



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Lee

Respondent: Northern Care Alliance NHS Foundation Trust

Held at: Manchester Employment Tribunal

On: 5-8 February
2024

Before: Employment Judge Barker
Mr Q Colburn
Mr M Stemp

Representation:

Claimant: In person

Respondents: Mr Gibson, solicitor

JUDGMENT having been sent to the parties on 20 February 2024 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary Matters and Issues for the Tribunal to decide

1. By a claim form dated 22 September 2021 and having engaged in ACAS Early Conciliation on 30 July 2021, the claimant brings claims of constructive unfair dismissal and disability discrimination against the respondent. The parties had drafted a List of Issues which was discussed with them at the start of the hearing and further clarification was thereby obtained for the Tribunal.
2. Mrs Lee was assisted by her daughter during the hearing and the Tribunal accommodated breaks in the proceedings as requested by her. The Tribunal was assisted by a bundle of documents prepared by the respondent. We heard witness evidence from the claimant, Ms Dunn her line manager, Mrs Antrobus, who was the clinical services manager at the

respondent who heard the claimant's grievance, and Mr Stallard who heard the claimant's grievance appeal.

The List of Issues

3. The parties came before Employment Judge Feeney in March 2022 for a case management discussion. At the case management discussion, at which both parties were represented by solicitors, EJ Feeney recorded that the parties had agreed a draft list of issues. The draft list of issues was said to be attached to the case management order but was not and it is not on the Tribunal file. A document entitled "agreed list of issues" was before the Tribunal at this hearing and is attached to these written reasons as an Annex. The claimant confirmed that this had been prepared by her solicitor, who came off the record and stopped acting for her on 8 December 2023.
4. . The claimant complains of a failure to make reasonable adjustments. In her claim form, her complaint is put as follows:

(at paragraph 49): *"the claimant avers that the PCP [provision, criterion or practice of the respondent] was the requirement to perform her role in the office (on premises)."*

(at paragraph 50): *"as a result, if she complied with this PCP, she would be put at a substantial risk of serious complications due to her physical disabilities if she caught Covid 19 compared to those who do not have the same physical disabilities."*
5. The list of issues, such as it relates to the claimant's reasonable adjustments claim, does not properly reflect the case as pleaded in the claimant's particulars of claim in that number 14 in the list of issues states *"did this PCP put the claimant at a disadvantage by putting her health at significant risk..."* Mrs Lee's claim form as set out at paragraph 50 (cited above) states *"as a result, if she complied with this PCP, she would be put at a substantial risk of serious complications..."* (our emphasis added).
6. It is apparent from the evidence, including the contents of the parties' witness statements and questions put in cross examination, that the claimant's case is that the PCP would have put her at a disadvantage had she complied with it in that had she gone to the office her health would have been put at significant risk, not that she did go to the office and that her health was put at significant risk. That is neither party's case on any reading of the evidence and the only place where any reference to this is made is in the list of issues.
7. Mrs Lee told the Tribunal, when asked questions about the list of issues at the start of cross examination, that she had relied on her solicitors to produce the list of issues. We do not therefore consider it to be in accordance with the overriding objective that the claimant's claim is to be limited to an argument that the PCP did put her at a disadvantage – the Equality Act states *"puts or would put"* and in this case it is clear that the claimant's case is that it would have put

her at a substantial disadvantage, irrespective of any statement to the contrary in the List of Issues.

8. The List of Issues is not to be considered as a substitute for formal pleadings. It is also not a complete statement of either party's case in that it does not go on to plead either party's position on the rest of the issues that the Tribunal needs to consider for Mrs Lee's reasonable adjustments claim.

Time Limits

9. The respondent wrongly concludes in its ET3 particulars of response that the claimant alleges that the latest date on which she pleads a failure to make reasonable adjustments was 29 December 2020 and consequently the claim is time-barred. This is not what the ET1 says. The claimant says at paragraph 51,

"the claimant avers that she made a request for a reasonable adjustment on the following dates:"

10. Thereafter is listed eleven instances of the claimant asking to work from home and being either refused or ignored. This culminates in 51.11 which states *"on 29 December 2020 when she was asked to return to work after being vaccinated and confirmed her GP's advice and the trusts own advice that she should still work home despite being vaccinated."*
11. At paragraph 52 the claimant states *"the claimant avers that the request to work from home was a reasonable one and the respondent either outright refused, failed to respond, or failed to implement any adjustments."*
12. Therefore, contrary to the respondent's response, the claimant did not assert that the last date on which the respondent failed to make reasonable adjustments was 29 December 2020. The date of 29 December 2020 was the last pleaded date on which the claimant made such a request, but that is not when the time limit begins to run for a failure to make reasonable adjustments. The Tribunal must ask by what date the respondent should reasonably have taken those steps. The Early Conciliation Certificate is dated 30 July 2021, meaning that any complaints which pre-date 26 May 2021 may be out of time unless the Tribunal considers that it is just and equitable to extend time to allow the claims to be brought late.

Findings of Fact

13. Several facts in these proceedings were not in dispute, including that the claimant was disabled at the relevant time by reason of COPD. The claimant's long service with the respondent and the length of time (over 6 years) she was managed by Louise Dunn, her line manager at the time to which her claims relate, was also not in dispute. We note that although the claimant and Ms Dunn agree that they had a cordial professional relationship, we do not find that they were particularly friendly and there was some history of problems between them. Ms Dunn sought to downplay any

such issues, but we accept Mrs Lee's evidence that there had been some difficulties between them previously.

14. Mrs Lee was a medical personal assistant ("PA") in the respondent's Radiology department and Ms Dunn, although now Radiology Operations Manager, was at the time Secretariat and Systems Services Support Manager for the Radiology department. The time to which these claims relate was also the period of the coronavirus pandemic in the UK.
15. In the evening on 21 March 2020, which we note was a Sunday, Mrs Lee received a text message from the government to inform her that she should be shielding to protect herself from Covid-19. She was unsure what this meant but understood that she would not be able to attend work and therefore although it was late on a Sunday, she called Ms Dunn to inform her of this. There was a dispute of evidence over what Ms Dunn said to Mrs Lee, and whether Ms Dunn was questioning Mrs Lee's need to shield and therefore remain at home. Mrs Lee subsequently received a letter which contained more detail dated 23 March 2020, and notified Ms Dunn about the contents of the letter when it arrived. The letter confirmed that she needed to remain at home as a result of her clinical vulnerability to Covid as a result of her COPD. Consequently, Mrs Lee did not attend work and shielded at home from 21 March 2020 onwards.
16. We have carefully considered the conflicting evidence of Mrs Lee and Ms Dunn to make findings of fact of what was said both on 21 March and in relation to the subsequent letter, as these conversations at this time did much to influence the relationship between them from this point onwards and were the start of the issues to which these proceedings relate. Having considered all of the evidence of both individuals including answers given to questions while under oath, we find that Ms Dunn did question Mrs Lee's need to shield at the time, and this made Mrs Lee feel uncomfortable and uneasy. Ms Dunn questioned the claimant's entitlement to remain at home and as a result, the claimant felt the need to justify the instructions given to her by the government at the time. This was stressful for the claimant, and we find was not necessary.
17. Mrs Lee asked whether it would be possible for her to continue with her duties from home, but we find that Ms Dunn did not facilitate this at first and told her just to remain at home, which the claimant did. Mrs Lee did not have any work to do in the initial months of the Covid pandemic. Mrs Lee asked again in June 2020 about working from home. Ms Dunn at this time provided the claimant with her department login details so that she could log on at home from her personal computer, but Mrs Lee never managed to log in as she dropped her laptop down the stairs shortly afterwards. Mrs Lee asked Ms Dunn if she might be given a laptop by the respondent and on 13 July 2020 Ms Dunn ordered a new laptop for Mrs Lee, who was told by Ms Dunn that the respondent's IT department expected a delay of several weeks in being able to send a laptop to her, as the respondent was prioritising providing IT equipment to clinical staff, which we accept was the case at the time.

18. As the pandemic progressed, the claimant was notified that her period of shielding was due to end in August 2020. Mrs Lee had a conversation with Ms Dunn on 30 July 2020 about what this meant and how the ongoing risk to her health of Covid might be managed if she came back to the workplace. During this conversation, we find that Ms Dunn told Mrs Lee she would be expected to come back to work, that is, to come back onto the respondent's premises and back into an office with other people. Mrs Lee was, we accept, very anxious about this.
19. In the context of these proceedings and the issues that followed between Mrs Lee and the respondent, this conversation on 30 July was very important. However, Ms Dunn did not make a note of it. There is a dispute of evidence as to what was said during this conversation and we have spent a considerable amount of time establishing what was said, on the balance of probabilities. We consider it poor practice that Ms Dunn did not generally keep notes of her conversations with Mrs Lee. The evidence that we have considered in making findings of fact as to what was said during this conversation, in addition to the witness evidence of Ms Dunn and Mrs Lee, was an email from Ms Dunn to Katy Chadwick of the respondent's HR department on 28 August 2020. This email reports what was said by Ms Dunn to Mrs Lee on 30 July, as does an email from Ms Dunn in January 2021 to Mrs Antrobus.
20. We note that none of Ms Dunn's emails about this conversation mention Mrs Lee having been offered her own office at the back of the main radiology office, as was Ms Dunn's evidence to this Tribunal. Mrs Lee is adamant she was not offered her own office and we accept that had she been offered it, it may well have been an acceptable adjustment to enable her to return to the workplace. We find that Ms Dunn never offered the claimant her own office, either on this occasion or subsequently.
21. Instead, Mrs Lee was offered the opportunity to visit the main office to view the layout of the desks, but she did not take it up. It was her evidence that she knew who sat in that office and that social distancing would not be possible as a result. Ms Dunn raised the issue of Mrs Lee wearing a mask in work. We find that Mrs Lee found the suggestion that she could wear a mask to be offensive as she considered that Ms Dunn would know that she was unable to do so, on account of her COPD.
22. We accept that Mrs Lee was confused as to why she was being told to return to work at this time. Although the national guidance had changed, the respondent was aware that she was clinically extremely vulnerable. As recently as June and July 2020, she was being given log-in details to work from home and a new laptop had been ordered for her.
23. We also accept Mrs Lee's evidence that Ms Dunn said to her during the 30 July conversation "*the risk [i.e. of Covid] is the same for all of us*", which upset Mrs Lee. We accept also that this was clearly not true – the risk was greater for Mrs Lee than others who did not have her medical conditions.

Ms Dunn used the same phrase during this hearing in her answers to cross-examination about Covid being distressing for Mrs Lee. She told the Tribunal "*it was emotional for all of us*" which we find indicated that she was not prepared to accept that Mrs Lee was more at risk, and therefore more alarmed by, Covid, than other people. We find on the balance of probabilities that Ms Dunn was resentful about Mrs Lee not being required to come into the office when she was and was not prepared to acknowledge the increased risk to Mrs Lee's health that Covid posed. As we will find below, this led to a failure to make reasonable adjustments for her.

24. We accept Mrs Lee's evidence, that she was effectively given no choice but to go to her GP for a sick note, which she obtained along with a letter informing the respondent of her continuing clinical vulnerability to Covid. She remained off sick and unable to work from home, having not yet been provided with a laptop and having no laptop of her own.
25. Mrs Lee was sent by Ms Dunn to the respondent's Occupational Health ("OH") provider for an assessment. A report was received from OH in August 2020, which recommended a return to work with adaptations, despite acknowledging Mrs Lee's clinical vulnerability. Ms Dunn called Mrs Lee the next day and told her she was required to return to work. We note the promptness of Ms Dunn's telephone call on this occasion, compared with other occasions during this period when Ms Dunn did not keep in regular contact with Mrs Lee despite being required by the respondent to do so. We find, having considered the witness evidence of both women and preferring that of Mrs Lee, that Mrs Lee asked Ms Dunn to be able to return to work in a separate office and offered to change her hours to be able to do so, but this was not acceptable to Ms Dunn, who said that no separate offices were available. Given this, Ms Dunn told Mrs Lee that she would need to get another fit note and letter from her GP in order to get paid. Mrs Lee did so, and subsequently Ms Dunn referred Mrs Lee back to OH for a further assessment.
26. In an email to Ms Dunn dated 6 October 2020, Else Armitage from the respondent's HR department said that she was keen to facilitate homeworking for Mrs Lee and said that access to a remote desktop could be made available on a temporary basis for her. Ms Dunn's response failed to acknowledge the offer of a remote desktop and instead she noted "*Bridget will be a priority once the Radiology laptops arrive, if ever*". The Tribunal notes that the claimant provided evidence that was not disputed by the respondent that Mrs Antrobus said in Mrs Lee's grievance appeal meeting in July 2021 that laptops had in fact arrived in September 2020 and that a laptop remained in Radiology waiting for a forwarding address for Mrs Lee, but this was never sent to her. Therefore, on the balance of probabilities, at the time Ms Dunn replied to Ms Armitage in October 2020, a laptop was already available for the claimant but Ms Dunn took no action to send it on to her.
27. Mrs Lee was sent to OH for an assessment again and following the assessment, on 13 Oct 2020 OH was of the opinion that Mrs Lee could

return to work with the option of home working as a priority or instead, by working in a separate office. Again, Ms Dunn did not action this.

28. Mrs Lee received no communication at all from Ms Dunn after the OH assessment on 13 October and so emailed Ms Dunn's line manager Gillian Catlow, who was the overall Radiology department manager, on 6 November 2020. Mrs Lee wrote "*I have been waiting for someone to contact me regarding my ongoing request to work from home which originated in the beginning of lockdown in March*". She also reported to Ms Catlow that she had no contact from Ms Dunn since 23 September 2020. Mrs Lee told Ms Catlow that she was prepared to work from home or be temporarily redeployed. Mrs Lee referred to the respondent's "home first" approach and queried why this could not be applied to her.
29. Ms Catlow and Ms Armitage asked Ms Dunn for comments on Mrs Lee's email and Ms Dunn replied to them that a laptop was still on order for Mrs Lee. Ms Dunn did not offer to take any further action, despite the claimant's offer of temporary redeployment. We again note that on the balance of probabilities, a laptop was readily available for Mrs Lee in the Radiology department at this time.
30. Further questions were asked by Ms Armitage of Ms Dunn about Mrs Lee working from home on 12 November 2020. Ms Dunn refused, and we note that the reasons given by her were largely inaccurate. She told Ms Armitage that laptops were not compatible with the CRIS dictation system, that Mrs Lee would need a scanner when Mrs Lee had already told Ms Dunn she has access to one, and that others were not working from home. The latter reason ought not, without further enquiry as to whether working methods could accommodate home working, have been a significant consideration for Ms Dunn.
31. Ms Lee and Ms Armitage exchanged emails about redeployment on 12 November 2020. Ms Armitage told Mrs Lee that working from home would not be possible without a scanner, but Mrs Lee replied to inform her that she has a scanner and therefore did not need to be redeployed away from Radiology and indeed that she did not want to move from that department.
32. Ms Dunn emailed Mrs Lee on 19 November 2020 in response to the issue of redeployment and home working. This email was, we find, highly significant and we have therefore cited the text of it in full.

"Hello Bridget

The decision to temporarily redeploy was made due to the lack of radiology duties you will be able to undertake at home.

As you know we have recently recruited 2 band 3 support secretaries whose duties include the alerts and faxing. I have not had an update on the laptop as yet but will chase with IM&T tomorrow. I am sure Else [Ms Armitage] will find you a suitable role until such time as you can return to the workplace within radiology."

33. The claimant was very upset on receiving this e-mail. She considered that this email informed her that she had been replaced. Her evidence in her witness statement was *“I was shocked and upset, I felt completely deflated... I felt that Louise Dunn was using her position as my manager to bully and intimidate me, it is difficult to defend yourself when the other party is in a position of power.”*
34. The Tribunal considers the e-mail of 19 November 2020 to be pointed and dismissive. Ms Dunn would have known this e-mail would have been upsetting to Mrs Lee. We consider that the aim of this e-mail was to deter the claimant from future communication. We consider in the circumstances that this e-mail constituted bullying of the claimant by Ms Dunn. This e-mail triggered the claimant raising a grievance against Ms Dunn on 8 December 2020.
35. The grievance stated *“I feel unable to discuss this with my manager because I believe she is using her position to bully and intimidate and discriminate against me. She has been rude, accusing and at times verbally aggressive in her manner towards me.”* We find that it ought to have been clear to the respondent from the outset that the claimant was complaining of bullying, harassment and discrimination by Ms Dunn.
36. The claimant was not aware of this at the time, but Else Armitage also clearly considered Ms Dunn’s e-mail of 19 November inappropriate, as the same day she escalated it to her colleague Katie Chadwick in HR who, also considering it inappropriate, escalated it to Ms Dunn’s manager Gillian Catlow and Mrs Antrobus, who was the clinical services manager at the respondent. Ms Chadwick's e-mail to Ms Catlow and Mrs Antrobus forwarded Ms Dunn’s email of the same date to Mrs Lee, and commented *“I am getting increasingly concerned by the way Bridget is being managed... please see below e-mail sent today.”*
37. Mrs Antrobus offered to investigate with Ms Dunn. She reported back to Katie Chadwick and Gillian Catlow by e-mail on 25 November 2020. We consider this e-mail, which was not seen by the claimant prior to her resignation, to be extremely noteworthy. Ms Antrobus stated *“I met with Louise Dunn yesterday, who provided a file relating to the efforts she has gone to, to try and accommodate either Bridget's request to work from home, or to encourage Bridget to return to the workplace. This file contains all contemporaneous notes taken by Louise during the multiple phone calls she has ...all fit notes, email exchanges and IM & T requests to demonstrate Louise’s attempts to facilitate Bridget’s request.”*
38. We consider this e-mail to be highly misleading. We find that no file was provided to Mrs Antrobus by Ms Dunn on this occasion, because no such file exists. No such file was provided to the Tribunal in connection with these proceedings, and had one been in existence, we would have expected to see it as it is relevant, and necessary for us to decide the issues in this claim. When asked where this file was, Ms Dunn’s answer was not

particularly clear. No such file was provided to Mrs Antrobus when she conducted the claimant's grievance or to Mr Stallard when he conducted the claimant's appeal.

39. Ms Dunn conceded that there were no contemporaneous notes made of important conversations such as the conversation on 30 July 2020. We therefore find that Mrs Antrobus was not being truthful when she said she had seen a file which contained such notes. It also appears that Mrs Antrobus subsequently disclosed that a laptop for the claimant had been present in the Radiology department since September 2020. Therefore, any reference made in November 2020 to a laptop not having materialised, either by Mrs Antrobus or Ms Dunn, was also not accurate.
40. Furthermore, Mrs Antrobus ignored the fact that Ms Chadwick's e-mail at 17:42 on 19 November refers to a lack of contact between Ms Dunn and Mrs Lee. It is particularly inappropriate that, given Mrs Antrobus' predetermination of the matter, she subsequently heard the claimant's grievance. It ought to have been apparent to her that she was not an independent or appropriate person to do so given her evident close friendship with Ms Dunn and she should have declined to investigate, in our opinion.
41. Returning to what the claimant knew at the time, the claimant continued to chase for a response to her grievance and had not received any by the 29th of December. She was not aware of Mrs Antrobus' email of 25 November 2020 discussed above.
42. Mrs Lee was informed that Mrs Antrobus had been appointed to hear her grievance. Mrs Antrobus asked Ms Dunn on 5 January 2021 for a written record of the calls and conversations that she had had with the claimant. Again, had Mrs Antrobus' e-mail of 25 November 2020 been truthful, she would not have needed to request this information as she had already been passed a file, she said, of all of Ms Dunn's interactions with the claimant.
43. The extent of Mrs Antrobus' unsuitability to independently assess the claimant's grievance is further highlighted by emails between the two of them dated 11 February 2021. In relation to Ms Dunn forwarding to Mrs Antrobus an e-mail from the claimant inquiring as to the whereabouts of her laptop, Mrs Antrobus signed off with the following:
"thank you for all your work with this, I know you've been exhausted by it".
44. Ms Dunn replied *"I despair sometimes of Bridget's behaviour especially raising a grievance during these very difficult times. We are all working extremely hard and her e-mail deflates me. I have to be completely honest, I do not think she is capable of the rota duties which is why she is protesting."* We note the pointed reference to the lack of the claimant's capabilities which Mrs Antrobus responded to by describing this as *"a capability matter"*, with a threat of formal action being implied by that.

45. Mrs Antrobus said “*Thank you again. I'm sorry she's had such an effect on you. I value you, and everything you do, your support is very much appreciated.*”
46. This is particularly noteworthy as Mrs Antrobus had already been told by HR of the lack of contact between Ms Dunn and Mrs Lee. Furthermore, Ms Dunn told the Tribunal that the Radiology department was extremely quiet as a result of the pandemic. We therefore do not accept that Ms Dunn could properly be described as having worked “*extremely hard*” in relation to the claimant or as being “*exhausted*” by the situation.
47. We note that the claimant did not see any of these emails. However, these are relevant findings of fact for the Tribunal to make in relation in particular to the claim for a failure to make reasonable adjustments.
48. The claimant and Mrs Antrobus spoke on the telephone on 17 February 2021 for an initial grievance listening meeting and a letter recording the outcome of that conversation was sent to the claimant on 19 February 2021. We note that Mrs Antrobus, in her letter, redefines the claimant’s grievance. Given that the main complaint in the claimant’s grievance was of bullying and harassment Ms Dunn, Mrs Antrobus defined the claimant’s grievance as a failure to make reasonable adjustments for ill health and the fact that two support secretaries were recruited into her role while she was absent from work. There is no mention whatsoever of bullying or inappropriate conduct by Ms Dunn in Mrs Antrobus’ letter. We also note that Mrs Antrobus failed to have reference to the respondent’s Dignity at Work policy. We find that this will have contributed to the claimant’s feeling that she was being ignored and that no one was properly looking into her grievance, and that key parts of it were being brushed aside.
49. On 18 March 2021, the claimant discovered that she had been recorded by Ms Dunn as being on sick leave from 2 September 2020 until 14 February 2021, and therefore her pay was affected. It was accepted by the respondent that she should have properly been recorded as having been on medical suspension for most of that time, and even if we accept that this was an oversight on the part of Ms Dunn, we accept also that it will have made the claimant feel targeted, and that people were not paying proper attention to her circumstances.
50. The claimant complained by e-mail to Mrs Antrobus on 23 March 2021 that her grievance had not been properly addressed. We accept that this was the case. We note that bullying was not properly addressed. Also, we accept that Mrs Antrobus’ reference to the claimant’s situation being “*unique*” was not correct and the claimant reasonably queried this. The respondent had a policy of “home first” home working, available for numerous other employees of the respondent in the same position as the claimant. It is accepted that amongst the Radiology administrative staff, the claimant was the only person asking to work from home, but we do not accept that her situation was in some way unique at the respondent or uniquely difficult. We find that the e-mail of 23 March is evidence that Mrs

Lee knew that the respondent was ignoring evidence of bullying. The claimant knew that Mrs Antrobus had seen the e-mail of 19 November and failed to address its tone.

51. The claimant was invited to a formal grievance hearing with Mrs Antrobus on 6 May 2021. She makes no complaints to this Tribunal about the conduct of the hearing, but following the hearing, she received an outcome letter dated 2 June 2021 which we find reached unsustainable conclusions about Ms Dunn's actions. Her behaviour and the e-mail of 19 November 2020, which is on its face is evidence of bullying, was specifically mentioned in the outcome letter, however bullying itself is barely mentioned in the letter, being only briefly referred to.
52. While the claimant's grievance process was ongoing, she had been provided with a laptop in February 2021 and had started working from home. Her evidence, which we accept, was that the regular meetings that she was told would take place to help her co-ordinate her work with the other members of the team who were in the office, did not happen in any meaningful sense and there were not proper systems in place to help her do the tasks she had been allocated to do. She told the Tribunal that she considered that Ms Dunn was not prepared to make any proper effort to ensure that she worked effectively from home. We accept that this was the case.
53. The claimant appealed against the grievance outcome on 15 June 2021. We accept, as she wrote in her grievance appeal letter, that there was very little reference to the actual grievance meeting in what was discussed in the grievance outcome letter. We find that this led Mrs Lee to conclude that what had been discussed during the grievance meeting had been ignored by Mrs Antrobus in reaching the outcome that she did. Mrs Lee asked to have the grievance fully addressed and upheld.
54. Mr Stallard was appointed to hear the claimant's grievance appeal. The claimant was invited to a meeting which took place on 22 July 2021. She was provided with an outcome letter dated 10 August 2021. The claimant described herself as disappointed by the outcome.
55. We note that despite Mr Stallard having Ms Warner, the acting director of HR to assist him, neither of them considered it appropriate to review the respondent's Dignity at Work policy, even though they understood that bullying was an issue in the claimant's grievance. This may explain their apparent lack of understanding as to how Ms Dunn's bullying manifested itself. In effect, Mr Stallard found for the claimant but concluded, in relation to the allegations of bullying and harassment from Ms Dunn "*I confirm that we were unable to find evidence of bullying and or harassment*".
56. Mr Stallard nevertheless did write

"however we did conclude that minimal pastoral support was afforded to you during many months of absence from work. We also

found there was an apparent reluctance to apply the adjustments to support homeworking and make the necessary adjustments for you. Similarly, there was a lack of appropriate escalation to facilitate homeworking in a timely way. Whilst we were unable to conclude that you've been subject to bullying under harassment, we recognise that the principles of values-based management have not been applied and that this has impacted on your health and well-being."

57. Mrs Lee therefore understood that Ms Dunn would not be held to account. She said that this was the last straw that caused her to issue her resignation, which she did on the 25th of August 2021. She knew that she would receive no support from senior management and that Ms Dunn was exonerated. We find it was reasonable for her to conclude that she had no confidence in change and no confidence in mediation being effective.

58. Mrs Lee's resignation letter stated that she was resigning in relation to the events of the past months. She said

"As for the offer of mediation with my manager I do not feel personally that there would be anything to gain from that exercise. Since February when a laptop was provided there has been a definite reluctance to expand the limited role I was allocated. Even though you stated this would be discussed it was never implemented by Louise. It has been stated on more than one occasion that there is not enough work for me to perform at home, I get the definite impression that Louise was never on board with me working from home and the hostility is palpable and demonstrated by her actions."

59. We accept that this was a reasonable conclusion for the claimant to reach in the circumstances.

The Law

60. The Court of Appeal in ***Parekh v London Borough of Brent 2012 EWCA Civ 1630, CA*** noted that as the employment tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence (also ***Price v Surrey County Council and anor EAT 0450/10B***)

61. In section 95(1)(c) of the Employment Rights Act 1996 it is said that a constructive dismissal occurs where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct."

62. The burden of proof is on the claimant to show that on the balance of probabilities there has been a fundamental breach of contract, including a breach of trust and confidence.

63. In ***Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606***, it was held that;

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee”

64. The duty of trust and confidence is only breached where the employer has no 'reasonable and proper cause' for his actions (***Gogay v Hertfordshire County Council 2000 IRLR 703.***) It is the employer's conduct which the tribunal must assess, not the unfairness or injustice to the employee.

65. It is well established law that determination of an unfair dismissal complaint is to be done, in the first instance, in accordance with section 98 of the Employment Rights Act 1996. A respondent employer must show on the balance of probabilities that it had a fair reason for dismissal. In this the respondent's reason is that of “some other substantial reason”.

66. The respondent must show that the reason to dismiss was within a range of reasonable responses that a respondent could have taken in that situation. There must be a fair investigation in all the circumstances, and the decision to dismiss must take into account equity and the substantive merits of the case.

67. The Tribunal is expressly cautioned against substituting its view for that of the respondent in reaching the decision to dismiss. The Tribunal must not decide the case on the basis of what it considers to be the correct action in the circumstances, but instead must decide whether the respondent's actions, including the decision to dismiss, were the actions of a reasonable employer in the circumstances.

68. In relation to the claim of disability discrimination and the time limit for presenting the claim, the Tribunal will ask whether the treatment complained of was a one-off act or an ongoing act of discrimination?

69. Was the treatment complained about to the Tribunal within three months (subject to ACAS Early Conciliation) of the incident or the last act in a series of incidents?

70. If there was no complaint within three months (subject to ACAS Early Conciliation) of the incident or the end of the ongoing act, was the complaint made within such further period as the Tribunal considers is just and equitable (as per s123 Equality Act 2010)?

71. Section 123(3) and (4) Equality Act 2010 make special provision relating to the date of the act complained of in the following situations:

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

72. The Tribunal must consider a number of factors in deciding whether a claim presented late can still be considered on a “just and equitable” basis.
73. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the evidence might be affected by the delay and the steps taken by the claimant to obtain advice once he knew of the possibility of taking action. The Tribunal must also take into account the merits of the claim.
74. Duty to make reasonable adjustments: Provision, criterion or practice (s20(3) Equality Act 2010). Did the respondent have a provision, criterion or practice (PCP) that put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? If so, did the respondent know or could it reasonably have been expected to know, that the claimant was likely to be placed at any such disadvantage? If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?
75. ***Smith v Churchills Stairlifts plc 2006 ICR 524, CA*** - the test of reasonableness in the context of a duty to make reasonable adjustments is an objective one and it is the employment tribunal’s view of what is reasonable that matters.

Application of the Law to the Facts Found

76. We find on the balance of probabilities that the claimant was constructively dismissed. A cumulative series of events as described above, which taken together form a chain of conduct extending over a period of time, amounted to a breach of the duty of trust and confidence and led the claimant reasonably to conclude that the respondent did not intend to be bound by the contract of employment between them. We accept that the claimant resigned on 25 August 2021 for the reasons set out in that letter, with the last straw being the grievance outcome dated 10 August 2021. The claimant did not affirm the breach of trust and confidence in any way. She resigned in response to the breach, in a reasonable time.

77. The respondent's case in the alternative is that if the claimant was dismissed, she was fairly dismissed for "some other substantial reason" (as per s98 of the Employment Rights Act 1996). We do not accept that the respondent's actions fell within the range of reasonable responses, even if the respondent is able to establish a potentially fair reason for her dismissal. No reasonable employer would have acted as the respondent did. No reasonable employer would have carried out the grievance process, including the appeal, in the way that the respondent did. It is clear to us although the claimant did not see the emails at the time between Ms Dunn and Mrs Antrobus, or between members of HR, she was fully aware that a fair and objective procedure was not followed.
78. Mrs Antrobus was not neutral. She was a friend and close colleague of Ms Dunn and persisted in turning away from any evidence that Ms Dunn behaved badly towards Mrs Lee, even though it was clear, and even though it concerned several of those in HR.
79. Mr Stallard, whether directly instructed to do so or not, clearly understood that a clear finding of bullying by Ms Dunn would be unacceptable to his colleagues and senior management, especially we must assume to Mrs Antrobus. This resulted in the somewhat contradictory findings of his grievance appeal outcome letter, in which he clearly finds a lack of support lack of proper management by Ms Dunn but fails to name her as responsible despite her being the claimant's line manager. He also failed to conclude that the exclusion of the claimant was for bullying. He demonstrated a surprising lack of curiosity as to who or what was behind the failings despite concluding the impact on the claimant's health and well-being was significant, despite the claimant still being employed and still working directly with Ms Dunn and despite the next step being mediation and a return to work which we find would not have been effective in the circumstances, as there was no acknowledgement that Ms Dunn needed to alter her behaviour towards the claimant.
80. Even if the respondent was able to establish a potentially fair reason for the claimant's constructive dismissal, we find that the respondent is not able to establish that they acted reasonably in constructively dismissing the claimant. The unfair dismissal claim therefore succeeds.
81. In relation to the claim for a failure to make reasonable adjustments, the respondent has provided much evidence to the Tribunal about the difficulties of facilitating home working in the circumstances. Much evidence was provided, which we accept, about the shortage of IT equipment and the need to prioritise clinical staff. The claimant's laptop was collected on 18 February 2021 and a screen on 25 February, but it took a number of weeks for her to source cables herself as these were not provided with the laptop and she needed to be provided with a screen as one did not work. She also needed to be provided with a mobile phone which arrived later.
82. Thereafter, there needed to be the proper management of her duties and plans drawn up by Ms Dunn as her line manager about what duties she should carry out and how these should be done in practice, given that co-operation was required by members of the team who were in the office with the claimant at

home. We accept Mr Stallard's evidence that this was not easy to achieve and that there were complications around access to systems and that continually changing government guidelines were complicating the operational systems of the respondent. Therefore, we consider that a period of until the end of April 2021, so, 30 April 2021 would have been required to allow the respondent to fully implement systems and roles to allow the claimant to perform her duties and work from home. Mrs Lee finally realised in mid-July, we find, that this was not going to happen and went off sick with stress, then resigned following the outcome of the appeal hearing.

83. Section 123(4)(b) Equality Act 2010 states

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

84. Applying s123(4)(b), the respondent might reasonably have been expected to make adjustments to allow the claimant to properly perform her duties and work from home by 30 April 2021. The time starts to run on the expiry of that period which is 1 May 2021. The claimant approached ACAS on 31 July 2021 and her claim is therefore in time.

85. We find that there was there a policy, criterion or practice (PCP) which obliged the claimant to attend the respondent's premises in order to perform her duties as a Medical Personal Assistant and this PCP, had she complied with it, would have put her at a disadvantage by putting her health at significant risk during the Covid-19 pandemic compared to colleagues who did not have the same physical disabilities. It is clear that for Mrs Lee, attending the office during Covid as a person with COPD would have put her health at significant risk.

86. We note that the practice of the radiology team to require its administrative staff to attend the office did not reflect the overall policy of the respondent but was a practice of Ms Dunn's team. The respondent overall was promoting a homeworking policy they referred to as a "home first" policy, but that had not been reflected in Ms Dunn's management of the administrative staff of the radiology department.

87. Mrs Lee requested to be allowed to work from home or work in a private office separated from her colleagues as adjustments on several occasions as set out in the findings of fact above. We find that these adjustments were reasonable in light of the size and resources of the organisation, indeed, the possibility of a remote working desktop or a laptop were available in the summer of 2020 to allow her to work from home.

88. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? We find that they did.

89. Much has been made by the respondent during these proceedings of the provision of a laptop in February 2021 and the fact that the claimant was never subjected to any formal action for a failure to attend the office. However, this does not mean that the respondent properly facilitated remote working for the claimant, and as a result, they failed to make reasonable adjustments. Mr Stallard acknowledged the same in his grievance appeal outcome letter.
90. The steps that it would have been objectively reasonable for the respondent to take, which they did not take, were the provision of either a private office for the claimant on the respondent's premises or the ability to work from home. The former was not offered to her. The latter was offered to her but was not properly implemented so she could not properly perform her duties. In addition to allowing her to work from home, she required the provision of operational IT equipment, which she did not receive. Her additional screen did not work, she received no connecting cables, or power cables. She asked Ms Dunn for a screen at the end of February 2021 but received no response. Mrs Lee sourced items privately with the assistance of her daughter and although the respondent offered to reimburse her, this ought not to have been necessary.
91. In order to properly work from home the respondent also needed to provide a clear job specification for the claimant such that her colleagues would know and understand what her role was and how it related to theirs and to properly manage team dynamics to allow the claimant to be provided with enough information and support to carry out her role from home. These adjustments were reasonable and were not made.
92. By the time of the claimant's resignation on 25 August 2021, although she was not in the office and had been given a laptop and some duties to perform, she was not able to carry out her adjusted duties because of a failure to make the reasonable adjustments listed above. As Mrs Lee noted in paragraph 76 of her witness statement, by July 2021 *"there was not enough work, and nothing was forthcoming from Louise Dunn"*.

Harassment Claims

93. These claims were presented to the Tribunal on 22 September 2021. The claimant had the benefit of legal advice from March 2021. The incidents of harassment were said to have taken place on 23 March 2020 and 31 July 2020. They were already significantly out of time when the claim form was presented and the Tribunal, having discussed the issue of their late presentation with the claimant, considered that it was not just and equitable to extend time to allow these claims to be considered late.

20 March 2024

REASONS SENT TO THE PARTIES ON
22 March 2024

FOR THE TRIBUNAL OFFICE

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

ANNEX - Agreed List of Issues

Jurisdiction

1. The Early Conciliation Certificate is dated 30 July 2021, meaning that any complaints which pre-date 26 May 2021 are out of time. In relation to the discrimination claims only, is it just and equitable for the tribunal to extend the limitation period to allow the tribunal to hear the claims?
2. In relation to the Constructive Unfair Dismissal Claim, do the alleged breaches form a chain of conduct extending over a period of time?

Constructive Unfair Dismissal

3. The Claimant relies on the events set out in paragraphs 11 to 40 in the Grounds of Complaint? Did this conduct occur as alleged?
4. If so, does this conduct constitute a fundamental breach of the implied terms of trust and confidence?
5. Did the grievance outcome, as described in paragraphs 39 and 40, constitute the last straw for the Claimant?
6. Did the Claimant resign as a result of these breaches?
7. Did the Claimant affirm the breaches of contract?

Harassment

8. Did the conduct, as set out in paragraphs 47.1 and 47.2 of the Grounds of Complaint, occur as described by the Claimant?
9. Was the conduct unwanted?
10. Did this conduct relate to the Claimant's disability?
11. Did this conduct have the purpose or effect of violating the Claimant's dignity?
12. In the alternative, did it have the purpose or effect of creating a humiliating, hostile, offensive, degrading, or intimidating environment for the Claimant?

Failure to make reasonable adjustments

13. Was there a Policy, Criterion or Practice which obliged the Claimant to attend the Respondent's premises in order to perform her duties as a Medical Personal Assistant?
14. Did this PCP put the Claimant at a disadvantage by putting her health at significant risk during the Covid-19 pandemic compared to colleagues who did not have the same physical disabilities?
15. Did the Claimant request to be allowed to work from home or work in a private office separated from her colleagues as adjustments?
16. Were these adjustments reasonable in light of the size and resources of the organisation?