022, Mr Henderson said he would pass the request for documents to HR.

33 On 1 March 2022 Mr Henderson wrote to the claimant confirming she could take annual leave with the result that she would be paid until 1 April 2022. Her sick pay would by then expire. He informed the claimant that he had not received the grievance outcome letter from Mr James and had only seen a copy which the claimant had recently sent him. He stated the grievance appeal process had been paused because the claimant had been admitted to hospital and that he

would seek guidance from the occupational health department about when it would be feasible to resume the ten day appeal process. He said he would forward the grievance outcome letter to the occupational health advisor to confirm the proposals were reasonable and appropriate. He would ask about reasonable adjustments for a return to work and about her fitness to attend the stage 2 meeting.

34 On 2 March 2022 Mr Henderson wrote to the occupational health advisor. He asked if there was an updated cardiologist report. He stated that the claimant had been in hospital from December but was now at home. He referred to the grievance which had taken place and sought advice as to when the process in respect of any appeal should be reinstated, having regard to the claimant's health. He recited the proposals of Mr James for support at any meeting. He stated that the claimant had said she was determined to return to work. He posed the following questions:

"1. In light of the fact that SW was admitted to hospital the grievance appeal process was paused. Please could you advise when SW would be fit to participate in this process and therefore what date we would be able to resume the 10 day grievance appeal process?

2. In an E mail I have received from Susan has said that she would be willing to return to work on a phased return in the next month or so. I would like to know if this is feasible as I am aware of how bad her health is and would she be able to cope with the work load that would be expected of her. The role can be mentally stressful and also physically stressful.

3. If Susan were to come back to work what type of reasonable adjustments the Podiatry department would have to make to accommodate any medical emergency should she require it. As a department yes we work in some GP surgeries but we are not affiliated with the surgery so they would have no obligation to keep a lookout on Susan's health while at work.

4. Susan worked for three days a week and is the minimum amount of days the department would like an employee to work. Would Susan be able to do this many hours of work without it affecting service delivery on a weekly and daily basis.

5. Would occupational health recommend to Susan due to her health that she take early retirement as she would not be able to fulfil her work commitments."

35 On 8 March 2022 Mr Henderson wrote to the claimant and informed her that HR would be contacted about starting a ten-day appeal process in respect of the grievance. He confirmed occupational health would be in touch.

36 On 11 March 2020 the claimant sent an email to Mr Henderson, copying in some HR officers. She repeated that she had not received the risk assessment and occupational health report which she had requested. She stated it was obvious from his response that the documents never existed. She said that an unqualified proposal had been made without any supporting evidence of professional input. She said that this was to propose dangerous support she never agreed to and could only be accepted by idiots, the only advice coming from 'Mr Heath Robinson'. She queried what the problem with having someone in the room with her was. She complained that the respondent had chosen to isolate her. She stated the only conclusion was that Ms Kennedy and her cohorts from HR

believed she was faking her health condition. She said she had been placed in a potentially life-threatening position; she had asked to be treated fairly. She made a subject data access request for all unredacted audit trails of her medical records from 1 November 2021. She requested all emails and documents from her personnel file for the last 26 months.

37 On 15 March 2022 Mr Henderson replied. In respect of the information requested from the grievance outcome he stated he could not facilitate that and would ask occupational health to confirm she could participate in an appeals process. He stated that he would take advice from occupational health in respect of whether the meeting could go ahead the following day, on 16 March 2022, because he was satisfied the claimant was unhappy with proposals about support in meetings. He stated that the occupational health advisor was on leave and so it might not be possible to obtain advice by the following day. He stated that following her annual leave they would work out a timetable for the claimant's return and how it could be accommodated, with advice from the occupational health advisor in respect of any adjustments. He stated he had forwarded the request for her subject data.

38 On 15 March 2022 Mr Walton sent two text messages to Mr Henderson, the first stating that "*someone needs to step in now to stop this madness before my wife dies*" and the second saying the claimant had not received an invitation for the meeting on 16 March 2022. The same day Mr Walton called Mr Henderson. Mr Henderson stated that Mr Walton was aggressive, shouted and swore, and stated "*you fucking lot need to sort things out, if my wife dies then there is going to be hell to pay*". He stated that his wife was downstairs crying her eyes out and that Mr Henderson had better be careful. Mr Walton put the phone down. Mr Henderson was upset by the phone call. It reduced him to tears. He sent the claimant an email and stated that, in the light of the telephone call, the meeting the following day would be cancelled.

39 On 31 March 2022 the claimant had a telephone meeting with the occupational health advisor.

40 On 13 April 2022 the occupational health department sent to the claimant a copy of the advisor's report and asked for confirmation it could be sent to her managers.

41 On 20 April 2022 the claimant replied. She stated she was not happy with the report and did not consent to its release. She said it was factually inaccurate. She stated she had not been sent a copy of the request from the respondent and asked for a copy of it.

42 On 10 May 2022 Mr James wrote to the claimant by email to inform her the 10 day appeal period had been paused given the circumstances. He stated that the 10 day period would be reinstated from 16 May 2022, with the final date for the appeal to be submitted by 30 May 2022 unless he heard from the claimant further. This was only sent to the claimant's work email and not to her personal email. She did not receive it.

43 On 17 May 2022 Mr Henderson wrote to the claimant to invite her to a stage 2 long-term sickness absence meeting. He asked the claimant to liaise with the occupational health advisor so that the report could be sent in by 23 May 2022. He informed the claimant that there were no further outstanding documents from the grievance process and that the proposals were identified by a senior manager with HR supporting. The claimant replied on 20 May 2022 to state that the occupational health report was still not agreed and included false statements. She was still trying to clear that up. She asked for the name of the senior manager he had identified, who had been involved in the grievance process. (In his evidence, Mr James said that there was no other manager involved and the decision was his, evidence we accepted. Mr Henderson's suggestion to the contrary was a mistake and was incorrect). She asked how the proposal was in compliance with the Trust policy to support her health, wellbeing and safety. She said she would start a grievance against the senior manager.

44 Further communication took place between the claimant and the occupational health advisor. On 25 May 2022 the claimant sent the advisor an email to clarify matters. Mr Henderson was copied into this email. The claimant stated that the request for support she had made the previous August was no longer relevant and the focus of the report should be upon her return to work at that time and what support she needed for that. She identified a factual inaccuracy in the report, that she had not requested a response to the grievance to be in writing and she stated that she had not been told the grievance process had been paused because of her admission to hospital. (Mr Henderson had informed the claimant that the grievance process had been paused in his letter of 1 March 2022 and that he would ask the advice of occupational health as to when it could be resumed). She requested the report be revised to remove references to the grievance and focus upon what was needed for her return to work.

45 On 8 June 2022 the occupational health advisor sent the claimant an amended report. She said she had taken on board her comments. She stated that she had

suggested a further referral, given two months had elapsed since the appointment.

46 On 9 June 2022 the claimant wrote to Mr Henderson to express her concern that she was not being paid and this was attributable to the delays of the respondent.

47 On 22 June 2022 Mr Henderson wrote to the occupational health department requesting the outstanding report. He was informed that an amended report had been sent to the claimant on 20 June 2022. The approved report was finally sent to Mr Henderson on 27 June 2022.

48 The advisor reported that the cardiologist had said the claimant could return if the work was not physically exhausting. A return was subject to the GP deeming the claimant fit. Subject to that, the advisor recommended a return, whereupon a risk assessment should be undertaken. In respect of the question as to whether the claimant could work for three days per week, the advisor stated, "*this is difficult to predict however Susan would like to try to gradually with increased hours over a few weeks with the aim of resuming three full days. I recommend Susan works Monday, Wednesday, Friday as this will enable periods of rest during working*

week". The advisor recommended a phased return to work whereby she would undertake three hours for three days a week and, depending on how she coped, gradually increasing the shifts by one hour a day to enable her to rebuild her stamina and increase the range of duties. She recommended the claimant should work from home for at least two months. She recommended one-to-one meetings on a weekly basis. In respect of the query about retirement, the adviser stated that this would be the claimant's decision and subject to her making an application.

49 The claimant resigned on 28 June 2022.

50 Mr Cooke invited the claimant to a meeting to explore the concerns by email of 8 July 2022. The claimant agreed to meet. That took place on 16 September 2022. Mr Cooke wrote on 1 November 2022 to summarise what had been discussed and the outcome of his enquiries. He had asked the claimant if she would consider returning to work on alternative roles with reasonable adjustments. The claimant had declined. He addressed the concerns raised about data security. In respect of the issue about what had been said of the claimant's admission to hospital, he stated that Mr Henderson had provided the information to Mr James. Mr Henderson could not recall from where he had obtained the information but thought it might have been a work colleague. He said he had reviewed the medical records and could confirm there was no illegitimate access. He asked if the claimant would give her consent to undertake an audit of the hospital's electronic patient record to see if any podiatrist had accessed the system. This was not followed up by the claimant. In evidence she said it was because she later made a data subject access request.

The Law

Discrimination

51 By section 39 (5) of the Equality Act 2010 (EqA) a duty to make adjustments applies to an employer and by section 21 of the EqA failure to comply with the duty in section 20 (below) is a failure to comply with a duty to make reasonable adjustments which is discrimination against a disabled person.

52 By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

The duty to make adjustments

53 Section 20 of the EqA provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

54 By paragraph 2 of Schedule 8 of the EqA, "*A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement*". Unfair dismissal

55 By section 94 of the ERA an employee has the right not to be unfairly dismissed.

56 A dismissal is defined by section 95 of the ERA and includes the employee terminating 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, section 95(1)(c). This is known as a constructive dismissal.

57 In order for there to be a constructive dismissal, the employee must have resigned because his employer has committed a fundamental breach of contract and he must not have otherwise affirmed the contract, for example by delaying his resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** and ***Buckland v Bournemouth University [2010] IRLR 445***. The term is not to be equated to a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*** and ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***.

58 There is an implied term in a contract of employment that the employer will take reasonable steps to ensure the employee is safe, see ***Johnstone v Bloomsbury Health Authority [1991] ICR 269***.

59 There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see ***Malik v BCCI SA (in liquidation) [1998] AC 20***.

60 Such a breach may be because of one act of conduct or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see ***Lewis v Motorworld Garages Ltd [1986] ICR 157***. If a series of acts, the last event must add something to the series in some way although, of itself, it may be reasonable, see ***Omilaju v London Borough of Waltham Forest [2004] ICR 157*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1***.

61 In ***Bournemouth University v Buckland [2011] QB 323***, Jacob LJ said, at paragraph 54, "*Next, a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation*", and at 56 "*Once an employer has committed a repudiatory breach there will generally be some time for him to try to make amends, for tempers to cool and for the employee to make a rational decision as whether he or she should stay on*".

Time Limits

40 By section 123(1) of the EqA proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint

relates, or such other period as the employment tribunal thinks just and equitable.

41By section 123(2) of the EqA conduct extending over a period is to be treated as done at the end of the period. In ***Commissioner of Police for the Metropolis v Hendricks (2003) ICR 503***, the Court of Appeal held that an act extending over a period was distinct from the succession of unconnected isolated specific acts that could constitute a state of affairs and was not restricted to a rule, policy or practice as identified in the earlier case law.

62 The higher courts have provided guidance upon the principles to be taken into account in determining whether it is just and equitable to allow a claim to proceed, notwithstanding the primary period has expired. The court must take into account anything which is relevant, see ***Hutchinson v Westwood Television Limited [1977] IRLR 69***, and this could include those factors which are considered in the exercise of the discretion of personal injury claims by virtue of section 33 of the Limitation Act 1980, see ***British Coal Corporation v Keeble [1997] IRLR 336***.

63 In ***Robertson v Bexley Community Centre [2003] IRLR 434***, the Court of Appeal stated that it was for the claimant to persuade the Tribunal that it was just and equitable to extent time, and that the exercise of the discretion was the exception rather than the rule. However, in ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327*****]** the Court of Appeal expressed caution about those remarks and Sedley LJ said, "*There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised*."

64 The Tribunal will always consider the prejudice to a party of a decision to extend time or to refuse the extension, see ***Miller v Ministry of Justice [2015] UKEAT 0003/15***. Prejudice to a respondent will include the loss of the limitation defence and also forensic prejudice which may arise from having to meet a case which has been brought later than was expected so that the quality of evidence is corroded by faded memories or loss of documents.

Analysis and Conclusions

Failing to make the reasonable adjustments.

Support at the meeting on 15 September 2021

65 The respondent accepted that there was a PCP in its policies of allowing attendance at sickness review meetings of a union representative or work colleague with the employee concerned. Having taken advice in August 2021, Ms Kennedy misstated this policy but said she was repeating what she had been told by HR. She made no reference to a work colleague attending as an alternative.

66 We are satisfied that the PCP would have placed claimant at a substantial disadvantage at the time. She had undergone heart surgery following a serious cardiac illness. The first occupational health report of 23 July 2021 confirmed that four stents had been fitted and further surgery was to take place, that there was

significant heart damage and the claimant was at risk of passing out if she became breathless. She had been left with low blood pressure.

67 At this time, meetings were taking place remotely because Covid restrictions still applied. Employees would therefore have meetings with their managers from home, unless they were otherwise at work. The problem the claimant faced was that her low blood pressure combined with the stresses of such meetings meant that she was vulnerable to fainting and would benefit from the attendance of someone else. A person who did not have the disability of the claimant would not face that disadvantage. Given the Covid restrictions, the obvious person to assist would have been the claimant's husband. He was at home with the claimant and knew about her condition. Alternatively, her son or daughter could have assisted. A work colleague or union representative attending remotely would not have been able to intervene immediately if the claimant passed out. That left the claimant without adequate reassurance in the circumstances.

68 Ms Kennedy was confused about this request. We do not accept the allegation of the claimant that Ms Kennedy believed she was faking her condition. In the 25 minute telephone discussion with Mr Walton, on 27 August 2022, three matters were discussed and this was the last. The first concerned his own complaint about access to his medical records which took up a significant part of the conversation. The second concern the claimant's concern about working with colleagues who had improperly accessed her husband's records. The third concerned support at meetings.

69 In seeking advice from HR about how to proceed, it is unlikely Ms Kennedy explained the reason behind the request for support. We find she had not fully appreciated the reason for it, following the long phone call. The decision that it would not be appropriate to have another person present unless the claimant was not able to communicate missed the point. This was nothing to do with the capacity to communicate. Ms Kennedy and the HR adviser did not know of the particular disadvantage to which the claimant would be placed.

70 We are satisfied that they ought to have. Ms Kennedy failed to evaluate the third issue raised by Mr Walton. We recognise there was a tendency for the issues Mr Walton raised to overlap, which could be a distraction, and the majority of the call was about the other issues. Nevertheless, on what she had been told, it was necessary for Ms Kennedy to seek further clarification by written communication with the claimant. The HR adviser or Ms Kennedy should have sent an email to the claimant to ask about the request. It was unwise to make a decision on what Mr Walton had said in a lengthy and complex telephone call. The adjustment was for the claimant. It would be reasonable to assume Mr Walton was raising a genuine concern for his wife and this needed to be explored further with the claimant, before a decision was made.

71 Had that been done, the particular disadvantage which we have identified above would have become clear. Any cross reference to the earlier occupational health report of July 2021 would have confirmed the medical position.

72 To have allowed Mr Walton to be present during the remote meeting to reassure the claimant and to safeguard her in the event of a health episode was a modest adjustment. It would have removed the disadvantage. There was a breach of the duty, regardless of the fact that this was not raised again at the commencement of the meeting on 15 September 2021. It is remarkable that the decision of Ms Kennedy had not been conveyed to Mr Henderson by Ms Kennedy or the HR officer who advised him.

73 We recognise that there were probably concerns, which were not voiced, about whether Mr Walton would have been able to discharge the role of attending and not becoming involved in the meeting. In an email, which he could not remember but which we find Mr Walton sent to Ms Kennedy on 15 September 2021, Mr Walton acknowledged matters had taken a toll on him, so it was properly wise that he was not there. But further discussion about that was closed down, because of the uncompromising stance which Ms Kennedy had taken by then on HR advice. The reasonable course would have been to allow the adjustment and, if Mr Walton could not have restrained himself, then to have rearranged the meeting with the claimant's son or daughter in attendance.

Return to work

74 Although denied, we find there was a PCP that the claimant would work 3 days per week. This was in accordance with her contract of employment and expressed as a minimum expectation in Mr Henderson's referral of 2 March 2022.

75 In addition, there was a PCP that the claimant would discharge her duties from the Settle clinic, other GP practices and by domiciliary visits. Those were the duties of her job.

76 These PCP's would have placed the claimant at a substantial disadvantage in the spring of 2021 for the reasons explained in the occupational health report. That is why a phased return was recommended, starting with restricted duties from home in the first 2 months.

77 There was, however, no breach of the duty to make adjustments. The claimant resigned before the respondent had the opportunity to embark upon the phased return. There is every reason to suppose the recommendations would have been accepted. The claimant seems to base this part of the case on what she expected the respondent would not have agreed to as time went by. She wished to build up her work to 3 days, as before and to cover her full range of duties at some stage. Whether that could have been achieved because of her state of health or whether the respondent's business needs could have accommodated the level of adjustments that might have been necessary remains a matter of conjecture. It does not found the basis of a reasonable adjustments claim.

Constructive dismissal The implied term of trust and confidence

Not giving a transparent account as to how the claimant's grievance about the sickness review meeting of 23 September 2021 was dealt with.

78 The alleged lack of transparency appears to have been the failure of the respondent to produce a risk assessment and occupational health report which Mr Walton first suggested must have existed in his discourteous email to Mr James on 22 November 2021. There were then further requests which we have recorded in the facts above to which no early response was given until, ultimately, Mr Henderson confirmed they did not exist on 17 May 2022.

79 Criticism can be made of the respondent collectively, of failing to respond to these requests at an earlier stage. The problem arose initially because Mr James did not communicate with Mr Walton following his email of 22 November 2021. In evidence he said that was because he had found it personally offensive and that he did not have confirmation that he could communicate with Mr Walton about these matters on behalf of his wife. Ordinarily when someone is ill, information about their situation is conveyed by family members. This is done without written authority from the employee. This is a practical and sensible way of managing work relationships. Mr James accepted, in hindsight, he should have communicated to Mr Walton to state that he would communicate with the claimant about the matters in his email.

80 The claimant's own requests for a response to this email and to produce any reports or clarify that they did not exist was not picked up by Mr Henderson initially in January 2022. He had not been provided with a copy of Mr James letter. He therefore referred matters onto the HR Department, which is perfectly understandable in February 2022, but he failed to confirm in writing that no such documents existed until 17 May 2022. He knew that was the case at an earlier stage; it is recorded in the referral to the occupational health advisor in his letter of 2 March 2022. He should have cleared this up at that time with the claimant. By then the claimant knew no such documents existed. She stated that in her emotive and confrontational email to Mr Henderson 11 March 2022..

81 Were these failures to respond to requests for a risk assessment and an occupational health report acts which were calculated or likely to destroy or seriously undermine trust and confidence? That is an objective question. We do not find they were.

82 It was not possible to infer that a written risk assessment or occupational health advice had been obtained by Mr James. It is a proposition which ignores and contradicts the outcome letter. Mr James had proposed that advice would be taken from occupational health, not that it had been taken. In the interim and for the foreseeable future he proposed measures be put in place. Those were to address the health needs which he identified. He explained that Ms Kennedy had misunderstood the request. The proposition that he had made the interim proposals on new occupational health advice is misconceived, as he would have no need for interim measures had he already obtained the occupational health advice.

83 It was an assertion made by Mr Walton, based upon the fact that there had been a delay of two months from the inception of the grievance to its outcome on 17 November 2021. The delay had already been explained by Mr James on 8 November 2021. It had nothing to do with him obtaining occupational health advice or formulating a risk assessment. He specifically said it was because he was awaiting the review of his outcome letter by a senior HR business partner and had difficulty aligning their diaries.

84 The claimant and Mr Walton were bitterly critical of the proposals. Although we have concluded it would have been reasonable to allow Mr Walton to have been present at a meeting, it does not follow that the alternative suggestions of Mr James were unreasonable. Unlike Ms Kennedy he acknowledged the reason for the adjustments and made suggestions to protect the claimant's health by providing for levels of communication with and proximity to Mr Walton to minimise risks. This was an interim, holding position. A meeting may not even have been required before occupational health advice were received. That was frustrated by the admission of the claimant into hospital. The hostile and angry reaction to the recommendations and the personal criticisms of Mr James by Mr Walton and the claimant were unwarranted.

85 Moreover, the procedures of the respondent made it clear how to challenge a grievance. That was by appealing it. Mr Henderson or Mr James were not obliged to embark upon a written justification of the outcome in further communications with disclosure of materials used and people involved. All of this was for scrutiny in an appeal. The claimant had been told that the appeal process had been extended but at no time did she seek to pursue that avenue. Repeated demands for reports or the names of others involved were not the

proper way to resolve the concerns. Although Mr Henderson could have replied more quickly to the queries, his failure to do so was not, in the circumstances, calculated or likely to destroy or undermine trust and confidence.

Discovering (prior to her resignation) from the email of 24 November 2021 that her medical records had been accessed without her permission.

86 The claimant infers that the information in Mr James' email of 24 November 2021 must have been extracted from her medical records because she was in hospital, not in contact with the staff at the respondent and communicated only by text, because of the gravity of her condition.

87 Mr James knew that the claimant was in hospital because he had been informed of that by Mr Walton, in his email of 21 November 2021. His remarks about the claimant's condition that she had an antibiotic resistant infection, was very unwell and would remain in hospital came from information he received from Mr Henderson. Mr Henderson said he obtained that information from Helen Kirk who was another Podiatry Team Leader in the

Department and was the claimant's best friend. We did not hear evidence from Ms Kirk.

88 We consider the account of Mr Henderson and Mr James is likely to be correct. The information in the email of Mr James about the claimant's diagnosis is incorrect. The medical records for the material time which we have seen make no reference to a resistant antibiotic infection. The claimant was never told that was an issue. She said it might be information in a medical record which she has not seen as she has not obtained all her medical records.

89 This allegation is speculative and not borne out on the evidence. It assumes the illegal access to the records is of something the claimant has not seen, although she could have requested it, or is a mistaken interpretation of the records. Neither seem likely. Mr Cooke wrote to the claimant to say an audit undertaken for him revealed no violation of access to medical records and the claimant did not take up his offer of consent for a search of the hospital records. It would be more likely that the information about the claimant's condition came from her friend. Mr Henderson and the claimant were friends as well as colleagues, as is clear from the text communications in early 2022. Discussions between him and Ms Kirk, also a colleague and best friend of the claimant are highly likely, given the concerns they would doubtless have for their friend who had been recently taken to hospital.

Finding out prior to her resignation that the occupational health review referral was couched in negative terms discouraging the claimant's return to work.

90 The claimant received the referral letter of 2 March 2022 from Mr Henderson to occupational health advisors in late June 2022 in response to her data subject access request.

91 Its content had largely been reproduced in the occupational health advisors report which had been sent to the claimant on 13 April 2022. We do not consider that the referral letter itself disclosed anything which was significantly different to what was in the April report.

92 The claimant says that the tone of Mr Henderson's referral suggested he was seeking to influence the occupational health advisor with a view to discouraging any return to work.

93 In his evidence Mr Henderson accepted that on one reading, his wording could be read as reflecting a view he had formed that the claimant would not be able to return. In respect of the last question, "*Would occupational health recommend to Susan due to her health that she take early retirement as she would not be able to fulfil her work commitments",* he said the word *as* might be construed as his opinion the claimant could not undertake her work. Taken together with his earlier remarks that he was aware of how bad the claimant's health and his reference to a minimum requirement to work 3 days per week, the author could be said to have conveyed a pessimistic view about the

claimant's prospects of successfully returning to work. That said, the question about retirement is one which the guidance raises. Raising this as a consideration of itself, should not have carried a negative connotation.

94 Up until this time, Mr Henderson had been on friendly terms with the claimant. That changed a few days later when he received the claimant's email of 14 March 2022 and the telephone call from Mr Walton on 15 March 2022. There can be no doubt that he was well disposed to the claimant before that time. We find he was doing his best to assist her. He was criticised for not contacting her. He resumed contact by text in January 2022 and before then was mindful of the fact the claimant was in hospital. He was clearly concerned he should seek guidance as to how safely to communicate, given the problems which had arisen the previous year which had given rise to the grievance. We do not find that the terms of the referral were calculated to destroy trust and confidence. We find Mr Henderson wished for the best outcome for his colleague. His view of her health and prospects may have been influenced by the length of her absences and the number of hospital admissions she had had in the past 12 months.

95 Nor do we consider, objectively, the terms of his referral were likely to have destroyed or seriously undermined trust and confidence. Mr Henderson might have posed two of the questions differently, but context was required to issues raised and without it the advice would be so abstract as to be of little use. We do not consider, objectively, an employee would regard the referral as one which eroded or broke trust.

96 More fundamentally, we do not find that the claimant resigned because she believed the referral was cast in negative terms. She made no mention of that in her resignation letter. We find it is an idea that has evolved subsequently.

97 In the resignation letter, the claimant complained that Mr Henderson had included the grievance in his referral to obtain retrospective justification for Mr James's proposals. This was a matter she wished removed from the report which was a principal reason for the delay.

98 That criticism is unfounded. The repeated complaints made to Mr Henderson about the proposals of Mr James would inevitably have led to the conclusion that this matter needed addressing with occupational health advice. That is the very recommendation Mr James made. The claimant never suggested it was inappropriate prior to the referral, only doing so after she saw the first report. It would have been a failure to act responsibly, had Mr Henderson not initially invited the occupational health advisor to comment on whether support in meetings was required.

Putting the claimant upon zero pay.

99 The contract of employment of the claimant was not included in the bundle. Both parties referred to policies, extracts of which were included.

100 On the basis of those, we find there was a sick pay scheme, which envisaged an entitlement to full pay for the first six months of absence. That would then reduce to half pay for the following six months. The expectation was pay would be reduced to nil thereafter.

101 Half pay would be reinstated if there had not been a final review meeting. A local collective agreement provided that would only be when the failure to undertake the final review meeting was due to delay by the employer; not where the review was delayed due to reasons other than those caused by the employer.

102 The case had not been pleaded upon this clause, nor was it raised at the preliminary hearing. Rather, it had been suggested that, where there had been a failure to make reasonable adjustments, there was a term that the employer will be entitled to pay. There is no such express term.

103 We have considered the case on the basis of the policy as above. We must consider whether there was a delay to the final review meeting by the respondent. If so, the claimant would have been entitled to reinstatement of half pay.

104 There had been a delay in holding the stage 1 review because Mr Henderson had not wanted the claimant to feel unnecessary stress in the first months of her absence. There would have been time for the second and third final reviews before the expiration of half pay entitlement, had the claimant not been admitted to hospital in November 2021. The delay that caused could not be attributed to the employer.

105 Half pay was to expire on 22 February 2022. Mr Henderson had sought permission to make referral to occupational health in January 2022, in text communications with the claimant. She had taken annual leave which extended matters to 1 April 2022, but the staged 2 review was delayed from 16 March 2022 following the intervention of the claimant's husband in a difficult phone call with Mr Henderson. We are satisfied that the tone and manner of Mr Walton was inappropriate. There was then a further delay because the claimant did not agree with the inclusion of the grievance matters in the occupational health report. For the reasons we have set out, it was entirely appropriate for that to have been included. The delay continued until the end of June 2022, when consent was given to the disclosure of the occupational health report.

106 We are satisfied the delay was not attributable to actions of the employer. It was because of the claimant's further hospital admission and delays in the release of the occupational health report because of the claimant's objections.

107 It was argued on behalf the claimant that the delay was attributable to the failure to provide the material she and her husband were requesting. We have already addressed this. The proper process to scrutinise the grievance

outcome was by way of an appeal. The claimant could have pursued an appeal at the same time as working with her employer to return to work.

108 By mid-March the claimant had lost faith in her employer. She became hostile to any efforts they made, all of which she saw in a negative light. The frustration about the decision of Ms Kennedy and HR obscured the subsequent actions of the managers which we find were well-intentioned and a genuine attempt to assist. Any delay was not down to them.

109 In the circumstances we were not satisfied the claimant was entitled to any pay under sick pay scheme.

110 We have found that there had been a breach of the duty to make adjustments in respect of a return to work. In the circumstances an implied term that pay would be made in the event of a failure to implement adjustments does not arise.

Breach of the implied term and constructive dismissal

111 The breach of the duty to make adjustments on 15 September 2021 was conduct which would be likely seriously to undermine trust and confidence and was without reasonable and proper cause. Not every act of discrimination would amount to a breach of the implied term but this is one which does.

112 Is any other conduct of the respondent which we have criticised which does not amount to a breach implied term in itself, nevertheless a breach cumulatively with other conduct, particularly the breach in respect of adjustments?

113 The failure to respond more quickly to disabuse the claimant of an unreasonable belief, if generally held, that the documents did not exist was not of a character or quality to undermine trust and confidence even having regard to the failure to allow the claimant had to support in September 2021. For the reasons we have given this was a matter for an appeal. The claimant and her husband's demands were misplaced and their criticisms misdirected.

114 In the circumstances, the only action which constituted a breach of the implied term was the breach of the duty to make adjustments on 15 September 2021. The claimant continued in work and did not resign for nine months. For part of that time she received half sick pay and then holiday pay. She invoked the grievance procedure. She engaged with occupational health with a view to returning to work. All of these actions intimated that she intended to keep the employment relationship alive. Even taking into account the fact the claimant

was off sick, we cannot regard the delay in resigning as justifiable in the context of other conduct which plainly and objectively affirmed the contract.

115 Given that affirmation, the allegation of a constructive dismissal cannot succeed. The claims for unfair dismissal and a discriminatory dismissal are therefore dismissed.

Time limits

116 The primary time limit in respect of the complaint of the breach of the duty to make adjustments would expire on 14 December 2021, that is three months after the respondent acted inconsistently with its duty, see section 123(4)(a) of the EqA.

117 The claimant argues there was conduct which extended over a period. In the light of our findings there was no further conduct which is breach related. Subject to whether it was presented within a further just and equitable period, the first complaint of the breach of duty to make adjustments would be out of time.

118 In her evidence the claimant stated that she had not brought this claim because when she had been released from hospital and returned home, she believed the time limit had expired. It is clear that she had knowledge of a primary three month time limit to bring claims; but she was unaware of any further qualifications which might extend that primary period. She became aware of the concept of a continuing act of discrimination when she attended a preliminary hearing before Employment Judge Brain.

119 We accepted that evidence. We find the reason the claimant had not brought the claim was because when the 3 month period passed she was in hospital, and that admission precluded her from presenting her claim, and when she was discharged she thought it was too late. Although there is reference in the claim form to failure to provide support which predates 3 months, that is included to establish the context of the claim, identifying concerns arising over a period of time up to the resignation.

120 The delay is significant, being 9 months after the initial 3 month period had expired. One might expect parties to make themselves aware of the legal procedures, particularly intelligent and educated people such as the claimant. On the other hand, the claimant believed she did know the time limit rule. In such circumstances, one can understand why she did not seek out further advice to double check.

121 Whilst delay will always have a corrosive impact on the quality of the evidence, in this case we heard from the principal witnesses involved and it was not suggested the evidence had been significantly impaired by the passage of a further 9 months before issue. That is not to say there is no disadvantage to the respondent, if we agree that the claim was presented within the further period. The loss of the time limit defence is, of itself a disadvantage. The balance of disadvantage, however, weighs more greatly with the claimant.

122 Having regard to all of the above we have concluded the claim was presented within such a further period as was just and equitable.

Further hearing

123 There shall be a remedy hearing to consider what compensation to award for the breach of duty.

Employment Judge D N Jones
Corrected decision, under rule 69 due to a clerical error in paragraph 1.
Date: 4 September 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 July 2023

Corrected Judgment sent to the parties on 7 September 2023

M.McGuigan
FOR THE TRIBUNAL OFFICE