EMPLOYMENT TRIBUNALS

Claimant: Ms P M Duckworth

Respondent: Gas and Electricity Connections Ltd

Heard at**:** **Manchester , in person** **On**: 4,5, 6, 7 and 8 March 2024
In Chambers: 19 April 2024

Before: Employment Judge Holmes
Mr I Taylor
Ms S Howarth

Representatives

For the claimant: Mr A Marshall , Counsel

For the respondent: Mr M Mensah, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant's claims of disability discrimination were presented out of time, and it would not be just and equitable to extend the time for their presentation. They are dismissed.

2. The claimant was not constructively , and hence not unfairly , dismissed.

REASONS

1.By a claim form presented on 29 April 2021 the claimant brings claims of unfair dismissal and disability discrimination. Disability was not conceded, and it was agreed that this issue should be determined by the Tribunal as a preliminary issue at the start of the hearing. The Tribunal determined that the claimant was at the material times a person with a disability, by reason of her condition of peripheral nerve hyper - excitability disorder and its judgment was given orally on 5 March 2024.

2.The hearing then resumed on liability. The claimant was recalled, and her evidence on liability was taken. No other witnesses were called by the claimant. The respondent called Scott Bedall, and Jill Rhodes. There was an agreed bundle. After the evidence had been heard the Tribunal reserved its judgment , the parties agreeing to make written submissions , which they did, the claimant 's being dated 22 March 2024, and

the respondent's 26 March 2024. The respondent also under cover of an email of 20 March 2024 submitted copies of handwritten notes of the grievance interviews that were conducted. These have not been added to the bundle, as neither party has referred to them in their submissions, so it is assumed that nothing turns upon them.

3. The Issues to be determined were identified by the Tribunal at the preliminary hearing held on 30 August 2023 and are at pages 76 to 80 of the bundle. They are set out in Annex A to the judgment. Issue 2, disability, has , of course been determined, and the claimant has withdrawn her claim of direct disability discrimination.

4. In short the remaining claims before the Tribunal were:

Unfair (constructive) dismissal

Disability discrimination in the form of:

Indirect discrimination

Discrimination arising from the claimant's disability

Failure to make reasonable adjustments

5.Having heard the evidence, read the documents that it has been referred to, and considered the written submissions of the parties, the Tribunal, having convened in Chambers on 19 April 2024 , makes the following relevant findings of fact .

5.1 The claimant had worked for the respondent in its sales team between October 2015 and April 2016. In that role she was required to make 60 to 100 "cold calls" per day. She did not enjoy this role, which she found stressful and pressured, which is why she left to find another job in April 2016.

5.2 In Summer 2017, however, she re-applied to the respondent for a different role, for which she was interviewed by Adam Samuels (HR Manager) and Scott Bedall (Sales Manager). She made it clear to them that she did not want to go back to working on cold calls, and wanted to work on internal recruitment only, which would not involve such calls.

5.3 She was assured that she would not be required to carry out that type of work, and on that basis she accepted the position, from 10 July 2017. She was initially employed on a 6 month contract for the role of Utility Account Manager/Internal Recruitment Manager , with a written contract (see pages 82 to 100 of the bundle). The position became permanent in March 2018, when she was provided with a new contract (pages 101 to 121 of the bundle). The claimant signed both these contracts.

5.4 Both contracts contain these clauses:

"3.2. Your normal duties are as laid down from time to time by the person to whom you

report and as detailed in any written job description issued from time to time by us.

3.3. In addition to, or substitution for, your normal duties we may require you to undertake other duties from time to time and work in other departments and for our associates as the need arises."

5.5 The claimant started this role, and her work did not involve cold calling.

5.6 On 18 October 2018 the claimant's contract of employment transferred to the current respondent pursuant to a TUPE transfer, on the same terms and conditions (page 122 of the bundle).

5.7 In May 2019 the claimant began of suffer symptoms of tingling/numbness in her hands and face, and a twitchy eye. These symptoms were episodic, but got worse. The claimant suffered shaking during these episodes. She first consulted her GP complaining of tremor symptoms, and tingling around her mouth on 30 April 2019 (page 178 of the bundle) , and after a blood test was referred to a neurologist. She was seen in the Neurology clinic on 27 June 2019, and had another appointment on 16 September 2019 , reporting episodes of generalised shaking, which are recorded as being particularly triggered by exercise (page 177 of the bundle). She underwent an MRI scan.

5.8 On 30 June 2020 the claimant underwent a further MRI scan on her brain. The results are in a letter from her Consultant (now before the Tribunal at page 293 of the bundle). Its terms are largely reproduced in the entry in her GP notes for 17 August 2020 (page 172 of the bundle). It may be that she underwent another MRI scan shortly after that, but this is hard to tell from the notes.

5.9 The claimant had been seeking these results of this test, or these tests, for some time – see the entries in her GP notes for 16 July 2020 (page 174 of the bundle) , 20 July 2020 and 13 August 2020 (page 173 of the bundle). It appears that she received them after 13 August 2020, as that day (page 172 of the bundle) she had a surgery consultation , via "askmyGP", so via email, in which she is recorded as giving a history of her eye, chin and neck twitching for some 6 months. The claimant also is recorded as having pulses or minor cramp in her left eye, chin, the back of her left leg, and her neck. She said it was starting to get worse and more continuous. She described it as "really uncomfortable".

5.10 It is unclear when and how the claimant received the results of her MRI scan of 30 June 2020. Whilst she gave evidence that it was July 2020, because she then had a meeting at work with Mr Bedall and Mr Samuels , and she had the letter with her MRI scan results with her, that may not have been July 2020, as on 21 August 2020 there is an entry in her GP notes (page 172 of the bundle) in which she is again chasing up the MRI scan results, and is actually provided with the telephone number for Salford Royal to ring herself.

5.11 Whilst Scott Bedall's evidence was that he did not recall the claimant telling him that she had a diagnosis of a brain lesion which might be epilepsy or multiple sclerosis, the Tribunal does not accept that. The evidence of Adam Samuels in the grievance investigation (page 245 of the bundle) clearly shows that he was shocked at what the claimant told him and Scott Bedall, and this is only consistent with the claimant's account of what she said in this meeting. The claimant also informed her line manager, Alastair Carrington, of her condition around this time.

5.12 The claimant's medical advisers proposed a further scan in 6 months time, with review in clinic if the repeat MRI was significantly abnormal.

5.13 The claimant continued to work as normal, and was very busy. She continued her follow up investigations and treatment. No referral was made to occupational health, and the claimant found her workload increasingly heavy. She had been advised, and says she had told the respondent, to avoid stressful situations, and was finding her work was becoming increasingly stressful

5.14 One issue that the claimant had was that if she had a day off, no one would cover her work in the interim, and when she returned, she would find she had even more work to do.

5.15 The claimant experienced difficulties in getting a day off in September and November 2020, and there was email communication about this. The respondent also operated a "one – off" policy , which meant that only one person in a department could be off at a time. There were also difficulties in the claimant getting single days off, she being required to take leave in multi – day blocks.

5.16 On 24 November 2020 , the claimant attended a meeting with Adam Samuels , the Finance Manager, who told her that she was to move on a temporary basis from her role in Utilities and onto the Sales Support Team. The claimant understood this to be in an admin support role, which would not involve making cold calls.

5.17 As part of her remuneration the claimant was entitled to commission in her role in the Utilities team. She was concerned at the effect this move may have upon that entitlement , and , further, was concerned that clients whom she serviced in her role in Utilities would not be serviced properly during her move, and would become dissatisfied. She therefore wanted to ensure that her absence would be covered, and her work done by someone else during this temporary move. She explained this to Adam Samuels, and asked for some written proposals, setting out how her concerns would be addressed. He agreed to do this, but never did.

5.18 Shortly after her conversation with Adam Samuels, the claimant was informed by Ashleigh Aldred, the Sales Account team leader, that once she had joined Sales, the claimant would be expected to make a minimum of 60 cold calls a day. This was the opposite of what she had been verbally assured when she returned to work for the respondent in 2017, and what Adam Samuels had led her to believe.

5.19 The claimant followed up this meeting with an email to Adam Samuels at 10.25 on 24 November 2020 (page 209 of the bundle) , in which she questioned how her commission would not be affected by this move, and asked him to explain what he meant by that. He replied at 16.19 that day (pages 208 to 209 of the bundle) saying that her commission would still be "active" and that her work would be covered by the team. The claimant further queried this in a further email at 16.34, to which Adam Samuel replied at 10.26 the following day, 25 November 2020 (page 208 of the bundle). In that email he noted the claimant's concerns about commission, but went on to say that he wanted to give the claimant the opportunity to earn commission "rather than the furlough scheme be operated". It was he who first raised the issue of furlough, and this prompted a reply from the claimant (page 207 of the bundle) in which she asked about "the other option", and asked if this would be the furlough scheme.

5.20 During the morning of 25 November 2020 between 08.46 and 11.06 the claimant was also raising with Adam Samuels an issue in relation to holiday. She had been seeking one day off as holiday, but had been told that she could not take it, because of the respondent's policy that only one person at a time (in a department) could take time off. The claimant sent emails about this issue separately, and Adam Samuels responded (see pages 205 to 203 , going in reverse order for this email exchange).

5.21 On 26 November 2020 the claimant sent a further email to Adam Samuels in these terms (pages 206 to 207 of the bundle) :

"In 2016 when I first worked for Crown I was employed as an Account Manager, doing 60-100 cold calling a day. This caused me huge amounts of stress and so I left the company and would never return to do a cold calling role.

As you are aware, I have told you about my current health problems at home. Having more stress at work will not benefit this but it seems that its being ignored.

I completely understand that the business needs support in different areas and I have always been the one to complete tasks to help my team. In this scenario Sales needs support, which I was happy to assist with but from our meeting in the boardroom yesterday morning, I was led to believe that it was 'supporting sales with administration work' not outbound sales calls only. Before I agreed I asked you to send me a plan of what I would be doing and the end date. I never received this.

Since yesterday, I have been very concerned for my welfare. I experienced severe dizziness and anxiety due to the stress that has been caused from the business. I have been moved from my current role, which I had finally got myself up to date and my stress was at a manageable condition.

I have not been told if I will ever return to doing my role as a Planner, I have not been told how long I will be in Sales for, you told me my work would be covered and ensured tasks would be completed but I have 33 unread email from yesterday and 6 overdue tasks effecting my target, I am worried my customers will not get the level of service I would of provided. I then find out my holiday was declined but accepted for another member of staff which caused me a lot of emotional stress and confusion to why I am getting treated differently.

I would like you to review my email and help make things better for both myself and the company."

5.22 Shortly after the claimant sent this email to Adam Samuels, Adam Buchan, the Office Manager, asked to speak to her. He had become involved because of the mention of the furlough scheme, for which he was responsible. He asked her to come into the Boardroom for a chat. When the claimant asked what it was about, he would not say, only saying that it was "personal". She asked if was about the email she had sent to Adam Samuels, but he would not be drawn. The claimant did not go into the Boardroom, and he walked off in the direction of the office of Keeley Downing.

5.23 Scott Bedall then came out and spoke to the claimant , asking , in front of colleagues, to have a word with the claimant in the Boardroom. This room was in the middle of the offices, and was often used for ad hoc meetings. When she asked why he would not say, but reiterated "in the Boardroom". The claimant asked if it was about

her email to Adam Samuels, but he would not say. Scott Bedall's reason for wanting to speak to the claimant was that Adam Buchan , who reported to Scott Bedall, had not been able to speak to her, and Scott Bedall considered that she was undermining him.

5.24 The claimant asked if she could go to the toilet , Scott Bedall said that she could, and she did so. When she returned she went into the Boardroom to find that Scott Bedall and Adam Buchan were there. Scott Bedall said to the claimant "What's going on?" and the claimant asked if this was about her email to Adam Samuels. He said that it was, and asked her why she had asked for written assurances. She explained that just wanted confirmation of what he had told her, whereupon Scott Bedall said, sarcastically, that he had time to send her an email, he had nothing better to do. The claimant mentioned her health issues, which he said he knew about. He also mentioned how she found cold calling stressful, and that her doctor had advised her to avoid stressful situations.

5.25 Scott Bedall went on to tell the claimant that there was no work for her to go back to, which she did not understand as she had been very busy in the Utilities section.

5.26 There was a discussion about the change in role, the claimant repeating her request that this be put into writing. The claimant was told that her options were to take the Sales Team role or take unpaid leave. Furlough was not an option, as there was work for her (the claimant was not, in fact, asking to be furloughed, that had only come up in Adam Samuels' emails to the claimant) , and she was asked to think about the business. Scott Bedall did not want to put anything in an email to the claimant , preferring to explain the position to the claimant himself. The meeting ended with Scott Bedall telling the claimant to go and do the job she had been told to do.

5.27 The claimant was upset by this meeting, and left it in tears. She began to experience a panic attack. She went to her desk, passing Alastair Carrington and Lee Carden, who could see she was in visible distress, and went home.

5.28 Scott Bedall did not put anything in writing in any email to the claimant . On 27 November 2020 Adam Samuels replied to the claimant's email to him of the previous day (page 206 of the bundle) saying this:

"I am sorry to hear the ongoing support roles [sic] *is causing you stress. Your health and welfare are first priority, as I do remember the ongoing health issues you discussed with myself and Scott.*

I did not intend for any stress to be caused from the sales support, as I did not have clear sales responsibilities at that time.

I will get Scott to send the responsibilities over to you, just to outline support needed.

Your work in operations has not gone unnoticed, you are a great asset to the team. You have continued to show great all rounds signs of an operational planner.

The role of the sales support, will be flexible for the time being, but Alastair will have the control and ability to move resources back into operations, when and where necessary.

He will ensure your tasks are managed and completed, with the team fully educated on there responsibilities to work GEC tasks.

I hope your O.K. Phoebe, any issues with your health, please update me on any further developments."

5.29 The claimant phoned in sick the next day, and consulted her GP (noted in her GP records on page 167 of the bundle) that day. She did not get a fit note, as she had leave booked in any event. She did , however, send a text to Adam Samuels on 27 November 2020, telling him that she was very stressed, and had not slept all night. On 30 November 2020 she sent him a further text, telling him that she was seeing her doctor, and was using her annual leave.

5.30 The claimant, being off work, did not see Adam Samuel's email of 27 November 2020. The claimant remained off work, and on 4 December 2020 sent a grievance letter to Keeley Dowling, the Managing Director. That grievance is at pages 212 to 215 of the bundle, and the email sending it is at page 217 of the bundle. It is a lengthy document, but in it , in essence, the claimant:

sets out her medical diagnosis, and how she informed Scott Bedall and Adam Samuels about it around June 2020

explains the need for her to avoid stressful situations

complains about how her applications for leave have been dealt with

complains about the proposed change in her role as communicated to her in the emails from Adam Samuels on 25 November 2020

complains about the meeting that she was called to have with Scott Bedall and Adam Buchan on 26 November 2020, and the conduct of Scott Bedall towards her in that meeting

5.31 She explained how she had seen her doctor and could not face coming back to work whilst this situation was hanging over her, because of the effect upon her health. She concluded by saying that she was taking legal advice, and was seeking that her grievance would be dealt with by a senior and independent person.

5.32 On 7 December 2020 the claimant was issued with a fit note by her GP (page 133 of the bundle) for work stress for a period of 28 days.

5.33 Keeley Downing acknowledged receipt by email on 7 December 2020 (pages 216 and 217 of the bundle) , and informed her that she was passing the grievance to Group HR to deal with. She asked the claimant to keep her and Alastair Carrington informed about her absence.

5.34 The claimant's grievance was allocated by Group HR to Jill Rhodes, Group Financial Controller of Crown Oil Limited, an associated company. She arranged a meeting with the claimant to discuss her grievance , which was held on 15 December 2020.

5.35 The claimant was accompanied by her mother in that meeting, and notes were taken (pages 232 to 236 of the bundle). The claimant was afforded the opportunity to amend the notes , once they had been sent to her, which she took up and did propose some amedments.

5.36 From that meeting and the claimant's grievance letter Jill Rhodes understood the claimant's grievances to be :

The claimant considered Adam Buchan , Adam Samuels, Scott Beddall and Keeley Downing as the management team had shown a disregard for her health;

The claimant wanted to understand whether it was true that Mrs Downing made the final decisions in the respondent's business;

The claimant's holiday requests that had been rejected in-line with the Respondent's ""one employee off policy" were for 14 December 2020 and 1 September 2020;

In respect of being asked to temporarily move to the respondent's sales team:

i) the claimant was concerned that her usual workload would not be picked up by her colleagues;

ii) the claimant being told by Ashleigh Aldred (Team Leader) that it would involve the claimant making 60 calls a day and undertaking sales training;

iii) Adam Samuels being unable to give the Claimant a date as to when she would be able to move back to her usual role; and

iv) no plan was provided to the claimant as to what she would be required to do during the temporary move.

Having sent her email to Adam Samuels and Alastair Carrington (Operational Manager) on 26 November 2020 (pages 206 to 207 of the bundle) expressing concerns about her workload and the requirement to move to the sales team, she was asked to attend a meeting in the respondent's boardroom with Scott Beddall and Adam Buchan. The claimant felt that during this meeting Scott Beddall spoke to her using a sarcastic and smug tone as if he was not taking her seriously. The claimant also confirmed that she felt intimidated by being required to attend a meeting with two senior managers.

5.37 In terms of outcome, she considered that the claimant was seeking:

A full response to each of her grievances;

Confirmation from the respondent that she had been subject to bullying behaviour by Mr Beddall;

Confirmation from the respondent they had neglected her health and welfare;

An apology from the Respondent for endangering her health;

An apology from the respondent for Scott Beddall's behaviour; and an apology from Scott Beddall.

5.38 Having met with the claimant , Jill Rhodes then continued her grievance investigation by:

Interviewing Adam Buchan on 17 December 2020

Interviewing Scott Bedall on 17 December 2020

Interviewing Adam Samuels on 22 December 2020

These meetings were all noted, and the minutes appear in the bundle. She also reviewed a number of documents, mainly various email chains, relating to the claimant's leave requests, the claimant's workload, and the proposed change in the claimant's role into the Sales Team. She also reviewed leave records, workload records and analyses, and the claimant's contract of employment.

5.39 Jill Rhodes concluded her grievance investigation and on 5 January 2021 sent the claimant her outcome letter (pages 251 to 255 of the bundle). This is a lengthy document, but its conclusions , in summary , were as follows.

5.40 Although she felt that more could have been done, she did not accept that the respondent had been negligent of the claimant's health and welfare at work. She did make the recommendation that a Management Health Report should be obtained in order to better understand her capabilities and any potential reasonable adjustments which could be made in the role of Utility Planner.

5.41 In respect of the allegation of bullying by Scott Beddall, from her interviews with Adam Buchan and Scott Beddall she was unable to find any evidence to suggest that the claimant was being bullied or harassed. She did, however, go on to say this (page 253 of the bundle) :

"I do have concerns that your refusal to meet with Adam when requested was not entirely professional in the first instance and wonder whether Scott's involvement may have even been necessary if you had complied originally. From your own account you had to be asked four times until you complied."

5.42 In relation to the requirement to move to Sales/Outbound Calls, she considered that this could be considered a reasonable management instruction, and did form a part of the terms and conditions of your employment under Clause 3, which she quoted. Nevertheless, she did feel that the situation should have called for further discussions with the claimant as to her abilities and consideration of her health issues. She referred to the email from Adam Samuels of the 26th November where he attempted to reassure her .

5.43 She was , however, concerned that the claimant was asked to undertake the temporary Sales role or take unpaid leave – a decision she found to be questionable. Therefore, she upheld the claimant's grievance in regard to being informed that unpaid leave was the only other option. She recommended that the claimant returned to her substantive role pending further medical advice via the Management Health Referral.

5.44 In summary, she proposed that the following recommendations were followed to resolve the grievance (page 255 of the bundle):

"1) That you return to your substantive post (Utility Planner) with immediate effect (or following the end of your sickness). This will be the full role you performed prior to the request to move to Sales.

2) That a Management Health Referral be undertaken as soon as you return to assess your suitability both for the Sales role and your ability to continue safely in your role as Utility Planner.

3) An arranged meeting between you and Scott Beddall upon your return to clear the air/mediation.

As you do not report directly to Scott in either role, we hope that mediation would enable you to rebuild professional working relationships."

5.45 She went on to say that although the claimant had requested confirmation by the Company that she had been bullied by Scott Bedall , an apology from the Company for his behaviour and a personal apology from him, she could not uphold her request based on the lack of evidence available. She also explained that she could not accede to the requested confirmation by the Company that they had neglected her health and welfare and that they apologise for endangering her health. Whilst she did feel that further discussions should have been held regards her ability (or not) to perform the Sales role, she did not believe that this constituted "endangering". She referred to Adam Samuels' email of the 26th November about further discussions which could have been held had the claimant not left the office.

5.46 The claimant was advised of her right of appeal against this outcome, which was to be exercised within five working days by writing to Joseph Lee, Group HR Manager.

5.47 The claimant resigned on 7 January 2021 , by letter (pages 256 to 257 of the bundle). She did not appeal. In this letter, the claimant's main issues were :

Her allegation that Scott Bedall had seriously bullied her had not been adequately investigated , and had not been upheld. He had lied, and Adam Buchan had not told the truth. The respondent had accepted this evidence and rejected hers.

She found the suggestion that she meet with Scott Bedall again an insult, and action should have been taken against him.

The investigation had not included interviewing her line manager Alastair Carrington, who had seen how upset she was after the meeting, or other independent witnesses. There had not been a thorough investigation to protect her from this treatment.

She had been let down by the respondent not making enquiries about her health until she raised the grievance when this should have been done some time previously.

5.48 She ended this letter as follows (page 257 of the bundle) :

"I have been a good employee. I have worked hard and been successful in my work. You and the managers I have complained about have acted disgracefully. Your letter,

which is littered with inconsistencies, was the last straw in the neglectful management of me as an employee and of my health and welfare at work. I am therefore resigning from my position with the business with immediate effect and will be seeking legal advice."

5.49 Although the claimant had not appealed, Jill Rhodes on 11 January 2021 interviewed Alastair Carrington and Lee Carden (the notes are at pages 258 to 259 and 260 to 261), the latter because the claimant had said that he was also present when the claimant came out of the meeting. Both confirmed that the claimant was upset when she came out of the meeting, and saw her leave to go home.

5.50 On 13 January 2021 Jill Rhodes wrote again to the claimant (pages 262 and 263 of the bundle) informing her of her further investigations, and their result. Whilst these witnesses had confirmed that the claimant had been upset after the meeting with Scott Bedall, they did not support other claims that the claimant had made, so Jill Rhodes could not change her decision on those aspects of the claimant's grievance which related to the conduct of Scott Bedall on 26 November 2020. She invited the claimant to consider whether there were circumstances in which she would be prepared to return to work, and reconsider her resignation.

5.51 The claimant replied the same day (page 264 of the bundle) explaining why she would not be able to return to work, and why she remained dissatisfied with the grievance outcome. She would only reconsider if the five outcomes she had asked for (effectively those identified in para. 5.37 above) were the actions that the respondent would now take. She went on to say how she was, in the meantime, continuing with her application for her case to be heard by an Employment Tribunal.

5.52 By email in reply (the date is omitted from the copy in the bundle at page 264, but is likely to be the same day or the day after) , Joe Lee , Group HR Manager, confirmed that as the claimant could not return to work in these circumstances, the respondent had no option but to accept her resignation.

5.53 The claimant sought other employment. She was able to find another job fairly quickly, as by 19 January 2021 she had been offered a role with Balfour Beatty, albeit a temporary one, which she accepted, and started on 25 January 2021 (pages 287 to 289 of the bundle)

5.54 The claimant commenced ACAS early conciliation on 11 January 2021, and obtained a certificate on 17 February 2021. She presented her ET1 claim form , or rather, solicitors acting for her did, on 29 April 2021.

5.55 The claimant was unable to give any explanation for the delay in presenting her claim form until 29 April 2021.

6. Those then are the relevant facts. The main factual issues have been between the claimant and Scott Bedall. Where their evidence diverged, the Tribunal has preferred the evidence of the claimant . That is largely because she has given , from an early stage (her grievance letter is only some 9 days after the incident on 26 November 2020) a consistent and detailed account of their meeting , which is the main factual dispute. We note that the Tribunal did not hear from Adam Buchan who was also present in that meeting. By contrast we found Scott Bedall's evidence less convincing,

and inconsistent with other documented evidence. For example, his account of the meeting in which the claimant told him and Adam Samuels about her medical condition, which was clearly a serious one, and which Adam Samuels in grievance interview (page 245 of the bundle) agreed was shocking, and that the claimant was distressed, is very different and rather dismissive, playing down the seriousness of the situation and the claimant's concerns. Similarly, his refusal to accept that the claimant was upset in or at the end of the meeting with her on 26 November 2020 is at odds with the evidence also given to Jill Rhodes by two colleagues that , moments after coming out of that meeting , the claimant was visibly upset.

The Submissions.

7. Both parties made written submissions, which will not be repeated here. The salient points made in relation to the various issues will be considered as the Tribunal considers the issues in the claims.

The law.

8.The relevant statutory provisions are set out in counsels' Submissions, and need not be repeated here.

9. The relevant caselaw will be considered in greater depth when the Tribunal considers each head of claim.

Discussion and findings.

a.Jurisdiction – the disability discrimination claims.

10. In terms of the order in which the Tribunal will consider the claims, it is of the view that as there is a jurisdiction issue in respect of all the disability discrimination claims being out of time , this should be dealt with first.

11. The first issue is whether these claims were presented in time. Now that the claimant has withdrawn her claim of direct disability discrimination in respect of Scott Bedall's conduct on 26 November 2020, the question arises of what disability discrimination claims the claimant still makes, and when does time begin to run?

12. The remaining disability claims are (or appear to be, the List of Issues is not very clear):

Failure to make reasonable adjustments under para. 5.3, namely :

5.3.1.The arrangement of an occupational health assessment;

5.3.2.The arrangement of a stress risk assessment; and

5.3.3.Permission for the Claimant to use her annual leave in August 2020 to manage her medical condition which would have been an exception to the PCP;

5.3.4.The assignment of somebody to cover the Claimant's work when she took a week's holiday from 10 September 2020 until 18 September 2020.

13. On terms of items 5.3.1 and 5.3.2 , no date is specified, but, under the provisions of s.123(4) where there is an alleged failure to do an act, the relevant time limit runs from the date by which the respondent either does an act inconsistent with doing that act that they have failed to do, or at the end of the period in which the respondent might reasonably have been expected to do it. The Tribunal considers that this would have been , at the latest , 26 November 2020, and probably considerably before that date, as the claimant's case is that she informed the respondent of her disability in June or July 2020. (The Tribunal would add that these two heads of alleged failure to make reasonable adjustments would not, in any event , of themselves, have been capable to amounting to such failures to make reasonable adjustments, on the authority of ***Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 664*** and ***Spence v Intype Libra Ltd. UKEAT/0617/06***)

14. There is also a claim of indirect disability discrimination (Para. 3 of the List of Issues) , but no date is ascribed to this claim. As it involves the same complaint as appears in para.5.3.3, it would also have arisen in or around August 2020.

15. The other disability discrimination claim is a s.15 claim, under para.6.1 of the List of Issues. Again, no date is specified. It seems to the Tribunal, however, that the latest date for such a claim to have arisen must be 26 November 2020, when Scott Bedall tried to impose , on the claimant's case, working in the sales team upon her. As she then went off work sick, and the grievance outcome on 5 January 2021 expressly rescinded any requirement for her to work in the sales team, the last act of unfavourable treatment must have been no later than 26 November 2020.

16. On that basis, taking , in the claimant's favour, the latest of any these claims as arising on 26 November 2020, as the claim form was not presented until 29 April 2021, and the claimant commenced ACAS early conciliation on 11 January 2021, obtaining her certificate on 17 February 2021, any claims arising on 26 November 2020 when presented on 29 April 2021 were presented at least 26 days out of time, and any others, which precede it, obviously even more so.

17. No analysis of the relevant dates for the running of these time limits appears in Mr Marshall's Submissions, nor does he concede that any claims are out of time, but they clearly must be. Whilst he has made reference to conduct extending over a period of time , within the meaning of s.123(3) of the Equality Act 2010, that can only, if correct , apply to link the claims which are earlier than the last one, on 26 November 2020. That provision cannot save the earlier claims from all being presented out of time if the last one, arising on 26 November 2020, is out of time, which it clearly is.

18. In the alternative, however, Mr Marshall seeks an extension of time under the just and equitable provisions of s.123(1)(b) of the Act. Mr Mensah resists this. Firstly , he points out, correctly , that in para. 63 of his Submissions, Mr Marshall has sought, impermissibly, to advance a new argument that was not in the claimant's evidence before the Tribunal, in these terms:

"…….the Claimant submits that an unprecedented set of circumstances prevented her from presenting her claims earlier. In the first instance, at the start of 2021, the country had been placed in lockdown which caused delays in conducting normal business. Secondly, from 4th January 2021until 19th April 2021, the Claimant was suffering a significant increase in her symptoms and was undergoing a range of further tests as can be seen in her medical records (at pages 161 – 165)."

19. That was not the evidence that the claimant gave. Rather, she told the Tribunal that she knew of the three month time limit, was taking legal advice, and did not know why the claim form was not submitted to the Tribunal until 29 April 2021. It is true that she was undergoing further medical tests , but she did not advance this as a reason for the late presentation of her claim form, nor did she give evidence of any of the other matters referred to in this paragraph.

The just and equitable extension.

20. In terms of the law on the just and equitable extension, in deciding whether to exercise the discretion that we have , we take into account the classic guidance upon how we should approach this task set out in ***British Coal Corporation v.Keeble [1997] IRLR 336*** . In the event that the disability claims as presented, are out of time, the Tribunal has to consider whether to extend time on the basis that it would be just and equitable to do so. This discretion, of course, is the same as conferred by several other discrimination statutes, and caselaw has evolved as to how a Tribunal should approach the exercise of its discretion. One of the leading cases is ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434*** ,a judgment of the Court of Appeal, cited by Mr Mensah. Of particular note is the judgment of Auld L J, who made it clear that there was no presumption of extension, but rather the converse was the case, extension was the exception, not the rule, and an out of time claimant had to convince a Tribunal why an extension should be granted. In terms of the principles upon which a Tribunal should approach the exercise of the discretion, the EAT in ***Chohan v. Derby Law Centre [2004] IRLR 685*** endorsed the approach taken in ***British Coal Corporation v. Keeble*** to the effect that Tribunals should consider the factors listed in s.33 of the Limitation Act 1980 , which applies to the exercise of discretion to extend time in personal injury claims before the civil courts. Those factors are:

The length of and reasons for the delay;

The extent to which the cogency of the evidence is likely to be affected by the delay;

The extent to which the party sued had co-operated with any requests for information;

The promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and

The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

21. Those factors, whilst useful, must not, however, be regarded as a checklist, or exhaustive. In ***London Borough of Southwark v. Afolabi [2003] ICR 800*** the Court

of Appeal held that the s.33 factors were of utility, but that as long as no significant factor was left out of consideration, a failure to follow the express provisions of s.33 would not be a error of law. In that case, delay of 9 years was, exceptionally, not fatal to the application to extend time.

22. The relevance and significance of absence of any reason for the delay being provided by the party seeking an extension of time has been much considered in the jurisprudence on extensions of time on the just and equitable basis for discrimination and similar claims.

23. Whilst there had been a developing view that absence of an explanation for the delay would be automatically fatal to an application for an extension of time, that view was considered and examined by the EAT in ***Concentrix CVG Intelligent Contact Ltd v Obi 2023 [ICR] 1***. The upshot of this review of the caselaw was that it would be an overstatement to say that absence of an explanation for any delay would always be fatal to an application for an extension of time, but the length of and reasons for any delay were likely to remain highly relevant factors that a Tribunal would be likely to have to consider in exercising its discretion.

24. In ***Polystar Plastic Ltd v Liepa [2023] EAT 100*** Eady J. , now President of the EAT, endorsed the view that a Tribunal which did not expressly address the reasons for a delay could not demonstrate that it had correctly exercised its discretion, suggesting that a Tribunal would normally need to know at least what the reasons for the delay were before it could go any further.

25. Our view is that the absence of any explanation for the delay is very significant. Whilst Mr Marshall has suggested reasons for it, the claimant , in her evidence , did not. It remains, therefore , unexplained. Its length is significant, 26 days, almost a third of the original time limit. We accept that the second and third factors in the ***Keeble*** list do not apply here, the cogency of the evidence, has probably not been affected by the delay, and no issue arises upon co-operation in providing information. Turning to the fourth and fifth factors , the claimant did act promptly, as she brought a grievance , in which she states that she was taking legal advice as early as December 2020. She contacted ACAS on 11 January 2021, shortly after her grievance outcome and her resignation.

26. Thus far, the claimant had acted promptly. It is unclear when the claimant instructed the solicitors who on 29 April 2021 presented the claim form for her, but they did not present it until then. Whose fault that was is not in evidence, and the claimant has not sought to blame them in her evidence. The claimant was clearly considering Tribunal proceedings in January 2021, because she refers to them in her email to the respondent on 13 January 2021. She acted promptly in contacting ACAS, and got a certificate on 17 February 2021. The question that then arises, is why were the claims not presented for another 10 weeks? The Tribunal has not been provided with any explanation.

27. Whilst Mr Marshall mentions in para. 64 of his Submissions that the claims have merit , that is not a strong point. The Tribunal will assume that they do, but that is of minor relevance. Of greater relevance, on the other hand, is that the disability discrimination claims are not the only claims that the claimant has before the Tribunal. She has an in time unfair dismissal claim. Declining to grant her an extension of time ,

therefore, would not leave her without any potential remedy. That , the Tribunal considers is another factor which it is entitled to take into account when deciding whether to exercise its discretion to extent time.

28. Taking all those factors into account, but considering the absence of any explanation for the delay to be a weighty factor, for all these reasons, and mindful of the guidance in ***Robertson*** above that extension of time is the exception and not the rule, even in the absence of prejudice to the respondent, the Tribunal has not been persuaded by the claimant that it would be just and equitable to extend time for the presentation of her claims of disability discrimination, and they are all dismissed.

b.The constructive unfair dismissal claim.

29. The Tribunal now turns to the claim that can proceed. At the outset the Tribunal will set out the law. Section 95(1)(c) of the Employment Rights Act 1996 provides that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

30. The classic statement of the law on constructive dismissal is set out in the judgment of the Court of Appeal in ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221*** which held that for an employer's conduct to give rise to a constructive unfair dismissal it must involve a repudiatory breach of contract. There are three elements to a constructive unfair dismissal, namely:

That there was a fundamental breach of contract on the part of the employer;

The employer's breach caused the employee to resign; and

The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

31. In order for a Tribunal to deal with these matters it must identify the contractual term or terms, either express or implied, which have allegedly been breached. It must then go on to identify a fundamental breach of that contract on the part of the employer. The implied term of trust and confidence was the term of the contract which had allegedly been breached by the respondent by various acts or omissions over a period of time which, the claimant says, cumulatively amounted to a fundamental breach. The Tribunal, therefore must firstly decide whether the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

32. In terms of the contractual terms relied upon, breach of which is relied upon, the claimant's case has been put solely upon the basis of breach of the implied term of trust and confidence. It is important to bear that in mind at the outset, as there has been some suggestion that , in requiring the claimant to move from her role in Utilities to one on the Sales Team, the respondent was thereby breaching an express agreement that the claimant alleges was made with the respondent when she returned to their employment in 2017.

33. The claim has not, however, been pleaded on the basis of breach of an express term, nor, frankly, could it have been. Whatever may have been verbally agreed, the fact remains that in both the written contracts of employment issued to and signed by the claimant after she resumed working for the respondent in 2017 there is clause 3.3, in these terms:

3.3. In addition to, or substitution for, your normal duties we may require you to undertake other duties from time to time and work in other departments and for our associates as the need arises."

34. These documents were, it should be noted, not merely written statements of terms, they are signed by both parties, and, being executed as Deeds, witnessed. It is a principle of contract law that where the parties have entered into a written agreement , those written terms are the express terms of the contract. As Chitty on Contracts 35th Edition , para 16-023 to 16-024 puts it :

"It is often said to be a rule of law that:

"If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given … so as to add to or subtract from, or in any manner to vary or qualify the written contract."

Indeed, in 1897, Lord Morris accepted that:
"… parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract."

This rule is usually known as the "parol evidence" rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing, such as drafts, preliminary agreements and letters of negotiation."

Whilst there are a number of exceptions to this rule, none applies or has been claimed to, here, so there was no express term that the claimant could not be required to work in another role, so her claim for constructive dismissal could not be (and is not) founded upon breach of such an express term.

35. That is not, of course, to say that such a requirement could not amount to a breach of the implied term of trust and confidence. In the List of Issues, at para. 1.1.3 , however, reference is curiously made to the respondent's conduct being in breach of "the alleged agreement with the Respondent/implied term" in the claimant's contract of employment. This is , however, under the heading of para. 1.1 , where the issue is identified as whether the respondent's conduct amounted to a breach of the implied term of trust and confidence. It is thus unclear what the claimant is pleading. Whatever it is, there was no express term, the Tribunal is quite satisfied, that the claimant could not be required to work in another role, as clause 3.3 expressly provides that she could, and, in relation to any implied term, the legal contractual position is summed up in the maxim (permissible , the Tribunal trusts, given both sides are represented by counsel) *unius inclusio alterius exclusio est* – an express term precludes implication of an implied term in respect of the same terms of any contract.

36. It is therefore to the implied term that is relied upon that the Tribunal now turns That term, as recognised in cases such as ***Wood v. W M Car Services (Peterborough) Ltd [1981] IRLR 347*** and ***Mailk v BCCI [1997] IRLR 462*** is that the respondent will not , without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.

37. It is clear that in order to establish that there has been a fundamental breach of contract it is not necessary to show one fundamental act or omission. There does not need to be one event, there can be a series of events which cumulatively amount to a breach of that implied term. In such circumstances, where there is not one individual act or omission relied upon, but a series of actions that are alleged to amount to that breach, where they culminate in one particular act that is known as the "last straw", and in order to establish that a claimant has been constructively dismissed there has to be a last straw. Indeed in the leading case which the Tribunal is considering on this issue, ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35,*** a decision of the Court of Appeal and the judgment of Lord Justice Dyson, it is clear from the discussion in that case of the nature of constructive dismissal, that in order for there to be a constructive dismissal where there is a series of acts, the final straw must be there, and although the final straw may be relatively insignificant, it must not be utterly trivial. There must be a final straw, otherwise there can be no constructive dismissal. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. The judgment goes on to say:

"A claimant cannot subsequently rely on those acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

Moreover, and this is an important part of the judgment:

"An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence have been undermined is objective."

38. So to the extent that the claimant might have perceived that as being the case, the Tribunal cannot rely solely on that, it must look objectively on the act complained of.

39. Further consideration of the last straw doctrine was undertaken by the Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833***. Underhill LJ confirmed ***Omilaju*** as the leading case on last straw arguments. In particular, he set out the following passages from the judgment of Dyson LJ which he said sum it all up and should require no further elucidation:

"14 The following basic propositions of law can be derived from the authorities:

The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: ***Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27.***

It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, ***Malik v Bank of Credit and Commerce International SA [1997] IRLR 462****, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".*

Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in ***Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347,*** *[at page] 350. The very essence of the breach of the implied term is that it is "calculated or likely to destroy or seriously damage the relationship" (emphasis added).*

The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at p.464, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:

""Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.""

15. The last straw principle has been explained in a number of cases, perhaps most clearly in ***Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157****. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:*

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? … This is the 'last straw' situation."

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application….

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred."

40. So to the extent that the claimant might have perceived any act as being the last straw , the Tribunal cannot rely solely on that, it must look objectively on the act complained of. The Tribunal has therefore also to examine whether there was, cumulatively in this instance, a fundamental breach of contract, entitling the claimant to resign, in response to which she did resign, and did not delay her resignation too long so as to affirm the contract.

Discussion and findings on the constructive dismissal claim

41. It is clear that there were several aspects of the conduct of the respondent upon which the claimant could have sought to rely in establishing that there was a breach of the implied term of trust and confidence. The Tribunal, however, is confined to the List of Issues (***Chandhok v Tirkey [2015] IRLR 195***) and indeed, the Tribunal was not (expressly) invited by Mr Marshall to go beyond that List.

42. The List must, therefore, be the starting point, and the conduct relied upon as set out in the List as constituting fundamental breach of the implied term of trust and confidence is :

1.1.1 The refusal to allow the claimant to be placed on furlough leave subject to the Government's Coronavirus Job Retention Scheme in November 2020 instead of requiring the claimant to move to the sales team temporarily;

1.1.2. The alleged suggestion by the respondent that there was no alternative to the claimant moving to its sales team temporarily;

1.1.3. The breach of the alleged agreement with the respondent/ implied term in the claimant's contract of employment that when the claimant was re-employed by the Respondent in July 2017 she would not be required to work in the respondent's sales team during her employment (in order to determine this the Tribunal will first need to determine whether this was a term of the claimant's contract of employment); and

1.1.4. The respondent's alleged failure to deal with the claimant's grievance in a professional manner

(further particulars were requested in this respect as per the Case Management Orders set in November 2021, but not provided).

43. Of immediate note, as highlighted by Mr Mensah in para. 43 of his Submissions, is what is not included in the List of issues, which is the conduct of Scott Bedall on 26 November 2020 in the meeting that he held with the claimant. Although the respondent's handling of the claimant's grievance about that conduct is part of the conduct relied upon as amounting to breach of the implied term, the conduct itself is not.

44. Going through these issues, the Tribunal will address each, and determine whether fundamental breach of the implied term is made out. Starting with 1.1.1 , this cannot be relied upon. It is based upon a misunderstanding of the claimant's case. She did not ask to be put on furlough. That suggestion came out of the email exchange with Adam Samuels, where he mentioned it. The claimant did not ask for it, she merely asked if that was being suggested by the respondent as an alternative. In any event, In any event, as both sides agree that there was work for the claimant to do, it would not have been appropriate for her to have been placed on any furlough scheme, so any refusal to do so would not have been without reasonable and probable cause.

45. Turning next to Issue 1.1.2, this is best considered also with 1.1.3, as they both relate to the same thing, the respondent's attempt to change the claimant's role from one working on Utilities, to one working on the Sales Team . This impinges upon the issue discussed above about any agreement that the claimant would not be required to work on cold calling. As observed above, there was no such binding legal agreement, but the claimant had not wanted to work in that type of role before her diagnosis, and she certainly did not want to do so after it.

46. Had the respondent gone through with this proposal , the claimant would have a strong case for contending that this did amount , in the circumstances, to a breach of the implied term of trust and confidence. The problem for the claimant's case, however, is that the respondent did not. The proposal was made, and the claimant , had she not gone off work sick, may then have been required to start work in that role. But she never was. Once she raised the grievance, in this regard, it was upheld, and she was clearly told that no such move would occur, she was to return to work in the role that she had.

47. The Tribunal appreciates that the proposal was one which was of concern to the claimant , and one to which she was entitled to, and did, object. That objection was quickly, and before she had returned to work, noted and accepted, and the proposal or

requirement was withdrawn.

48. This brings us into the territory of anticipatory breach. Constructive dismissal is a creature of the law of contract, and it is contractual principles which have to applied. In considering the nature of the alleged breach of the contract of employment , a Tribunal must examine whether the breach is repudiatory in itself, in other words, is cohate, and irreversible, or anticipatory. If the former, there is no going back for the employer, the breach has been committed, and changing its mind later will be of no avail. If, however, the breach is anticipatory, because it relates to future performance of the contract, and if the employer does, before employee accepts the breach by resigning, withdraw the anticipatory breach, the breach is remedied, and the employee loses the right to then accept it and claim constructive dismissal.

49. An example of this can be found in the case of ***Harrison v Norwest Holst Group Administration Ltd [1985] IRLR 240***, which shows that, in the case of anticipatory breach, in the absence of unequivocal acceptance of the repudiation, the employers are entitled to withdraw their threatened anticipatory breach since there was a sufficient anticipatory element in their breach to confer on them a "*locus poenitentiae"* (yet more Latin, with apologies, that is to say, an opportunity to withdraw the anticipatory breach) at any time before acceptance of the repudiation was communicated by the employee.

50. The Tribunal's view is that this was such a case. The claimant was never actually made to start work on the Sales Team. It is appreciated that Scott Bedall told her to go and do what he had told her, and that the alternative was unpaid leave, but she immediately then left work, and was off sick. In the ensuing 6 weeks , still employed, taking some of this time as paid annual leave, the claimant raised a grievance, the result of which was that the proposal or requirement was dropped, and her position in Utilities was confirmed as the one to which she would return when fit to do so. In these circumstances, the Tribunal considers that the respondent was entitled to withdraw the proposal and did so in good time before the claimant accepted what would then have been the anticipatory breach, so she was not entitled to resign by reason of that conduct.

51. Alternatively, and perhaps less legalistically, the Tribunal considers that in examining the conduct on the part of the respondent which is relied upon as amounting to a fundamental breach of the implied term of trust and confidence, the Tribunal is entitled to look at the conduct as a whole, right up until the claimant's resignation. That must include, issues of whether any breach was anticipatory aside, whether the respondent tried to remedy anything that could be regarded as undermining the trust and confidence between the parties. Our view is that by quickly and very clearly making it clear that she would not be required to work in the Sales Team upon her return to work , in the time before the claimant resigned , the respondent was not acting in a manner calculated (not really suggested as part of the claimant's case) or likely to damage the relationship of trust and confidence. It was doing the opposite, it was quickly and clearly showing her that her concerns would be addressed, and she would not be forced to work in a role she did not want.

52. Part of the problem, however, we consider, is that , by then, the issue of whether the claimant would or would not have to work in the Sales Team was not the only one

of concern to her, there were others, which were a major part of the grievance, and that also led to her decision to resign. We therefore turn to the final pleaded ground of breach of the implied term of trust and confidence, which is the grievance, at issue 1.1.4.

53. The way in which this is put is "failure to deal with the claimant's grievance in a professional manner". Whilst further particulars were requested they were not provided, but paras. 40 to 52 of Mr Marshall's Submissions supplement the pleading, and set out more fully the way in which this part of the claim is now put by the claimant.

55. To summarise the claimant's position on this aspect of the constructive dismissal claim, from the Submissions:

Jill Rhodes's grievance investigation and subsequent response fell well below the level that should be expected of a reasonable employer and therefore constituted a further breach of the implied duty of mutual trust and confidence.

In particular, Jill Rhodes failed to:

interview Alastair Carrington, in regard to the claimant's contention that she had informed him of her diagnosis of a brain lesion and the symptoms she was experiencing in July 2020, or about the aftermath of the meeting on 26th November 2020, despite the fact that the claimant had stated in her grievance letter (page 214) that he had witnessed how upset she was following the meeting;

interview Lee Carden about the aftermath of the meeting on 26th November 2020, despite the fact that the claimant had stated in her grievance letter (page 214) that he had witnessed how upset she was following the meeting

Jill Rhodes, however,:

absolved Scott Beddall and Adam Buchan of bullying or behaving unreasonably towards the claimant during the meeting of 26th November 2020 having apparently accepted their versions of events at face value over that of the claimant. without seeking any independent testimony from these witnesses;

recommended that on her return to the office, the claimant have a face-to-face meeting with Scott Beddall to clear the air, despite the fact that it was a face-to-face meeting with Scott Beddall which had caused her such distress previously.

in her grievance response accused the claimant of unprofessional conduct in refusing to attend a meeting in the boardroom with Adam Buchan (see page 253). Jill Rhodes did not appear to give any consideration to the fact that Adam Buchan had refused to explain to the claimant what the meeting was about, just saying "It's personal…".

failed to ask Adam Buchan to explain why he had not simply provided the claimant with an email as she had requested. Instead, Jill Rhodes took Adam Buchan's side and chose to accuse the claimant of unprofessional conduct in refusing to attend the meeting with Adam Buchan.

recommended that a Management Health Referral to be undertaken upon the claimant's return to work.

Jill Rhodes' comprehensive failure to interview the correct witnesses and ask the right questions which may have resulted in her reaching the wrong conclusions and making crass and erroneous recommendations in her grievance outcome letter.

56. It is an implied term in a contract of employment that the employers will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have (***W A Goold (Pearmak Ltd) v McConnell [1998] IRLR 516, EAT***) . Failure , therefore, to deal properly with a formally raised grievance may constitute a contractual repudiation, based on this specific implied term to take such grievances seriously. However, it is also clear that such failure will be a breach of the implied term of trust and confidence , such as , in relation to denial of proper procedures on an appeal in a grievance case, was found in ***Blackburn v Aldi Stores Ltd [2013] IRLR 846, EAT.*** The claimant's case, of course, is pleaded on the basis only of the implied term of trust and confidence.

57. The first point to make is that the way in which the claimant's case is put in the claimant's Submissions goes much further than is pleaded in the agreed List of Issues. There it is put (as it was pleaded at para. 20 of the Grounds of Claim at page 17 of the bundle) as "failure to deal with the claimant's grievance in a professional manner". The Submissions , however, do not only address the manner in which the grievance was dealt with, but also its conclusions. One of the claimant's main complaints is that Jill Rhodes "absolved" Scott Bedall of any blame for his conduct of the meeting, and accepted his and Adam Buchan's evidence at face value. The claimant also , in Submissions , attacks the recommendations made by Jill Rhodes. Again, this goes further that the pleaded claim, and , given that the claimant was to provide further particulars of this ground of her claims but never did, is a very late attempt to broaden the ambit of the claims. The Tribunal does not consider that the claimant can do so, again, following the principles in ***Chandok v Tirkey*** , and should be confined to the pleaded case that Jill Rhodes did not deal with the claimant's grievance in a professional manner.

58. If that is the claimant's case, it will fail. Whatever else Jill Rhodes did or did not do, it cannot be said that it was not professional. She conducted a meeting with the claimant at an early stage, to find out what her grievance was about, notes were taken, and the claimant allowed to amend those noes which she did. She then interviewed the two people about whom the claimant had complained, along with Adam Samuels. Again, notes were taken. She reviewed a lot of documentation. The claimant's grievance was quite wide ranging, including as it did issues about holiday arrangements , but despite this, and the time of year, Jill Rhodes completed it, and sent the claimant a comprehensive outcome letter within 5 weeks of receipt of the grievance. We can see nothing about the process which was in any way not professional.

59. That the claimant disagreed with the outcome does not make it unprofessional, nor does the fact that Jill Rhodes could have interviewed more witnesses make it unprofessional, especially when timely completion was required. Nor do we find her

recommendations “unprofessional”. That the claimant did not want to have a mediation with Scott Bedall may be understandable, but the recommendation (not, be it noted, order or requirement) that there should be one is in no way unprofessional, nor even unreasonable. Likewise with the recommendation for a Management Health referral, which the claimant took issue with mainly because , firstly it should have been done earlier, with which Jill Rhodes would probably have agreed, and secondly because it was being suggested that this took place upon the claimant’s return to work. Nothing in Jill Rhodes’ recommendations precludes such a referral whilst the claimant was still off work sick, if that remained the position. The thrust of Jill Rhodes’ outcome, it seems to us was to reassure the claimant that she could come back to work in her existing role.

60. We note the claimant’s dissatisfaction with Jill Rhodes criticising her for a lack of professionalism in not agreeing to speak to Adam Buchan. This appears on page 253 of the bundle. Jill Rhodes, however, did not “accuse” the claimant, she was more measured. She expressed concern that the claimant had not been “entirely professional”, which is rather less strident. We consider that a reasonable remark to make, and a view she was entitled to take.

61. In short, we consider that there was nothing “unprofessional” in the manner in which Jill Rhodes dealt with the claimant’s grievance.

62. If, however, we are permitted to consider this part of the claim on the wider basis advanced by Mr Marshall in his Submissions, our conclusions would be no different. In none of the caselaw cited above, whether as part of the duty to act in accordance with the implied term of trust and confidence, or under the stand alone implied term to be afforded a reasonable opportunity to obtain redress of any grievance that an employee may have, does an employee have the right to have a grievance resolved in their favour. The obligation is to afford the employee a reasonable opportunity to obtain redress, not to have that redress. The emphasis is upon process. Outcome is not, we appreciate, wholly irrelevant, but it seems to us that unless the employer is acting without good faith, conducting a sham process, or is wilfully coming to conclusions that are manifestly unsustainable , there will be no breach of either implied term.

63. Nor, we consider, is it conduct capable of amounting to a last straw, as defined in ***Kaur*** . Even if that were wrong, there has to be some antecedent conduct to which the last straw can be added to tip the scales. On our findings, once the threatened move to the Sales Team had been lifted, there was no conduct on the part of the respondent sufficiently serious to which the grievance inadequacies could then be added to amount to a fundamental breach.

64. Further, we do not consider that an employer , in order to satisfy either of the implied terms, is obliged to carry out a forensic enquiry or investigation into the grievance issues that leaves no stone unturned. Rather , as when conducting disciplinary processes, we consider the employer need only act reasonably, and afford the grieving employee a reasonable opportunity to obtain redress. We consider that Jill Rhodes’ grievance process, and indeed her conclusions , (which we would not have agreed with in some respects, such as the conduct of Scott Bedall on 26 November 2020), were open to her, were arrived at in good faith, after a reasonable investigation and were a measured response to the claimant’s grievance.

65. Before leaving this topic, it is important to keep in mind that not every matter which was the subject of the claimant's grievance has been relied upon as a matter contributing to the fundamental breach of the implied term relied upon. As has been observed, that actual conduct of Scott Bedall on 26 November 2020 has not been relied upon (although it could have been) , but neither have the other issues around leave arrangements and working hours that the claimant also raised, which were relied upon in her discrimination claims, but not for her constructive dismissal claim.

Conclusion.

66. The upshot, therefore, is that the claimant's claim of constructive unfair dismissal fails, and is dismissed. Thus, with some sympathy for the claimant, whom we wish well with her ongoing health issues, we are unable to find for her on any of her claims, which are all accordingly dismissed.

Employment Judge Holmes

Date: 13 June 2024

RESERVED JUDGMENT SENT
TO THE PARTIES ON
28 June 2024

FOR THE TRIBUNAL OFFICE

ANNEXE A – THE LIST OF ISSUES

1.Constructive Dismissal.

1.Did the Respondent's conduct amount to a repudiatory breach of contract due to a breach of the implied term of mutual trust and confidence entitling the Claimant to resign in response to it? The conduct relied upon by the Claimant is as follows:

1.1.1.the refusal to allow her to be placed on furlough leave subject to the Government's Coronavirus Job Retention Scheme in November 2020 instead of requiring the Claimant to move to the sales team temporarily;

1.1.2.the alleged suggestion by the Respondent that there was no alternative to the Claimant moving to its sales team temporarily;

1.1.3.the breach of the alleged agreement with the Respondent/ implied term in the Claimant's contract of employment that when the Claimant was re-employed by the Respondent in July 2017 she would not be required to work in the Respondent's sales team during her employment (in order to determine this the Tribunal will first need to determine whether this was a term of the Claimant's contract of employment); and

1.1.4.the Respondent's alleged failure to deal with the Claimant's grievance in a professional manner (further particulars are requested in this respect as per the Case Management Orders set in November 2021).

1.2.If it is decided that the act(s) or omission(s) as decided at paragraph 1.1. were sufficiently serious to constitute a repudiatory breach entitling the Claimant to resign and claim constructive dismissal, did the Claimant delay in resigning thus reaffirming the breach?

1.3.If so, did the Claimant accept the repudiatory breach by resigning in response to the act(s) or omission(s) set out at paragraph 1.1, or did the Claimant resign for some other reason? Noting that the Claimant commenced new employment two weeks after her employment with the Respondent terminated.

2.Disability

[Now determined]

3.Indirect Disability Discrimination

3.1.It is admitted that the Respondent's 'one employee off' policy amounts to a provision, criterion or practice ("PCP") and that this was applied to persons without the Claimant's disability, as well as to the Claimant.

3.2.Did this PCP place people with the Claimant's disability and therefore the Claimant at a particular disadvantage compared to people without the Claimant's disability? The Claimant alleges that the substantial disadvantage she was put at was the high levels of pressure and stress this policy put her at which exacerbated the symptoms of her alleged disability.

3.3.If so, is the PCP a proportionate means of achieving a legitimate aim? Namely, the requirement for the Respondent to ensure it had enough employees in the Claimant's team working at any one time to meet customer demand and to permit the Respondent to manage the substantial amount of holiday that had been accrued by employees in the Claimant's team whilst they had been on furlough leave.

4.Direct Disability Discrimination

[Now withdrawn]

5.Failure to make reasonable adjustments.

5.1.It is admitted that the Respondent's 'one employee off' policy amounts to a PCP and that this was applied to persons without the Claimant's disability, as well as to the Claimant.

5.2.Did this PCP place people with the Claimant's disability and therefore the Claimant at a substantial disadvantage compared to people without the Claimant's disability? The Claimant alleges that this caused her high levels of pressure and stress which exacerbated the symptoms of her disability. In particular, as she was not permitted a day off in August 2020 which would have allowed her to manage the high levels of stress she alleges she was experiencing as another employee already had annual leave booked that day.

5.3.If so, were there adjustments that were not undertaken by the Respondent, that if they had been would have avoided any such disadvantage? The Claimant alleges that the following adjustments should have been made:

5.3.1.The arrangement of an occupational health assessment;

5.3.2.The arrangement of a stress risk assessment; and

5.3.3.Permission for the Claimant to use her annual leave in August 2020 to manage her medical condition which would have been an exception to the PCP;

5.3.4.The assignment of somebody to cover the Claimant's work when she took a week's holiday from 10 September 2020 until 18 September 2020.

5.4.Did the Claimant request the adjustments set out at paragraph 5.3 during her employment?

5.5.Did the Respondent carry out, or attempt to carry out, the adjustments at paragraphs 5.3.1. - 5.3.4?

5.6.Would the adjustments listed at paragraph 5.3 have alleviated the substantial disadvantage the Claimant alleges she was put at?

5.7.If so, would it have been reasonable for the Respondent to have taken those steps at the relevant time taking into account the size of the Respondent and the resources available to it?

6.Discrimination arising from the Claimant's disability.

6.1.Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disabilities? The Claimant alleges that the Respondent's management team continued to subject her to high levels of work-related pressure and stress despite having knowledge of the Claimant's disability and her doctor's advice to avoid stressful situations. It is understood that this is the unfavourable treatment the Claimant seeks to rely upon.

6.2.If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent seeks further particulars from the Claimant in respect of this head of claim. Namely, the conduct relied upon by the Claimant (including the dates that such conduct occurred) to evidence that the Respondent's management team continued to subject the Claimant to high levels of work-related pressure and stress. .

7.Jurisdiction:

7.1.Does the Tribunal have jurisdiction to hear the Claimant's discrimination claims?

7.2.Is the Respondent's application of the time limit rules as set out at paragraph 33 of the amended Grounds of Resistance correct?

7.3.Are the acts and/ or omissions complained of by the Claimant part of a continuous course of conduct continuing until the termination of the Claimant's employment?

8.Remedy:

8.1.What is the value of the Claimant's basic award?

8.2.What is the value of the Claimant's immediate and future financial losses?

8.3.What is the value of the claim for injury to feelings?

8.4.Has the Claimant made reasonable attempts to mitigate any financial loss suffered?
8.5.Should a reduction be made on any compensatory award for the Claimant's failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures due to her failure to appeal the grievance decision prior to her resignation? If so, what should the reduction be (up to 25%)?

8.6.What interest, if any, should be issued on any award made?