Case Number: 1404212/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss K Kreciszewska**

Respondent: **Granville Care Home Ltd**

Heard at: **Bristol Employment Tribunal via Video hearing**
On: **5, 6, 7, 8 and 9 August 2024**

Before: **Employment Judge Youngs**
Ms Y Ramsaran
Ms M Luscombe-Watts

Interpreter: **Ms M Wierzbicka for 5 August 2024**
Ms A Moranska for 6-9 August 2024.

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The Claimant's claims for discrimination and constructive unfair dismissal fail and are dismissed.

2. The Claimant's claim for holiday pay was admitted by the Respondent. A gross payment of £277.20 (subject to deductions for tax and national insurance contributions) is to be paid by the Respondent to the Claimant in respect of holiday pay.

REASONS

3. By a Claim Form dated 29 October 2021, the Claimant brought complaints of disability discrimination and holiday pay. The Claim was subsequently amended to include a complaint of constructive unfair dismissal. The Respondent responded on 22 March 2022, resisting the Claim.

Procedure, documents and evidence heard

4. The hearing was held in person at the Bristol Employment Tribunal. The Claimant was represented by her partner, Mr D Mierzynski. The Claimant gave evidence on her own behalf. The Respondent was represented by Mr G Lomas, Tribunal Advocate. Evidence was given for the Respondent Mrs Shen Butt, Director of the Respondent, Ms Tanya Cantillon, Home Manager, and Ms Zoe Young, Administrator. Each witness had a written

statement that stood as their evidence in chief. An interpreter was made available for, and utilised by, the Claimant and her representative, as the Claimant's first language is Polish.

5. Prior to hearing evidence, the List of Issues, as agreed at a prior preliminary hearing, was confirmed.

6. We had before us an agreed bundle of documents, along with the witness statements. During the course of the hearing, the Claimant's representative sought to have some further documents admitted, which were allowed, save for guidance in relation to furlough. The parties were asked to identify the date of the iteration of the guidance that was sought to be admitted, and to agree that date, so that the Tribunal could determine relevance. In the event, this did not happen and the document was not admitted.

7. As part of the Tribunal's reading, we had noticed that two ACAS pre-claim conciliation certificates had been included in the Bundle in relation to the Claimant and the Respondent. The first certificate recorded that the Claimant had contacted ACAS on 3 August 2021 (Day A) and that the conciliation period ended (and the certificate was issued) on 4 August 2021 (Day B). The second certificate recorded that the Claimant had contacted ACAS on 20 August 2021 (Day A) and that the conciliation period ended (and the certificate was issued) on 1 October 2021 (Day B). An issue therefore arose as to which was the correct ACAS Certificate. This was dealt with as a preliminary issue at the start of the hearing and we heard submissions on the issue.

8. We found that the Claimant (or someone on her behalf) had contacted ACAS on 3 August 2021 and started the pre-claim conciliation process. A certificate was issued the following day. We do not know whether this was at the request of the Claimant, for example, the Claimant could have indicated that she did not want to seek conciliation with the Respondent. However, it was a valid conciliation certificate. It was sent to the Claimant (or someone on her behalf) by email, and then disclosed to the Respondent as part of the disclosure process in these proceedings. The Claimant's position changed a number of times as to how she came to be in possession of this certificate, but the initial recollection was that it was emailed by ACAS, and Mr Lomas confirmed that the first time the Respondent saw it was as part of the Claimant's disclosure. This first certificate was not available at the first preliminary hearing, which supports this view. The Claimant subsequently wanted to try conciliation, and a friend contacted ACAS on her behalf. This gave rise to a second certificate being issued. The name of the Respondent on this second certificate is slightly different (the first certificate being correct), although this was not material to our finding as to which certificate was the certificate issued in compliance with the conciliation requirements set out in section 18A of the Employment Tribunals Act 1996 (the 1996 Act).

9. We concluded that the first certificate is the certificate for the purposes of section 18A of the 1996 Act. The EAT has previously found that only one mandatory early conciliation process is enacted by section 18A. A second certificate, where obtained and relating to the same matter, has no impact on the limitation period (Commissioners for HMRC v Serra Garav, which was followed in the subsequent EAT cases of Treska v Master and Fellows of the University of Oxford and Romero v Nottingham City Council.

10. This therefore impacts on time limits in this case (which are dealt with below).

11. We were asked by the Respondent to consider as a further preliminary issue striking out the entirety of the Claimant's claim on the basis that it was submitted outside of the primary

time limit. We considered how best to proceed and concluded that we were not satisfied that it would be in the interests of justice, or in accordance with the Overriding Objective to do deal with time limits without hearing the evidence. Further, the Respondent had not raised the issue around the ACAS certificate previously, the Claimant had not had opportunity to consider the legal tests surrounding time limits and extensions of time based on the dates in the first ACAS certificate. We explained to the parties that we would assist in eliciting with evidence in chief as to time limits on this basis and would allow the Respondent to do the same with its witnesses on the same point, and that both parties would be able to cross examine the other's witnesses. The Respondent was reminded that it would need to be able to explain the prejudice suffered by it if the Claimant's claims were heard out of time.

12. During the course of the hearing, the Claimant's representative reverted back to the issue of the ACAS certificate. He said that he had been in touch with ACAS and had an email evidencing that the first certificate was not valid. We asked for and received this email. It did not comment on the validity or otherwise of the first certificate. It was an email confirming that ACAS had retained the second certificate, because it was linked to a claim (having been referenced by the Claimant in the claim form), but that they do not otherwise retain these records. ACAS confirmed that the Claimant would need to check their emails for any additional Early Conciliation certificates. The Judge considered this as an application for reconsideration and determined that it had no reasonable prospects of success. ACAS did not say that the first certificate was not issued. The email did not change the position.

13. We had a number of breaks throughout the hearing in order to support the Claimant and her representative. We also broke early one day mid-week due to an issue with the facilities at the Tribunal. The Judge assisted the Claimant's representative in phrasing his questions where appropriate and in advance of and throughout the Respondent's evidence the Judge referred the Claimant and her representative back to the List of Issues so that they knew the areas on which they needed to focus.

14. After conclusion of the oral evidence, we heard oral submissions. We took a copy of the Claimant's written submissions, which were in any event read to us. We took into account the evidence and the oral submissions of both parties.

The issues

15. The issues to be determined at this hearing were set out in the Order of Employment Judge Bax made at a preliminary hearing on 14 November 2023. These are set out on pages 43 to 53 of the Bundle and were updated slightly at the start of the hearing and following the decision in respect of the ACAS certificate. It was agreed at the hearing that we would deal with liability only at this stage. The issues on liability are as follows:

1. Time limits (updated following our decision in relation to early conciliation)

1.1 The claim form was presented on 29 October 2021. The Claimant commenced the Early Conciliation process with ACAS on 3 August 2021 (Day A). The Early Conciliation Certificate was issued on 4 August 2021 (Day B). The Claimant's last day of employment was 30 June 2021. Accordingly, any act or omission which took place before 30 September 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

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

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the unfair dismissal complaint made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?
1.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Disability

2.1 The Respondent accepts that the Claimant was disabled by reason of Type 2 Diabetes at all times material to the claim.

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the Respondent treat the Claimant unfavourably by:

3.1.1 After informing Ms Cantillon on 30 March 2020 that her GP had advised that she was at risk if she returned to work and the lockdown being imposed on 1 April 2020, the Claimant asked her if she should return to work. Ms Cantillon told the Claimant that it was her decision
3.1.2 On 6 April 2020, the Claimant asked Ms Cantillon if she should return to work and did not receive a reply;
3.1.3 On 20 April 2020, Zoe Young's secretary asked the Claimant if she had a shielding letter, to which she replied, 'not yet'. Ms Young told the Claimant that it was not possible to offer her work from home or work with social distancing.
3.1.4 On 21 April 2020, Lisa Marsh, asked the Claimant the same question as on 20 April 2020.
3.1.5 On 15 May 2020, the Claimant was asked to provide a GP certificate, which she did on 18 May 2020. Ms Butt contacted the Claimant on 20 May 2020 asking her to contact her urgently. The Claimant spoke to Ms Butt and an attempt was made to force her to return to work by intimidation. The authenticity and relevance of the certificate/GP document was questioned, saying it was automatically generated and meaningless. She was told that if she did not return to work she would be replaced.

3.1.6 On 20 May 2020, Ms Butt, by text message, told the Claimant that she would receive a letter from the Respondent about the situation, but none was sent.

3.1.7 Between 30 March 2020 and May 2021 failed to furlough the Claimant. The Claimant says that she should have been furlough because she had a full work contract and other people working for other employers, who were unable to work because of covid were allowed to be furloughed. She was willing to return to work but she was unable to do so, because she needed to shield herself and she should have been furloughed in line with the Government guidance on the furlough scheme.

3.1.8 The Respondent ignored Unison's e-mail dated 13 July 2020 and did not respond.

3.1.9 From 20 May 2020 the Claimant received no contact from the Respondent until May 2021.

3.1.10 On 21 May 2021, Ms Cantillon wrote to the Claimant noting that they were moving out of lockdown and shielding and asked what her intentions were. The Claimant says this was unfavourable, because the letter was inaccurate, the Respondent was trying to change the facts and said that she had been absent from 16 February 2020, when she had been on annual leave at that time until 31 March 2020. It was not correct that she had said she was unable to work and she had said that she was willing to work but needed to socially distance The Claimant relies on her messages to Ms Cantillon on 30 March and 6 April 2020.

3.1.11 On 7 June 2021, Ms Cantillon wrote to the Claimant saying that her continued absence implied that she had or intended to resign, and she was asked to contact her to confirm that or say if she wanted to return to work. If she wanted to return, she would be asked to explain her unauthorised absence and if it was without good reason it was a serious disciplinary offence, which could amount to gross misconduct. The Claimant alleges this was a reframing of the facts and a threat of a disciplinary dismissal to force the Claimant's resignation and was trying to get her to accept she had an unauthorised absence since 16 February 2020.

3.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that she was unable to attend work due to the need to work from home or ensure social distancing at work because she was at high risk if she contacted covid-19 due to her diabetes.

3.3 Was the unfavourable treatment because of any of that thing?

3.4 Was the treatment a proportionate means of achieving a legitimate aim?

3.4.1 The Respondent says that its aims were (in relation to allegations 3.1.10 and 3.1.11): to know what the Claimant's intentions were in her returning to work in order to fulfil her contracted role as a care assistant and in order to know the numbers it required to provide the care and welfare to its service users. The Respondent said that the Claimant's continued absence when restrictions had been lifted was having a substantial impact on the Respondent's ability to plan and provide its service users the care they needed.

(as set out in the Respondent's amended response).

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
3.5.2 Could something less discriminatory have been done instead;
3.5.3 How should the needs of the Claimant and the Respondent be balanced?

3.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? The Respondent did not dispute that it knew the Claimant had Type II diabetes at the material times.

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date? The Respondent did not dispute that it knew the Claimant had Type II diabetes at the material times.

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

4.2.1 The requirement to attend work at the Respondent's premises and provide personal care to residents. The Respondent agreed that it had this PCP.

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she was unable to attend work due to the need to work from home or ensure social distancing at work because she was at high risk if she contacted covid-19 due to her diabetes?

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

4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1 Allowing the Claimant to work from home doing administrative work;
4.5.2 Giving her different duties, namely paperwork or back office work.

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

4.7 Did the Respondent fail to take those steps?

5. Constructive unfair dismissal (s. 95 and 98 Employment Rights Act 1996)/Discriminatory Constructive Dismissal (s. 39 Equality Act 2010)

5.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows;

5.1.1 The allegations of discrimination above;
(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

5.2 The Tribunal will need to decide:

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

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

5.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

5.4 Did the Claimant wait too long before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

5.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

5.6 Was there a discriminatory constructive dismissal within the meaning of s.39(2)(c) and (7)(b) of the Equality Act 2010?

6. Holiday Pay (Working Time Regulations 1998)

The Claimant confirmed to the Tribunal prior to the hearing that she was only claiming holiday pay in respect of the holiday year in which her employment terminated. The Respondent admitted that holiday pay was owing to the Claimant.

Findings of fact

16. We made the following findings of fact:

17. The Respondent owns and operates nine care homes for the elderly in Bristol and the surrounding area. One of those care homes is called Granville Lodge (the Home).

18. The Claimant was employed by the Respondent from 1 May 2016 until 30 June 2021 to work at the Home as a care assistant. This role involved providing (close) personal care to residents of the Home, who were unable to care (or care fully) for themselves. Immediately prior to February 2020, the Claimant's contracted hours were two night shifts a week each of 12 hours, including an unpaid break. She was paid for 22 hours a week.

19. The Respondent employed one administrator at the Home (Mrs Zoe Young), who had worked there for approximately eight years by the start of 2020. Mrs Young's role encompassed some HR, liaising with the families of service users and other stakeholders, as well as general admin. As a small employer, the Respondent was not set up for admin to be done from home. Admin required access to patient records and care plans, which were on site, and needed to remain on site both for data protection reasons and because they needed to be accessible by other staff on site. There were kitchen staff on site as well as other carers and managers. None of the roles facilitated social distancing, due to the type of business, the building, and the work done at the Home.

20. The Claimant has type 2 diabetes, which the Respondent admits is a disability for the purposes of the Equality Act 2010. She also has hypertension. Neither of these conditions affected her work for the Respondent prior to March 2020.

21. On 23 March 2020, the UK government announced lockdown measures as a result of the COVID-19 pandemic. The lockdown measures came into force on 26 March 2020. A furlough scheme was announced on 30 March 2020, with payments able to be backdated to 1 March 2020. The terms of this furlough scheme varied throughout the pandemic as the situation evolved. It was intended to enable employers who were affected by the COVID-19 pandemic to retain staff. It is not disputed that employees who were extremely clinically vulnerable could be furloughed under the furlough scheme, whether or not there was otherwise a reduction in work or demand.

22. During the first year of the pandemic, the Care Home had 81 beds for residents over two floors. The Claimant in her evidence acknowledged that this period was a "chaotic" time for care homes generally. Mrs Cantillon described that it was a scary time for everybody, families were upset that they could not see loved ones, people were ill and some died, with staff absences also due to COVID-19. Mrs Cantillon became emotional giving her evidence about what it was like at the Home during this time. It is not disputed that this was a frightening and difficult time for the Respondent, its staff (including of course the Claimant) and its service users.

23. The Claimant was particularly frightened about the potential risk to her health posed by the pandemic and she has viewed the events set out in her claim with heightened emotion and suspicion.

24. The Claimant was on a period of annual leave from 16 February 2020 and was due to return to work at or around the end of March 2020.

25. On 23 March 2020, the Claimant's line manager, Tanya Cantillon, Home Manager, sent a text to the Claimant saying:

    I know you're on annual leave again next week. Is there any chance you are able to work your two nights & I will also put you in for 22 hours annual leave. Please let me know ASAP.

26. We find that this is indicative of staffing pressures at the Home at this time.

27. The Claimant responded the following day, 24 March 2020 saying:

    Of course I can, please just send me confirmation of the rota. However, I am just awaiting confirmation from the NHS whether I can come in, I most likely can since I'm not at highest risk.

28. On 30 March 2020, a GP attending the Home confirmed that one of the Home's residents had COVID-19. That resident was in hospital at the time of the diagnosis, not at the Home, having been admitted to hospital on 28 March 2020. As set out below, the resident was in hospital at the time (evidenced by the staff WhatsApp exchanges, referred to below, which also indicate that the diagnosis was news to staff as at 30 March, and consistent with Ms Cantillon's evidence). We also have a contemporaneous record of COVID cases kept by the Respondent during the pandemic. We accept the Respondent's evidence that neither the staff nor the managers at the Home knew that this resident had COVID-19 prior to 30 March 2020. There is no evidence to suggest differently.

29. In evidence, the Claimant said that she felt that the COVID case at the Home had been concealed by the Respondent. We do not find this to be the case. Staff who were working

on 30 March 2020 were informed of the COVID case in a meeting that day. The Respondent intended to update other staff at their handover / briefing meetings as and when they came onto their next shift.

30. The fact of the COVID case was raised on the staff WhatsApp group on 30 March 2020, by staff who had not been at work that day asking whether it was true that someone in the Home had COVID. The same day, Tanya Cantillon, Home Manager, replied on the WhatsApp group confirming the position and asking staff to stop panicking. She said:

People, will you please stop panicking. We have one confirmed who is currently in hospital & was diagnosed in hospital. We need to carry on exactly the way we have been... Full PPE & hand washing. You will all be briefed by your RGN when you get to work & they will give you factual information OK. The absolute worst thing we can do is panic right now. .as long as we follow all procedures in place, we & our residents will stay safe.

31. The Claimant was concerned about the fact that someone who was normally resident at the Home had COVID. However, she did not raise this with the Respondent at this time. She did subsequently raise this on 6 April, which we will come back to.

32. Also on 30 March 2020, the Claimant sent a message to Ms Cantillon:

I had phone call from practise nurse on Saturday re my underlying health condition. Practise nurse strongly advised me to self isolating for 12 weeks as I'm diabetic type 2 medication controlled and also got hypertension . Can you advise on this please?

33. Ms Cantillon replied the same day saying "it's your decision". Ms Cantillon's evidence is that she did not know about the confirmed COVID case at the time of this exchange of messages with the Claimant. Ms Cantillon's message to the Claimant was sent at 10.44am. Ms Cantillon said that the GP would not have finished his rounds by that time, so she would not have caught up with him. The first whatsapp message from a staff member asking whether there was a confirmed COVID case was at 11.56 the same day. We have no reason to disbelieve Ms Cantillon on this point and we therefore find as a fact that Ms Cantillon was not aware of the COVID case when she responded to the Claimant as set out above.

34. The Claimant sent another message to Ms Cantillon the same day (30 March) as follows:

I was on another call today with my GP, they said that I must stay home by government law. Take care.

35. On the face of it, this looks like a direct response to Ms Cantillon telling the Claimant that it was her decision whether to work or not at this time and we find as a fact that Ms Cantillon took this to mean that the Claimant had decided that she would not be coming into work. Ms Cantillon therefore replied saying "*thank you. Take care of yourself*".

36. The Claimant now says that a few days after receiving the above message from Ms Cantillon, she "realised that the words: "Take care of yourself" could mean something else- "Your existential problems are not my problem…" and the Claimant said she then "felt blackmailed once again". We find that Ms Cantillon was simply replying the same vein as the Claimant, when the Claimant said "Take care". The Claimant has read into this exchange a negative inference, which we find did not exist.

37. The Claimant sent a further message to Ms Cantillon at 18.18 on 6 April 2020 as follows:

I am writing to you to make a decision. By many different doctors, I have been advised to stay home but I cannot get a sick note because I'm on the high-risk list but not on the shield list. I'm even more worried considering the already ill resident at the care home. I believe it is now up to you to make the decision whether I go into work or not.

38. The previous week the Claimant had indicated that she was going to stay at home. The Claimant's evidence to the Tribunal was that she wanted to work, but did not know if she could do that safely and she felt that it was the employer's decision. Ms Cantillon did not reply to answer the question posed.

39. The Claimant sent a further message to Ms Cantillon at 11.49 on 7 April (the next day) asking for her email address, which Ms Cantillon provided approximately half an hour later.

40. The position as regards the Claimant's attendance at work was then in any event overtaken, as the Claimant experienced symptoms of COVID-19 and obtained a self isolation note, which she forwarded on 9 April 2020 to the email address provided by Ms Cantillon [164]. This first one week isolation note covered the period 6 April 2020 to 12 April 2020 [166]. A further one week isolation note was then obtained and submitted for the period 13 April 2020 to 19 April 2020. It is agreed that the Claimant received statutory sick pay during the periods of self-isolation covered by an isolation note.

41. On 16 April 2020, there was a telephone discussion between Mrs Zoe Young, administrator, and the Claimant. Mrs Young says that she was prompted by payroll to have a discussion with the Claimant so that the Respondent could check what the Claimant should be paid for April 2020 (the Claimant having not worked and, at the time of this discussion, the Respondent did not have a copy of the Claimant's second self-isolation note.

42. The Claimant says that during this call Mrs Young asked the Claimant whether the Claimant had a shielding Letter, the Claimant said that she did not and she explained to Mrs Young that she had type 2 diabetes. The Claimant says that Mrs Young told her that it was not possible to offer the Claimant work from home or to work with social distancing. Mrs Young says that she told the Claimant that she (the Claimant) was not eligible for the Furlough scheme without a Shielding Letter. Mrs Young agreed that the Claimant said that she had type 2 diabetes and that she was struggling to get a note from the doctor. There is no material difference between the accounts of the discussion about whether the Claimant had a shielding letter. Mrs Young further went on to explain to the Claimant that the options for the Claimant were to shield (with a shielding letter), be off work with isolation notes or sick notes or be on unpaid leave. Both the Claimant and Mrs Young agree that the Claimant said that she could only work if she was working from home or socially distant, and Mrs Young confirmed to the Tribunal that she said to the Claimant that in the capacity of a care assistant, she did not think that would be possible. Mrs Young says she advised the Claimant to speak to her GP or otherwise she would need to decide whether she was to stay away from work on unpaid leave or return.

43. Mrs Young then emailed the Respondent's payroll administrator, confirming the discussion she had had with the Claimant that day:

Just got off the phone to Kat, shes having issues with the 12 week unfit to work, because of the *type of diabetes she has, but she will get a second note for SI over today, I have*

recommended that she contact her GP again about this, otherwise she will have to decide if shes going to stay off unpaid or come back.

44. As a result of the discussion with Mrs Young, the Claimant knew that her options included unpaid leave. The Claimant knew that she did not have a 12 week isolation note or a shielding letter at this time. We find as a fact that at this time the Claimant knew that she would be unpaid unless she had a shielding letter, isolation letter or sick note, or returned to work.

45. On 21 April 2020, the Claimant sent a further message to Ms Cantillon saying:

I have decided that I will stay at home during this pandemic and due to the coronavirus case already at the place. I am sorry for the inconvenience. Stay safe [163]

46. The Claimant's isolation note had run out on the 19 April. The Claimant knew, therefore, that unless she obtained another document (as referred to by the Respondent) she would be unpaid for as long as she remained off work.

47. Ms Cantillon replied asking if the Claimant had sent in a 12 week isolation note. The Claimant replied saying that she had "already told Zoe [Young] that I don't have one" [163]. Shielding letters and 12 week isolation notes were the official documents demonstrating that an individual was high risk from COVID.

48. From this point onwards, although the Claimant says that she wanted to work, we find that the Claimant was fearful of attending work and did not want to attend the Home throughout the pandemic. The Claimant was fearful of even attending a meeting on-site when suggested by Mrs Butt in May 2020, and the Claimant remained unwilling to attend Site as at June 2021. We acknowledge that the Claimant was very frightened during the pandemic, and considered her life to be at risk.

49. On 15 May 2020, there was a telephone call between the Claimant's supervisor, Lisa Marsh, and the Claimant. Around this time Ms Cantillon went off sick having been diagnosed with a serious condition requiring a period of isolation followed by hospital treatment, so she was not dealing with the Claimant at this time. Ms Cantillon did not return to work until around July 2020.

50. We note that the call with Mrs Marsh on 15 May 2020 was a month after the call with Mrs Young, which was instigated by a need to understand what should be put through payroll. It is likely that the call on 15 May was also triggered by the pay cycle, although this is not material. Ms Marsh made a contemporaneous note of the call [168]. The file note of the call does not, in our finding, record the full discussion, as there is a lack of context provided for questions asked. The note records that the Claimant was asked whether she had spoken to her GP about her health issues. The Claimant confirmed that she had but the GP had not mentioned a "note". We find that this started as a discussion about whether the Claimant had a 12-week isolation note, or other note that would enable her to be paid for her absence. Ms Marsh advised the Claimant to contact her GP again to see if the Claimant met the "furlough category". We accept that this involved a discussion around shielding and that the Respondent considered that a shielding letter was required in order to be furloughed on health grounds. The file note also records that the following was discussed:

Explained that she is not meeting her contracted hours and that the floor Kasha works on

has no COVID-19, explained also we have all P.P.E the same as hospitals have and that she needs to call me on Tuesday 19th May to give me an answer on return to work date or a letter from GP as Kasha cannot just furlough herself as she is needed on her night-shift duty rota.

51. The file note is handwritten, dated 15 May 2020 and signed by Ms Marsh. We are satisfied that the file note is contemporaneous. We conclude that the Claimant was again aware that she would not be able to socially distance or work from home as a care assistant, and Ms Marsh explained the precautions that were in place for the Claimant to be able to work at the Home. As recorded in the note, it is not disputed that Ms Marsh asked the Claimant to call her with an update by 19 May 2020.

52. We find that the Claimant still did not want to attend at the Home. We have taken into account that the Claimant knew that PPE was available and being used at the Home, had been assured that there was no COVID on the floor she worked on, and also that even in 2021 she was unhappy that it was suggested that a meeting with Ms Butt should take place at the Home. We find that there was no realistic circumstance in which the Claimant was in fact willing to return to work on-site at the Home during the pandemic.

53. Following the call with Ms Marsh, the Claimant made contact with her GP, which resulted in the Claimant sending a text message to Ms Marsh, forwarding on the text of a text message from the Claimant's GP which said:

Dear Miss Kreciszewska

You have an underlying health condition that means you would be at risk of severe COVID should you get the virus.

<u>You are not in the 'shielding' group</u> but it is important you work from home if possible and STRICTLY socially distance at work if you can't work from home.

Www.gov.uk/guidance/social- distancing- in- the- workplace- during coronavirus- covid-19- sector- guidance

Thanks, Dr Megan Rowlands
Pioneer Medical Group

54. The Claimant was therefore not shielding at this time. The advice to the Claimant was, in essence, to follow the Government advice to work from home where possible, and to social distance.

55. The Claimant forwarded the above message to Ms Marsh at 10.55 on 18 May 2020.

56. The Respondent's Director, Shen Butt, had been updated about the Claimant's absence by Ms Cantillon before Ms Cantillon went off sick. Ms Butt says that she did not know that the Claimant had sent a message to Ms Marsh, so Ms Butt made contact with the Claimant herself. She sent the Claimant a text message at 12.09 on 20 May 2020:

Dear Kasha
This is Shen the owner from Granville. You need to contact me urgently as you have been absent from work for a long time which means you are breaching your contract with us. Shen Butt.

57. The Claimant replied at 12.28 to say that she had sent Ms Marsh a statement from her GP on 18 May 2020:

Good afternoon Shen, on Friday Lisa and I agreed that I would send her a document just to find my absence before Tuesday. On Monday I sent Lisa a statement from my GP, explaining that I can only work from home or with strict social distancing due to my health conditions which prevent me from having direct contact. Below I attach the same document I sent Lisa. Kind regards, Katarzyna Kreciszewska.

58. The Claimant then forwarded the same doctor's text message to Ms Butt.

59. Ms Butt replied at 12.36 the same day (18 May 2020) to say:

With this job you can't work at home. Please call me to discuss.

60. As a result of this exchange, a phone call took place between Mrs Butt and the Claimant on 20 May.

61. The Claimant's account of this discussion is different to Mrs Butt's. The discussion was held in English, which is not the first language of either participant. The Claimant says that she thought the conversation with Mrs Butt was going to be negative, because of things she had heard about Mrs Butt. The Claimant says she was prepared for threats of dismissal, and then that was what happened on the call. The Claimant described Mrs Butt as using "power language" and says that during the call Mrs Butt tried to force the Claimant to return to work, by threatening the Claimant with dismissal (or replacing her) and manipulating her by "appealing to my conscious and pitying residents who miss me". The Claimant says that Mrs Butt dismissed the text from the GP saying it was "automatically generated" and had "no relevance".

62. Mrs Butt denies saying that the GP's text was "automatically generated and meaningless". She says that there was a discussion around needing a shielding letter in order to be furloughed and that she confirmed that the Claimant's shifts would need to be covered if the Claimant was not working. The Respondent's consistent evidence during these proceedings, both witness evidence and in the Bundle, was that only employees of the Respondent who had shielding letters could be furloughed by the Respondent, because the work as a care home continued throughout the pandemic. It follows, therefore, that the Claimant's shifts would be covered, and that the Respondent considered that the Claimant could not be furloughed because she did not have a shielding letter at this time.

63. On the balance of probabilities, we find that Mrs Butt was not trying to intimidate the Claimant by informing her that her shifts would continued to be covered. We find that Mrs Butt did not threaten the Claimant with dismissal. In the context of the discussion overall about work and furlough, we find that this is context in which there was a discussion about covering the Claimant's shifts.

64. The Claimant acknowledges that Mrs Butt asked the Claimant to revert back to her GP, and the Claimant's subsequent text message to Mrs Butt refers to calling the GP and indicates that the Claimant did not see the point in doing so. We find that the discussion about contacting a GP supports Mrs Butt's evidence that she did not try to intimidate her to return to work. She referred the Claimant back to her GP for advice as to her situation, and in particular whether she could work or be furloughed. The discussion about furlough

provided the Claimant with information as to how she could stay off work and be paid.

65. We further find that Mrs Butt did not refer to the GP text as automatically generated. However, it was not sufficient to enable the Claimant to be furloughed. The Claimant may have understood a discussion about this to mean that Mrs Butt thought the GP text was meaningless, but we do not find that this was what was said or that that was meant by the discussion. The discussion was around working or being on furlough, and the text was not sufficient for furlough.

66. There followed a further text exchange between Mrs Butt and the Claimant, which was fraught on both sides. The message exchange was as follows:

Claimant: with all due respect, after our talk I questioned the point of calling my GP again, I couldn't find sense in doing so. And according to what you said earlier, about me breaching my contract through my absence, and your plans of replacing me, and despite the statements from my GP, I contacted my Workers Union to aid me in solving this issue. Kind regards, Katarzyna Kreciszewska

Mrs Butt: For clarity you are absent from work and breaching your contract. You need to make an appointment to come and see me to discuss this issue.

Claimant: I understand that this is a difficult time for us both, allow me to wait for a lawyers interpretation of my contract regarding my work during a pandemic. When I receive the advice I will be sure to contact you.

Mrs Butt: You will receive a letter from us

67. We find that the Claimant's reference in the first message (above) to Mrs Butt saying that she was in breach of contract was a reference to the earlier text message from Mrs Butt (referred to at paragraph 56 above). We do not find that this was repeated on the call with the Claimant, and the Claimant does not alleged that this was discussed on the call.

68. No letter was subsequently sent by the Respondent. Mrs Butt reflected on the fact that the Claimant said that she was instructing a lawyer, and she thought it would be better to wait to see what followed.

69. On 2 July 2020, the Claimant contacted her trade union by email to seek some advice following the discussion with Mrs Butt. The Claimant explained to the union that she had been self isolating since the beginning of lockdown due to her underlying health conditions. The Claimant expressly states that these conditions "do not make me eligible to be in the shield group, and I have not received a letter from the government". The Claimant explained that she had been told by her GP to either work from home or perform strict social distancing, but that she could not do that at work because she was a care worker. The Claimant expressed that she felt she was being pushed to come back to work and threatened with redundancy.

70. The trade union representative emailed the Respondent on 13 July 2020. This was received by Mrs Cantillon as Home Manager, who was back at work and who forwarded the email to Mrs Butt. Mrs Butt's evidence was that she left a voicemail message for the trade union representative, but he did not call back. Mrs Cantillon says she subsequently had a discussion with Mrs Butt where Mrs Butt asked her to take over when the trader union representative got back in touch. We know from the Bundle that the trade union

representative was very busy and had missed emails. The evidence from Mrs Cantiollon, and the documentary evidence in relation to the trade union, all supports Mrs Butt's evidence that a voice message was left and the trade union did not reply.

71. The trade union representative emailed the Respondent again on 2 September 2021. Mrs Cantillon replied the same say asking the representative to call her. No call was received.

72. The trade union representative emailed again on 9 November 2021, saying that they had no received a reply to their email of 2 September 2021. Mrs Cantillon again replied the same day, referring back to the emails of 2 September 2021 (including her reply), and again asking the trade union representative to call her. The exchanges of emails are in the Bundle, and we accept that Mrs Cantillon did email the trade union representative twice, but did not hear further from him. The trade union has not provided evidence to the Tribunal in this case.

73. There was no direct contact between the Claimant and the Respondent from May 2020 to May 2021.

74. In February 2021, the Claimant received a shielding letter. She did not tell the Respondent about this.

75. Shielding advice was suspended across the UK on 1 April 2021. Lockdown and restrictions eased from around this time and onwards.

76. On 21 May 2021, COVID restrictions having eased and shielding having ended, Ms Cantillon wrote to the Claimant as follows:

I am writing to you in relation to your ongoing absence from your position at Granville Lodge since 16th February 2020.

You stated back in February, that you felt unable to work during the ongoing pandemic as a care assistant as you felt that it would put your health at risk. We requested that you supply us a 'shielding notification' from the Government and you informed us that you did not qualify for one, but you did not return to your position.

Now that we are moving out of the lockdown and shielding with or without a document has ended, I want to get in touch to inquire if you intend on returning to your position at Granville Lodge.

If you wish to return to your post, please can you contact me to arrange a back to work meeting. Should you not wish to return, I would request that you put that in writing, and arrangements will be made to make you a permanently leaver and get your P45 sent out in the post.

77. The Claimant says that this letter was not received by her until 2 June 2021. The Claimant was suffering with her mental health at this time. The above letter refers to the Claimant being absent since 16 February 2020. The Claimant was on holiday at that time, until the end of March 2020. The above letter further states that the Claimant said in February 2020 that she felt unable to work during the pandemic. Again, this conversation did not start until the end of March 2020. These errors were admin errors, rather than intended to upset or penalise the Claimant or mischaracterise her absence. Ms Cantillon had asked Ms Young to prepare letters along the same lines for all employees who had been

shielding (with or without a shielding letter) during the pandemic. Ms Young based the Claimant's letter on her first day of absence, not registering that the first day of absence, and few weeks after that, was annual leave.

78. Having not heard from the Claimant in response to the 21 May 2021 letter, and not knowing that it was not received by the Claimant until 2 June 2021, Ms Cantillon asked Ms Young to send a further letter to the Claimant. This letter was dated 7 June 2021 and was received by the Claimant on 11 June 2021:

You have been absent from work since 16th February 2020. We have made many attempts to resolve this absence via text, e-mail and letter, the last time we reached out to you was on 21st May 2021, asking you to contact us regarding your unauthorised absence.

Your continued absence from work without providing any reason whatsoever implies that you intend to, or have, resigned your position with the Company. If this is not your intention and you are proposing to return to work, we would ask you to contact Tanya Cantillon - home manager as a matter of urgency and, in any event, by no later than 12:00 PM on 14th June 2021.

You will be asked to explain why you have both failed to report for work and to contact us and when you do expect to return to work. We must warn you that unauthorised absence without good reason is a serious disciplinary offence which could result in disciplinary action being taken against you in accordance with the companies disciplinary procedure. Depending on the particular circumstances of this case, it may amount to gross misconduct.

However, if you have resigned, please supply us with a written resignation letter as soon as possible.

You are required to provide medical certificate to cover your absence no later than by 14th June 2021

79. The Respondent's evidence was that in not returning to work or contacting the Respondent after receipt of the 21 May 2021 letter, and restrictions having lifted, the Claimant's continued absence was unauthorised. The Respondent wanted the Claimant to return to work at this time.

80. The Claimant wrote to Ms Cantillon by email on 15 June 2021, asking for more time to respond to the letter (having only received it on 11 June), and expressing her deep dissatisfaction with the contents of the letter and how she considered she had been dealt with by the Respondent during the pandemic.

81. The Claimant subsequently resigned on 30 June 2021. Her resignation letter references the Claimant's lack of pay during the pandemic, that she could have done admin work for the Respondent, that she believed the fact a resident had COVID was covered-up in March 2020 (this is the resident referred to in paragraph 28 above), and inaccuracies in the letters of 21 May and 7 June 2021.

82. The Claimant's resignation letter was treated as a grievance and a grievance process was offered, although the Claimant subsequently declined to participate.

83. The Claimant issued Employment Tribunal proceedings on 29 October 2021.

The Law

Discrimination arising from disability

84. Section 15(1) of EqA provides:
    (1) A person (A) discriminates against a disabled person (B) if-
        (a) A treats B unfavourably because of something arising in consequence of B's disability, and
        (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

85. Langstaff P in Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

    "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative consequential) link. These are two separate stages."

86. Treatment is unfavourable if the Claimant could reasonably understand it to put her to a disadvantage.

87. As with direct discrimination, the focus must be on the conscious or subconscious motivation of the person or persons who decided on the unfavourable treatment: *IPC Media Ltd v Millar [2013] IRLR 707*.

88. These principles have been affirmed in *Pnaiser v. NHS England [2016] IRLR 174*.

Reasonable adjustments

89. Sections 20 and 21 of the Equality Act 2010 state that where this Act imposes a duty to make reasonable adjustments on a person, the person on whom the duty is imposed is referred to as A for these purposes.

90. Section 20(3) EA 2010 states:

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

91. Section 21(1) EA 2010 confirms that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

92. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in *Environment Agency v Rowan 2008 ICR 218* and is as follows:

    (a) Identify the PCP applied by or on behalf of the employer,
    (b) Identify comparators (if necessary),

(c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

93. A substantial disadvantage within the meaning of this part of the Act is one which is more than minor or trivial.

94. Only once the employment tribunal has gone through the steps in *Rowan* will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice.

95. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment (*Salford NHS Primary Care Trust v Smith [2011] EqLR 1119*) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement.

96. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather, it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated (*Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075*).

97. The test of reasonableness is an objective one (*Smith v Churchills Stairlifts plc 2006 ICR 524*.) Where the disruption of a proposed adjustment is in issue, the tribunal has to look at the extent to which the proposed adjustment would be disruptive and the extent to which the employer reasonably believed that such disruption would occur. It is necessary for the tribunal to look at the adjustment from both the point of view of the claimant and of the employer and to make an objective determination as to whether the proposed adjustment is reasonable or not. The tribunal has to focus on the practical result of the proposed adjustments rather than the process by which they are arrived at.

98. The focus of a reasonable adjustments claim is on practical outcomes rather than procedures (*Royal Bank of Scotland v Ashton 2011 ICR 632*).

99. Factors which may be relevant to the reasonableness of a proposed adjustment are referred to in the EHRC Employment Code. They include the effectiveness of the proposed step and the extent to which it was practicable for the employer to take the step. The financial and other costs incurred by the employer in taking the step and the extent to which it would disrupt any of the employer's activities are also relevant. The extent of the employer's financial and other resources, and the availability of financial or other assistance in respect of taking the step are also apt for consideration. The nature of the employer's activities and the size of its undertaking can also be considered.

Burden of proof – discrimination cases

100. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the

tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

101. In *Igen v. Wong [2005] EWCA Civ 142*, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:
(1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

102. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd [2017] EWCA Civ 1913, Royal Mail Group Ltd v. Efobi [2019] EWCA Civ 18*.

103. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong*, but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation [2016] UKEAT 0190/15*.

104. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board [2012] UKSC 37* not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Time limits – Discrimination claims:

105. Section 123 of EqA provides, so far as is relevant:
    (1) proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
        (a) the period of 3 months starting with the date of the act to which the complaint relates, or
        (b) such other period as the employment tribunal thinks just and equitable.
        …
    (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.

106. In *Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530*, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

    "48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…

    52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

107. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority [1992] IRLR 416, [1992] ICR 650, CA*.

108. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour:

Robertson v. Bexley Community Centre [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston [2009] EWCA Civ 1298*. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan [2018] EWCA Civ 640*.

109. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble [1997] IRLR 336*. These factors include:
    - the length of and reasons for the delay;
    - the effect of the delay on the cogency of the evidence;
    - the steps which the claimant took to obtain legal advice;
    - how promptly the claimant acted once he knew of the facts giving rise to the claim; and
    - the extent to which the respondent has complied with requests for further information.

Constructive dismissal

110. Section 95 of the Employment Rights Act 1996 ("ERA") provides:

> (1) 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)—
>
> …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …

111. An employee seeking to establish that he has been constructively dismissed must prove that the employer fundamentally breached the contract of employment and that he resigned in response to the breach: *Western Excavating (ECC) Ltd v. Sharp [1978] IRLR 27.*

112. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

113. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc [1997] IRLR 462*, as clarified in *Baldwin v Brighton & Hove CC [2007] IRLR 232*.

114. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-vReceptek [2013] ALL ER (D) 364:*

"12....It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of Eminence Property Developments Limited v Heaney [2010] EWCA Civ 1168:

"So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of Tullet Prebon Plc v BGC Brokers LP [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.""

115. It is not uncommon for an employee to resign in response to a "final straw". In *Omilaju v. Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35, CA* the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act was totally innocuous, in the sense that it did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history.

Time limits - Constructive unfair dismissal

116. Section 111 Employment Rights Act 1996 provides that:

> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
> (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
> (a) before the end of the period of three months beginning with the effective date of termination, or
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

117. The burden of proving in an unfair dismissal claim that it was not reasonably practicable to present a claim in time is a high threshold and rests on the Claimant. The authority for this point is found in the Court of Appeal's decision in Porter v Bandridge Ltd [1978] ICR 943).

118. In *Palmer v Southend BC [1984] ICR 472* the Court of Appeal held that the Tribunal must consider the substantial cause (if shown) of the Claimant's failure to issue within the primary time limit, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of her right to issue a claim, whether the Respondent had done anything to mislead or impede the Claimant issuing her claim, whether the Claimant had access to advice and lastly whether delay was in anyway attributable to that advice. The Court of Appeal also held that "reasonably practicable" does not mean "reasonable", and does not mean "physically possible", but means something like "reasonably feasible". This is later elaborated by the EAT in *Asda Stores Plc v Kauser [2007] EAT 0165/07* by

saying "the relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found, it was reasonable to expect that which was possible to have been done".

Conclusions

119. Applying the law to our findings of fact, we concluded as follows:

Time limits

120. The consequence of the first ACAS certificate being issued is that the second ACAS certificate did not operate to extend the primary time limits for the Claimant. The primary time limit expired on 30 September 2021. The entirely of the Claimant's claim was submitted outside of the primary time limit.

121. We have considered whether there should be an extension to the primary time limit. The tests are different for discrimination claims compared to unfair dismissal claims.

122. In respect of the discrimination complaints, we must decide whether the claims were made within a further period that the Tribunal thinks is just and equitable. The complaints were not made in time because the Claimant thought that the second ACAS certificate was effective and allowed for an extension of time under the early conciliation provisions. Had the second certificate had this effect, the last alleged act of discrimination (the alleged discriminatory constructive dismissal) would have been within the primary time limit. We have taken into account the impact on both parties, and the prejudice to the Claimant outweighs the prejudice to the Respondent in this case. We concluded it is just and equitable to extend time in respect of the final alleged act of discrimination.

123. In respect of the complaint of constructive unfair dismissal, the test is more stringent than the test as regards discrimination. The Tribunal must consider whether it was reasonably practicable for the Claimant to have brought her claim in time. In this case, we find that it was reasonably practicable for the Claimant to submit her claim in time. She had had support from the trade union at various stages, and indicated in contemporaneous correspondence that she would be taking advice in relation to submitting a claim. She could have sought further support from the trade union. The Claimant had in any event found out about time limits in order to submit her claim. She received the first ACAS certificate, which states within it that it must be kept and the number quoted in any Employment Tribunal application concerning this matter. The Claimant did not suggest any reason why she could not have filed the Claim earlier (and in time), other than to say that she based the timing off the second certificate. The Claimant said that ACAS could not find the first certificate number when ACAS was called the second time, but this is not supported by evidence and the number is on the first certificate, which the Claimant received by email (and subsequently disclosed to the Respondent). Unfortunately, she got the time limit wrong in circumstances where she knew the facts of the claim, she had set out the main bases of her claim in her resignation letter, and it was reasonably feasible for her to file the claim in time.

124. The Claimant's claim for unfair dismissal is therefore out of time and is dismissed. We note, in any event, that that claim was based on the alleged acts of discrimination as amounting to a breach of contract. Those allegations, for the reasons set out below, have not succeeded in any event.

Discrimination arising from disability (s.15, Equality Act 2010

125. We considered each allegation, first to consider whether the act happened as alleged, and, if so, whether the treatment was unfavourable and, if so, we considered whether there was a causal connection between the act and the alleged "something" arising from disability.

Allegation 1 – that the Respondent treated the Claimant unfavourably by Ms Cantillon telling the Claimant on 30 March 2020 that it was her (the Claimant's) decision.

126. It is not disputed that Ms Cantillon sent the Claimant a text message in the terms alleged. The Claimant says in her witness statement that she was "devasted and frightened" by these words and she felt that Ms Cantillon was emotionally blackmailing her with these words. Whilst we appreciate that the Claimant became increasingly fearful throughout the pandemic, we do not find the Claimant's assessment to be a reasonable response to Ms Cantillon's position. We do not find this to be unfavourable to the Claimant and we do not consider it reasonable for the Claimant to consider that she was being placed at a disadvantage. The Claimant needed to decide whether she felt able to work. It would have been unfavourable to have forced her to work if she was not comfortable doing so, it is not reasonable to see Ms Cantillon's response as unfavourable or detrimental in the circumstances.

Allegation 2 – that the Respondent treated the Claimant unfavourably by Ms Cantillon not replying to the Claimant's text on 6 April 2020, in which the Claimant asked Ms Cantillon if she should return to work.

127. We have found as a fact that a specific reply to this message was not sent. Failing to respond to a text message could be unfavourable treatment, particularly if done deliberately. However, in this case we do not find that the failure to respond was caused by the Claimant being off work, as alleged. Ms Cantillon replied to other messages from the Claimant, including one sent on 7 April 2020, and then the Claimant submitted two self-isolation notes in any event. The situation at the start of the pandemic was very difficult for all parties in these proceedings. The Claimant herself acknowledged that this period was a "chaotic" time for care homes. Ms Cantillon was also going through difficult personal circumstances (ill health unrelated to, but impacted by, the pandemic). We find on the balance of probabilities that the message was simply overlooked given the circumstances and the subsequent messages and change of position. In summary, whether or not the failure to respond was unfavourable treatment of the Claimant, the failure was not connected with the Claimant's absence, or her being or feeling unable to come into work, or because she was high risk because of COVID.

Allegation 3 – that the Respondent treated the Claimant unfavourably on 20 April 2020, by telling the Claimant that it was not possible to offer her work from home or work with social distancing.

128. The Claimant confirmed that she was not alleging that Mrs Young treated her unfavourably by asking the Claimant whether she had an isolation note or shielding letter. In any event, we did not consider that question to be unfavourable to the Claimant.

129. The Claimant and Mrs Young agreed that the Claimant told Mrs Young that she (the Claimant) could only work if working from home or socially distant, and we have found as a fact that Mrs Young said to the Claimant that in the capacity of a care assistant, she did not think that would be possible. We do not find it to be unfavourable for Mrs Young to

say to the Claimant that she did not think it would be possible to social distancing or working from home in the role of a care assistant. In any event, this was not said because the Claimant was absent or high risk, it was said because Mrs Young believed this to be true, and indeed the Tribunal accepts that it is not possible to provide close personal care in a socially distanced way or from home. Expressing this to the Claimant in the context of a discussion about pay, and potentially remaining unpaid, is not unfavourable.

Allegation 4 - that the Respondent treated the Claimant unfavourably on 21 April 2020, when Lisa Marsh, asked the Claimant the same question as on 20 April 2020.

130. The Claimant in her evidence confirmed that this relates to being asked whether the Claimant had a shielding letter. the claimant further confirmed that asking her this was not unfavourable. In any event, we find it was not unfavourable to ask whether claimant had a shielding letter or any other document to support absence. It would not be reasonable to view this as unfavourable.

Allegation 5 - On 15 May 2020, the Claimant was asked to provide a GP certificate, which she did on 18 May 2020. Ms Butt contacted the Claimant on 20 May 2020 asking her to contact her urgently. The Claimant spoke to Ms Butt and an attempt was made to force her to return to work by intimidation. The authenticity and relevance of the certificate/GP document was questioned, saying it was automatically generated and meaningless. The Claimant was told that if she did not return to work she would be replaced.

131. The Claimant does not allege that being asked to provide a GP certificate was unfavourable. However, she was not asked to provide a GP certificate, she was asked to confirm whether she would be returning to work or provide a GP letter. For the avoidance of doubt, we do not find that to be unfavourable.

132. We refer to our findings of fact in respect of the conversation with Mrs Butt, and the Claimant having decided prior to the call that the call would be negative. We do not find that Mrs Butt sought to intimidate the Claimant to return to work. We have found that Mrs Butt did not question the authenticity of the GP's text, but rather it is likely she expressed that it was not sufficient to enable the Claimant to be furloughed. We have found that, in the context of a discussion that included reference to furlough, Mrs Butt said that the Claimant's shifts needed to be covered. This does not, in our conclusion, amount to a threat of dismissal. It indicates that the Claimant's work was there to be done. Accordingly, we do not find that the Claimant was subjected to the treatment as alleged. We do appreciate that the Claimant genuinely believes her interpretation of this call. However, we conclude that the Claimant was mistaken as to what was said. In any event, Mrs Butt had limited involvement with the Claimant, and did not have any direct contact with her after May 2020.

Allegation 6 - On 20 May 2020, Ms Butt, by text message, told the Claimant that she would receive a letter from the Respondent about the situation, but none was sent.

133. The Respondent agrees that no letter was sent to the Claimant. It is reasonable to consider that it is unfavourable to not receive a letter having been told that you will receive one. However, we have found as a fact that the letter was not sent because Mrs Butt reflected on the fact that the Claimant said that she was instructing a lawyer, and she thought it would be better to wait to see what followed. The non-sending of a letter was not because the Claimant was absent or at high risk from COVID.

Allegation 7 - Between 30 March 2020 and May 2021 the Respondent failed to furlough the Claimant. The Claimant says that she should have been furloughed because she had a full work contract and other people working for other employers, who were unable to work because of covid were allowed to be furloughed. She was willing to return to work but she was unable to do so, because she needed to shield herself and she should have been furloughed in line with the Government guidance on the furlough scheme.

134. The Tribunal understands that the Claimant wanted to be in receipt of pay during the pandemic, and that being in receipt of nil pay was very difficult for the Claimant. In this context, we understand why the Claimant considers it to be unfavourable not to have furloughed the Claimant. However, the Claimant was not entitled to be furloughed prior to February 2021, because the Respondent had work that she could do, there was no downturn at the Home, and the Claimant was not in possession of a Shielding letter, which otherwise would have enabled her to be furloughed. We therefore concluded that the Claimant was not refused furlough in circumstances where she was entitled to it, but she was not furloughed because she was not entitled to be furloughed based on the medical evidence available to the Respondent. Although the Claimant now says that she was told that she should be shielding, this came later in the chronology and the consistent message given to the Respondent by the Claimant during 2020 was that she was not in a shielding group. This is underlined in the text sent to the Claimant by her GP. We therefore conclude that the Claimant was asking for more favourable treatment in seeking to be on furlough when she was not entitled to be furloughed, rather than being treated unfavourably. In any event, not furloughing the Claimant was initially because the Claimant was not eligible to be furloughed, and then from February 2021 was because the Claimant did not provide her shielding letter to the Respondent, so the Respondent believed that the Claimant remained ineligible to be furloughed. The Claimant not being furloughed was therefore not because she was high risk or absent, but because of her ineligibility (or perceived ineligibility). This is not unfavourable treatment arising from disability.

Allegation 8 - The Respondent ignored Unison's e-mail dated 13 July 2020 and did not respond.

135. We have found as a fact that Mrs Butt attempted to contact Unison in response to their email. Accordingly, we conclude that the Respondent did not ignore Unison's email.

Allegation 9 - From 20 May 2020 the Claimant received no contact from the Respondent until May 2021.

136. During the period July 2020 to November 2020, the Respondent attempted to communicate with Unison, who was acting on the Claimant's behalf. There was no direct contact with the Claimant during this period, but we do not find this to be because the Claimant was absent, but rather because the Respondent was trying to get communication from her representative. The Claimant had said that she was taking advice and would be in contact, and then contact came from her Unison representative. We therefore find that the Claimant was not treated unfavourably, as alleged, and the treatment she did receive did not arise from disability in any event.

Allegation 10 - On 21 May 2021, Ms Cantillon wrote to the Claimant noting that they were moving out of lockdown and shielding and asked what her intentions were. The Claimant says this was unfavourable, because the letter was inaccurate, the Respondent was trying to change the facts

and said that she had been absent from 16 February 2020, when she had been on annual leave at that time until 31 March 2020. It was not correct that she had said she was unable to work and she had said that she was willing to work but needed to socially distance The Claimant relies on her messages to Ms Cantillon on 30 March and 6 April 2020.

137. There are a number of elements to this allegation. We do not find that it was unfavourable to ask the Claimant what her intentions were as regards returning to work. The letter is inaccurate in that it implies that the Claimant has been off work due to the pandemic since February 2021. However, we accept that this was an unintentional error. We do not consider this to have been unfavourable or to be because of anything arising from disability. The purpose of the letter is unchanged by this error: the Claimant had not worked throughout the pandemic, and the Respondent wanted to know what he intentions were now that shielding had ended and restrictions were being eased. Finally, the Claimant says that it is not correct that she was unable to work, and that she had said that she will willing to work but needed to socially distance. We have not found an occasion where the Claimant told the Respondent that she wanted to work. Looking at the exchanges with Ms Cantillon in particular, as the 21 May letter was instigated by her, the Claimant made the following comments to Ms Cantillon via text:

    30 March 2020 – "Practice nurse strongly advised me to self-isolating…"
    30 March 2020 – "…*my GP, they said that I must stay home by government law."*
    6 April 2020 – "…I have been advised to stay home but I cannot get a sick note"
    21 April 2020 – "*I have decided that I will stay at home during this pandemic…"*

138. The Claimant's comments to other staff relate to only being able to work from home or with strict social distancing. Whilst the Claimant may think that stating circumstances in which she could work is sufficient to indicate that she wants to work, we do not find that to be the case. We understand that this was very difficult for the Claimant, mentally and financially, and that it was a time of huge worry for her. However, it is not the case that she communicated that she was willing to work. The clear impression given is that the Claimant wanted to, or had decided to, stay at home during the pandemic.

139. We conclude that sending this letter does not amount to unfavourable treatment. In any event, by this point shielding had ended. There is no evidence that the Claimant was unable to attend work at this time, which is the "thing" alleged to arise from disability. We therefore find that the unfavourable treatment did not arise from disability.

Allegation 11 – On 7 June 2021, Ms Cantillon wrote to the Claimant saying that her continued absence implied that she had or intended to resign, and she was asked to contact her to confirm that or say if she wanted to return to work. If she wanted to return, she would be asked to explain her unauthorised absence and if it was without good reason it was a serious disciplinary offence, which could amount to gross misconduct. The Claimant alleges this was a reframing of the facts and a threat of a disciplinary dismissal to force the Claimant's resignation and was trying to get her to accept she had an unauthorised absence since 16 February 2020.

140. We consider that the contents of this letter are, and it being sent to the Claimant is, unfavourable treatment. However, this letter was sent because no reply had been received to the Respondent's previous letter. The Respondent was not threatening the Claimant with disciplinary proceedings in respect of her absence prior to May 2021, but because she did not communicate with the Respondent after May 2021, and remained absent at that time. Shielding had ended at this point, and there is no evidence that the Claimant was unable to attend work at this time, which is the "thing" alleged to arise from

disability. We therefore find that the unfavourable treatment did not arise from disability. For the avoidance of doubt, we do not find that the Respondent re-framed the facts of the case. The Respondent had not heard from the Claimant following the May 2021 letter and needed to know whether the Claimant was intending to return to work.

Reasonable adjustments

141. The Respondent did not dispute that it operated the PCP, as alleged.

142. The comparator is a hypothetical comparator, who does not have the Claimant's disability.

143. The PCP did disadvantage the Claimant compared to persons without her disability, because she was at higher risk if she caught COVID, and she therefore felt unable to work without strict social distancing or being able to work from home. The Respondent was made aware of this.

144. The Claimant seeks two (alternative) adjustments:

    i. Allowing the Claimant to work from home doing administrative work;
    ii. Giving her different duties, namely paperwork or back office work.

145. Both of these adjustments would have required the Respondent to give the Claimant admin duties.

146. There was not administrative work that the Claimant could do from home. The Respondent was not set up for administration to be done from home. Admin required access to patient records and care plans, which were on site, and which the Respondent reasonably determined could not be moved off site for data protection and security reasons and because patient information needed to be accessible on-site at all times.

147. Ms Young was the administrator, and she worked on-site throughout the pandemic for these reasons.

148. Ms Young explained that whilst she was working on site, it was not possible to strictly socially distance in this role due to the size of the space and the requirements of the role.

149. Ms Young had detailed knowledge of the administrator role, and was required to liaise with the families and GPs of service users. The pandemic was a difficult and chaotic time, and it would not have been reasonable for the Respondent to disrupt its operation further by replacing Ms Young or reallocating some of her tasks at that time, even if that were possible.

150. In any event, we note that the Claimant was not willing to attend the Home for a meeting in or around May 2020. We find that she would not have attended the Home to undertaken admin tasks, if work had been made available for her on site. In that regard, the adjustment would not have facilitated the Claimant to return to work – we find on the balance of probabilities that she would have remained absent.

151. For these reasons, the adjustments suggested by the Claimant in these proceedings were not reasonable.

Constructive dismissal

152. Although we have found this claim to be out of time, in any event we have not found any fundamental breach of contract by the Respondent, and the Respondent's actions were not calculated or likely to destroy trust and confidence without reasonable or proper cause. The Claimant's discrimination claims have not succeeded, and those claims also formed the basis of the Claimant's constructive dismissal claim.

Holiday Pay

153. The Respondent admitted that it owed the Claimant 30.8 hours' holiday pay at £9 per hour, which amounts to £277.20 gross.

Employment Judge Youngs

Date: 6 September 2024

JUDGMENT SENT TO THE PARTIES ON

23rd September 2024

FOR THE TRIBUNAL OFFICE