EMPLOYMENT TRIBUNALS

Claimant: Mrs M Bray

Respondent: East of England Ambulance Service NHS Trust

HEARD AT: Cambridge: 27-31 January 2020

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Mr A Hare (lay representative)
For the Respondent: Mrs J Smeaton (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. The claimant's unfair (constructive) dismissal claim is not well founded, and is dismissed.

2. The claimant's claims of disability discrimination under ss. 15, 20 and 21 of the Equality Act 2010 are not well founded, and are all dismissed.

REASONS

BACKGROUND

1. The claimant was employed by the respondent as an emergency call handler at the respondent's Bedford emergency operations centre from August 2014 until her resignation giving 4 weeks' notice on 26 July 2018, the effective date of termination ("EDT") being 24 August 2018.

2. The claimant was diagnosed with multiple sclerosis ("MS") some years before she started at the respondent. It is accepted by the respondent that she was therefore at all material times disabled for the purposes of the Equality Act 2010. This was because MS is deemed to be a disability by virtue of the provisions of paragraph 6(1) of Schedule 1 to the Equality Act 2010.

3. By a claim form presented to the tribunal on 16 August 2018, the claimant asserted that her resignation amounted to a constructive unfair dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996. She also asserted that the respondent had failed to make reasonable adjustments for the purposes of sections 20 and 21 of the Equality Act 2010, and that it had discriminated against her because of something arising in consequence of her disability, contrary to section 15 of the Equality Act 2010. All claims are denied in the grounds of resistance. Amongst other things, though disability is conceded, the respondent denies knowledge of the substantial disadvantage relied upon by the claimant for s.20/s.21 Equality Act 2010 purposes, until May 2018 or April 2018 at the earliest. (Knowledge of MS was conceded for s.15 purposes.)

HEARING

The issues

4. At the beginning of the hearing, the representatives were referred to the detailed case management summaries made at preliminary hearings ("PH") on 3 January and 15 July 2019 and we went through them.

5. At the 3 January 2019 PH -attended by both Mr Hare and Ms Smeaton- the employment judge had gone through the disability discrimination claim with the parties, so as to identify precisely how the claimant's case was put. This was because, unfortunately, both her particulars of claim and the correspondence which was produced prior to that hearing -including a 'Reply to the Respondent's Grounds of Resistance' which had been drafted in whole or in part by Mr Hare- did not make her case as clear as it ought to have been.

6. A further PH took place on 15 July 2019, and was again attended by both Mr Hare and Mrs Smeaton. This time, the tribunal went through the claimant's constructive dismissal claim, which was founded on an alleged breach of the implied term of trust and confidence ("the T&C term").

7. This exercise was necessary because attempts to clarify how the claimant's constructive dismissal claim was put had been met with written responses which were described in the tribunal's 7 March 2019 letter as "confusing and unnecessarily prolix". Having read them, we respectfully concur with that assessment.

8. The tribunal set out in its 15 July 2019 case summary the matters on which the claimant sought to rely in establishing a breach of the T&C term.

9. At the start of hearing before us, having gone through matters with us, Mr Hare confirmed to us that the matters set out in two case management summaries from the two PHs accurately and comprehensively reflected the claimant's disability discrimination and constructive dismissal case.

10. They were as follows, using the wording from the last two PHs (and we will use the paragraph numbers in the list below elsewhere in this judgment):

<u>Section 15 Equality Act 2010</u>

1. Did the following things arise in consequence of the claimant's disability:
   a. Increased levels of stress and anxiety;
   b. Cognitive issues (specifically, the struggle to get words out, a tendency to say things round the wrong way, forgetting things and her thinking becoming muddled).
2. Did the respondent treat the claimant unfavourably by placing the claimant on the PIP [i.e. all the PIPs referred to below]?

3. Did the respondent treat the claimant unfavourably in that way because of any of those things?
4. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Sections 20 & 21 Equality Act 2010

5. Did the respondent not know and could it not reasonably have been expected to know that the claimant was a disabled person?
6. Did the respondent have the following PCPs:
   a. Applying a performance management policy from October 2015 whereby performance improvement action would be taken against an employee if the employee exceeded 2 non-compliances per month?
7. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the claimant, by reason of her disability, was more likely to have a greater number of non-compliances?
8. If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?
9. Is so were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:
   a. To relax the respondent's policy to allow the claimant to have up to 3 non-compliances per month before performance management action was taken[1].
10. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

[1] During our hearing, Mr Hare confirmed that he did not assert any 'reasonable adjustments' ought to have been made, other than this one.

Breach of the T&C term

11. The following are said to amount cumulatively to breach of T&C term, the 'final straw' being as set out at (l)(v) below:
    a. Placing the claimant on a PIP on 7 October 2015, and subsequently issuing her with a verbal warning.
    b. Placing the claimant on a PIP2 and issuing her with a 6-month informal warning on 7 December 2015.
    c. Placing the claimant on a PIP3 on 4 March 2016.
    d. Placing the claimant on a further PIP3 on 23 February 2017.
    e. Placing the claimant on an extended PIP3 on 27 June 2017 and giving her a first written warning.
    f. Removing her from call handling duties and telling her that the matter would proceed to a formal capability hearing on 3 October 2017.
    g. Delaying in arranging a formal capability hearing and thereby failing to comply with a 28-day timetable in the disciplinary policy.
    h. Placing the claimant on an extended PIP3 on 30 January 2018 for a 3-month period.
    i. Issuing the claimant with a final written warning on 27 February 2018.
    j. Delaying giving the claimant the outcome of the 27 February 2018 formal capability hearing until 23 March 2018.
    k. Causing Mr Frost to respond to the claimant's appeal against the final written warning on 11 April 2018 when it was not appropriate for him to do so. Also, Mr Frost's falsely stating in that response that the claimant's personnel file had not been available to him in its entirety at that hearing.
    l. In respect of the claimant's appeal against the final written warning on 18 May 2018:
        i. allowing the management case to be presented by Mr Frost;
        ii. allowing the hearing to be chaired by Mr Ashford, which was inappropriate because of his friendship with Mr Frost;

iii. Mr Ashford refusing to consider questions put to him by the claimant;
iv. Mr Frost making inappropriate comments about the claimant's disability and lack of wheelchair use; and
v. unreasonable delay in producing an outcome to the appeal hearing, and in particular the claimant's allegation that an outdated PIP policy had been used- this being the "final straw" leading to her dismissal.

The evidence

11. The claim had originally been listed for 8 days, based on the claimant's expressed intention to call about 10 witnesses. In the event, she did not call any.

12. We heard oral evidence from the claimant. For the respondent, we heard evidence from Nicholas Jones (Senior Ambulance Operations Centre ("EOC") manager), Nicola Turner (EOC manager for Bedford), Paul Frost (EOC manager for Chelmsford), and Robert Ashford (Director of Service Delivery). We were also taken to various pages in a 970-page bundle.

13. The witness statement of Mr Jones was submitted late, and Mrs Smeaton applied to admit his evidence out of time. Mr Hare opposed the application, although he candidly accepted that "in fairness, it might be useful to have him give evidence". Without in any way condoning the respondent's non-compliance with the case management order, we considered that it was in the interests of justice to allow in Mr Jones' evidence.

14. All witnesses, including the claimant, gave their best to give honest answers. Although the claimant was at times understandably upset, she gave her evidence in a clear way and at no point appeared unable to understand the questions being put to her.

15. The respondent's witnesses were all credible. Ms Turner in particular struck us as a thoroughly plausible, sympathetic and careful witness. Mr Hare conducted the cross examination, except in the case of Mr Ashford, where the claimant (with our agreement) took over the questioning as she felt better equipped to do so.

16. We did our best to ensure a level playing field, by asking such questions as we considered pertinent. We also made sure that the claimant, as well as having any necessary comfort breaks, was able to confer with Mr Hare and when necessary address us directly on any points which she felt had not been covered by him.

17. Mr Hare provided an opening skeleton argument on the first day, which we perused as part of our reading into the case. We heard evidence for about 2 days, and adjourned halfway through the third day in order to give Mr Hare the time he had asked for to prepare closing submissions. Both parties helpfully produced written admissions, to which they spoke on the fourth day. We deliberated for the rest of that day.

18. On 4 February 2020, after the other members of the panel and I had concluded our deliberations together and reached our collective decision, Mr Hare sent an email to me (using a judicial email address I had provided to the respondent's solicitors for onward transmission of both parties' written submissions, and without copying in Mrs Smeaton or her solicitors). In his email, he raised various new points/reiterated old ones. As I explained to him in response (copied to Mrs Smeaton), he had already had adequate opportunity to make submissions. I told him that I would take no further action in relation to his email at that time.

FACTUAL FINDINGS

Role, audits and PIPs

19. The role performed by the claimant as a call handler was a vital one. Call handlers are the first point of contact with the ambulance service in case of emergency. They not only provide life-saving advice service to members of the public, but also ensure that an appropriate response is sent to patients based upon their clinical need. Obviously, it is crucial that such a response is tailored to the nature of the emergency and the urgency of the requirement for assistance. As the claimant herself very fairly accepted in questioning, mistakes on the part of call handlers cannot be left unactioned. Otherwise, patient safety would be put at risk.

20. Audits take place of calls, in order to ensure that call handlers are performing their service to the requisite standard and that there is compliance with the requirements of the respondents' medical priority dispatch system license - which it requires in order to be able to operate. Those audits monitor only a very small fraction the calls with which the handlers deal.

21. During those audits, if one 'critical error' or 2 'major errors' are identified, the call is considered to be non-compliant. A repeat of non-compliant calls results in further action being taken, which can lead to the imposition of a performance improvement plan ("PIP"). The purpose of a PIP is to be supportive, and to provide any necessary extra training, mentoring or advice.

22. There are 3 levels of PIP. A failure to improve following the imposition of a 'PIP3' can lead to a capability hearing.

23. Various versions of the audit policy were in force from time to time. The policies set the trigger points for enhanced auditing etc. Version 2 of that policy was in force between November 2013 and November 2016. It governed, we think appropriately, the claimant's progression from PIP1 to PIP3 as explained below.

24. Version 3 came into force in November 2016. Pursuant to that version of the policy, target compliance levels were at the manager's discretion rather than by reference to

set trigger points. The same discretion is provided for in Version 2 and in Version 4 (which came into force in August 2017).

25. The International Academies of Emergency Medical Dispatch has now adopted the respondent's PIP procedure as a 'gold standard' to apply to other ambulance service providers.

Narrative

Claimant's issues

26. The claimant started work at the respondent in August 2014, having worked for the NHS for many years before that.

27. Mr Jones had initially suggested that she should be rejected for the job, after he noted she had had significant time off work elsewhere. But, as the claimant very sensibly accepted in her evidence before us -and at the May 2018 appeal hearing to which we refer below- and as the contemporaneous paperwork shows, Mr Jones did not know that the claimant had MS at that time. Once HR had explained that fact to Mr Jones, Mr Jones approved her employment.

28. Following the completion of her training and a six-month period of compliance waiver, she had a workplace assessment. At that time, she explained to the assessor that she had a 6-year history of MS "which predominantly affects her right side". It was said that she "relied on daily medication to enable her to manage her symptoms, which she reports were usually located within her neck, right shoulder, lower back and legs".

29. So, all symptoms referenced at that time were physical. As a consequence, the respondent made adjustments to her workplace to ensure her needs were met.

30. By July 2015, 2 non-compliant calls by the claimant led to her being given increased monitoring as at August 2015. Thereafter, 2 further non-compliant calls were noted. first PIP. In October 2015, the claimant was placed on a PIP1.

31. Thereafter, between October and November 10 audits were carried out in which two non-compliant calls, four partially compliant calls, 3 compliant calls, and one 'highly compliant' call was audited.

32. As a result, and in accordance with the policy, the claimant was put on a PIP2 in December 2015. The claimant did not at that time (or when the PIP1 was implemented) seek to suggest that symptoms related to MS may have led her to make those errors.

33. According to the respondent's Disability Policy, an Equality and Diversity Questionnaire ought to have been completed by the claimant when she was placed on the PIP 2. The respondent did not provide her with this questionnaire and in fact (it seems) it is not used throughout the organisation.

34. As Mrs Smeaton properly accepted, this is matter is "an important learning point" for the respondent. However, we agree with her that, albeit the Questionnaire was "one way in which an employee may bring information about disability" to the respondent, it was certainly not the only way. As will be seen below, there were many other opportunities for the claimant to raise/address the issue. She chose not to do so because (she said) of concerns about the approachability of her managers and/or fears of losing her job. There is no reason to think, and indeed the Claimant does not assert, that if a Questionnaire had been provided to her, her position on that would have changed.

35. Upon implementation of the PIP2, a new action plan was put in place, and alterations were made to her working hours to enable her to get more rest between shifts and focus on improvement. A call handler assessment was carried out in order to identify areas for improvement. The claimant received feedback from management, and additional training sessions. The intention of all that -as the claimant realistically accepted in cross examination- was to provide support, and achieve a necessary improvement in performance for the sake of patient safety. She also accepted that "lots of time and effort" was put into trying to help her improve.

36. In January 2016, the claimant was absent from work for a number of days due to what she described at the time as "genitourinary and gynaecological disorders".

37. Notwithstanding the various extra training sessions, errors regrettably continued at an unacceptable level. Between December 2015 and March 2016, 10 audits were carried out and identified 3 further non-compliant calls. The claimant accepted in questioning (and we agree) that the respondent "had to act" as a result.

38. She was therefore moved to a PIP3 in March 2016, and was set an objective of having no more than 2 critical errors from twenty audits over 2 months. We think that target was fair in the circumstances.

39. From 28 March 2016 until 31 August 2016, the claimant was off work due to "chest and respiratory problems". Again, no reference was made by her at the time to her absence being linked in any material way to MS.

40. In questioning, the claimant properly accepted that the simple fact she was off sick for a protracted period was no reason to 'wipe the slate clean'. Improvement was still required.

Occupational Health input

41. During this period of sickness, the claimant spoke twice with occupational health (once by telephone, once in person). On 7 June 2016, it was noted by the OH physician that the claimant's MS had been "classed as being in remission for the last 6 years and… controlled with medication". OH recommended a phased return to work, and also advised that on return from work, she could be "expected to be able to undertake her normal control room duties without other modifications or adjustments."

42. On 12 August 2016, she again attended occupational health. The OH report of that date explains that she "has been diagnosed with multiple sclerosis although this remains in remission at present". It is said that she "was diagnosed approximately 7 years ago with MS however has managed her symptoms and lifestyle and has been in remission for over 5 years".

43. On neither occasion did the claimant seek to suggest that her MS had caused her any material difficulties which might explain why she had repeatedly failed audits. The claimant said in questioning that she had not mentioned anything about MS symptoms interfering with her work, because she was afraid of losing her job. We consider such fears (in so far as they were felt at the time) to have been unfounded, given the respondent's supportive approach.

44. The PIP3 was thereafter extended on 3 occasions. (This meant the claimant was given additional time for improvement, and support). The first such occasion was in February 2017 when the claimant was given a verbal warning. But thereafter, further non-compliant calls, 2 for 'critical errors', were noted in the next couple of months. On 22 March 2017 in particular, the claimant made a potentially life-threatening mistake -giving the wrong 'action code' in respect of a caller. (The call was triaged as a 'category 3', which had a 2-hour expected response time. In fact, the call should have been classified as 'category 11', which should have a 7-minute response time.) As she rightly said, no one died as a result. But they might have done. As she accepted in cross examination, it was a "serious error".

45. On 9 May 2017, the claimant attended a formal performance meeting and was informed the matter would proceed to a formal capability meeting. In response, the claimant requested that the 'quick resolution process' be used instead. (This was a shortcut for which the respondent's procedure provides, and which can -if appropriate- be used rather than going through a formal capability hearing.)

46. In questioning before us, it was put to the claimant that she did not suggest at the meeting that she had any problems related to MS, or that her MS was somehow "getting worse". Her response to this question was "why would I? I didn't want to be labelled. I didn't like to use it an excuse. I didn't want to admit it to anyone".

47. When she was asked by the tribunal why she did not explain any MS-related issues to someone like Ms Turner, with whom she got on well, she said that it was "not possible to talk to the people she worked with like that". But it is very clear that the claimant felt able to talk about other sensitive personal issues such as gynaecological and family problems she had had, without being overly concerned or embarrassed.

48. In an email dated 18 June 2017, the claimant explained that she had "struggled with my role for the last year due to stress from outside and inside the EEOC, including being seriously ill and as time has gone by my stress has increased with the additional pressure of being on a PIP". She did not, however, suggest that her MS had been causing her to make errors.

<u>27 June 2017 formal performance meeting</u>

49. The claimant was then told that management agreed to use of the quick resolution procedure. A meeting was held on 27 June 2017, at which she was given a first written warning. Targets for improvement was set, and it was agreed she would receive additional training and mentoring. The PIP3 was also extended for 6 months.

50. In cross examination, the claimant was asked if the PIP extension was unfair. She accepted, we think realistically, that it was not and that the respondent had to take action

51. The promised training and mentoring were duly provided. She also permitted to change teams, at her request, and to undertake flexible working. She also attended a 'EMDQ" course to enhance her skills. All of these, as we find, were intended to be of benefit to and supportive of the claimant.

52. Regrettably, on 26 & 27 September 2017 two further 'non-compliants' were noted on audit. On 3 October 2017, she was therefore told that she had failed the PIP3, and she was removed from call handling duties and given alternative duties in the Bedford office.

53. The claimant said in her evidence to us that she did not want to do these alternative duties at that time, as she loved her job. However, at the time she accepted the decision. She also declined the opportunity to carry on working within the same department on restricted duties, because (she said) she found the idea of other staff asking why she was on restricted duties to be stressful.

54. From 4 October 2017 until 13 December 2017, the claimant was again absent from work, this time due to what were said to be "genitourinary and gynaecological disorders". As we see it, these 70 days off sick account for the vast majority of the time relied upon at para 11(a) of the List of Issues (above) as "delay in arranging a formal capability hearing". Any other delay, whilst unfortunate, was (we find) the result of the respondent entering into the very busy Christmas period, as well as a changeover in management for the claimant.

55. During this period of absence, she again consulted (by telephone) with occupational health on 11 December 2017.

56. The occupational health physician records that the claimant "has multiple sclerosis, which is a long-term condition, but is very stable on the whole … her MS remains stable, with her main symptoms being fatigue which was unfortunately exacerbated by the general anaesthetic from her gynae surgery. She has managed the MS for a long time however and as a result that is not expected to impact on return to work and ability to carry out their role". The OH physician explains "general medical evidence is that undue delay in dealing with stress levels can result in an exacerbation of symptoms and so our advice is to conclude matters with normal care, concern and sensitivity and in a timely manner as far as operationally feasible". However, she also opines that the claimant's MS "appears to be stable, with no relapse in the last 8 years". She and the claimant did not therefore suggest that there had been any exacerbation at that point.

57. In questions from the tribunal, the claimant conceded that once again, she did not seek to suggest to OH that her MS was having a material impact as regards performance of her job. When asked by the tribunal why she did not say anything to OH if she felt her MS was causing her material difficulties at work (e.g. 'cognitive symptoms' of the kind relied on in her s.15 Equality Act 2010 claim), she told us "that was not what I was there [at the OH appointment] for". We did not find that answer easy to understand, especially as MS was plainly under discussion with OH at the meeting, as indicated above.

58. On 10 January 2018, the claimant submitted a grievance in relation to "the length of time and lack of communication relating to the duration of my performance improvement plans and capability hearing". In essence, she said she wanted to understand "the reasoning behind my failure of PIP3" (albeit her errors had been explained to her on numerous occasions). She did not in that grievance seek to suggest that her MS had put her under any material disadvantage.

59. On 30 January 2018, she attended an informal grievance resolution meeting with Nicola Turner. At that meeting, Ms Turner explained that she would be taking over

the management of the claimant's performance and that a formal capability hearing would be arranged at the end of February 2018. She and the claimant agreed that in the meantime the PIP3 would once again be extended whilst further tailor-made support was provided to the claimant.

60. The claimant accepted in questioning before the tribunal, and we find, that Ms Turner was nothing but supportive of the claimant. At the January meeting, Ms Turner also told the claimant about concerns which had been raised relating to the claimant's use of a personal phone whilst on an emergency call. After that meeting, Ms Turner wrote to the claimant on 31 January 2018 explaining the improvements which would be required of her under the period of the extended PIP3. She also invited the claimant to get in touch with her if there were any issues they had not discussed during the meeting, or if she had any thoughts or suggestions as regards steps the respondent could take to help her improve. The claimant did not raise any further concerns or suggestions.

27 February 2018 capability hearing

61. On 27 February 2018 -by which time the clamant had (as set out above) already received 2 informal verbal warnings and a first written warning- the claimant attended the capability hearing, before Mr Frost. Ms Turner presented the management case.

62. At no point during that hearing did the claimant refer to her MS at all, except to say that it was controlled. She certainly did not at any time suggest that her underperformance was in anyway linked to her MS.

63. The claimant knew Ms Turner reasonably well by that stage. They had a good working relationship. As Ms Turner told us in evidence, and we accept, the claimant could thus (again) have been expected to mention any problems caused by her MS at that hearing if she really felt at that stage that it was having an impact on her performance.

64. It is also notable that the claimant felt comfortable enough at the meeting to discuss gynaecological issues she had been having, as well as sensitive family problems. Indeed, she said "… there are several occasions where my own personal health of family have imposed mitigating circumstances where I have admittedly been unable to focus on the job 100% … I am the main carer for my mother in law. I've also had an issue with my daughter … I work full time and I suffer from MS. I also had an ovarian cancer scare the day of my assessment… my MS is controlled and I have adapted it to my life".

65. We find that if she thought at that stage that her MS was in any way impacting on her so as to materially affect her performance, she would have said so.

66. The Claimant agreed with the proposition put to her in cross examination that, "for an employer who is not affected personally, they are not able to know what effect MS is having on you unless it is obvious, or they are told. They cannot guess". This may be setting the bar somewhat too high for the employee. An employer can be put in enquiry, depending on the facts. But here, as explained above, several OH assessments – on which we find the respondent was entitled to rely- were to the effect that the claimant was not suffering from any *material* complications as a result of her MS. And she did not say otherwise until April 2018 (as to which, see below.)

67. We also accept Ms Turner's evidence to the effect that it would have been indelicate and potentially discriminatory for the respondent itself to suggest the claimant's MS was responsible for her poor performance. MS, of course, can have terrible and life changing or threatening consequences on the individual concerned. But for years, it can have little or no impact at all on day to day activities. At no point had the claimant (or OH) by this stage suggested it had had a material impact on her.

68. We reject the notion that Mr Frost said anything at the 27 February meeting (or any other meeting) which was misleading or materially inaccurate as regards what he had, or had not, seen from the claimant's personnel file. (In fact, Mr Hare could not

explain to us what would have been in that file which could have made a material difference, beyond recording that the claimant had MS. Mr Frost was already aware of that fact- because the claimant told him.)

69. Mr Frost told the claimant at the meeting that she would be issued with a final written warning. She was eventually given that warning in writing, on 23 March 2018.

70. Unfortunately, in March 2018 the claimant then was heard on audit to commit 2 further critical errors. Had she committed one more such error during the remainder of that month, she would have failed what was already the 3rd extension of the PIP3. However, on 31 March 2018 the claimant went off sick once again, and did not return to work until she started a new role on 25 June 2018.

Claimant's appeal

71. On 27 March 2018, the claimant appealed against her final written warning. The appeal letter was, she told us in evidence, written by somebody else. Stylistically, it looks like it may well have been written by Mr Hare.

72. In the appeal letter it is asserted -we find, for the first time-that the claimant "had been treated less favourably with regard to my disability"; that "I have had an increase in my MS symptoms which has then, I would submit, caused me to make mistakes", and that "reasonable adjustments should have been made to the PIP to accommodate my condition".

73. Complaint is also made in the appeal letter about (amongst other things) the fact that the written warning had taken too long to arrive.

74. In that respect, the respondent's disciplinary procedure does provide that the employee will be given the outcome in writing normally within 7 calendar days "unless advised by the panel that a longer time period is required". That timetable was not

complied with; nor was the claimant given that advice by the panel. However, as we have already said, the claimant was already well aware that she was to receive a final written warning because she had been clearly told as much in the meeting.

75. In the letter, the claimant said that the various PIPs had caused her stress and anxiety -which had exacerbated her MS symptoms, and had caused her to make mistakes. She said that (unspecified) reasonable adjustments ought to have been made to the PIP to accommodate her MS. She asserted that the panel at the capability hearing had not taken her disability into account.

76. In accordance with the respondent's usual practise, and as the manager whose decision was being appealed Mr Frost formally responded to the appeal letter under cover of a letter dated 9 April 2018. We see no issue with him doing so (despite what is said at para 11(k) of the List of Issues.)

77. As a result of what the claimant had said in her appeal letter, she was once again referred to OH, and seen on 26 April 2018. OH reported the claimant's assertion that "increased work pressure and a disciplinary had led to heightened stress levels which in turn have exacerbated her multiple sclerosis … she was experiencing symptoms of anxiety and depression… poor balance, tingling in her head and neck, feeling woolly headed and struggling to get her words out". So, this (and what is said in the 27 March letter) was the first time the "something arising" to which reference is made at para 1 of the above List of Issues was articulated to the respondent by the claimant. We also find that this was about the first time that such matters ought to have been known by the respondent.

78. (We saw no medical evidence to support the claimant's contention that such symptoms in fact arose in consequence of her MS. But OH does not suggest that the history given by the claimant and her reported cause of those symptoms was inaccurate.)

79. The OH physician also suggests that looking at other roles outside the control room "may be of benefit". The claimant was deemed unfit to return to work, but able to attend a meeting whilst being absent from work.

Claimant's new job

80. On 1 May 2018, the claimant applied for a position as senior patient administrator at the respondent. Her application was successful, and she commenced that role on 25 June 2018. Hence the potential 'reasonable adjustment' of an alternative role which had been mooted by OH in April 2018 -and which we ourselves envisage could well have thereafter become an important reasonable adjustment to consider- was in fact (as it were) pre-emptively actioned by the claimant.

18 May 2018 Appeal hearing

81. The appeal hearing was diarised for 25 April 2018 but was postponed due to the claimant's ill health. At her request, the hearing was rescheduled for May 2018.

82. In her written submissions, the claimant asked that Mr Frost's decision be 'struck out'. Amongst other things, she said that she had been "made an example of" in front of her colleagues by being the first one to be put on a PIP. She said that Mr Frost ought to have "urgently sought" the claimant's personnel file if he did not have all of it at the meeting. She asserted that her managers were unsupportive, that they did not care about her, and that they had no understanding of a 'working day' for someone with MS. We do not think these are fair criticisms, in the light of the history and our findings set out above.

83. The meeting was chaired by Mr Ashford. Mr Frost presented the management case.

84. Part of the claimant's constructive dismissal case, as per para 11(1)(i) & (ii) of the above List of Issues, was that it was inappropriate for Mr Frost to present the

management case because of his role in issuing the final written warning. Also, that it was inappropriate for Mr Ashford to chair the hearing because of his friendship with Mr Frost. However, the claimant herself sensibly (and in our view, rightly) accepted during questioning before us that she did not rely on either of these points, in the light of what was said on the matter in the respondent's witness statements.

85. It is also part of her constructive dismissal case that Mr Frost made inappropriate at the meeting comments about the claimant's "disability and lack of wheelchair use". As to this, the notes record Mr Frost making a comment that although he knew "how serious" MS can be, he thought the claimant's MS was under control. We accept, having heard from him, that the gist of his remark was to the effect that he had no idea MS was "an issue in the workplace" for the claimant. His admittedly clumsy reference to her "not being in a wheelchair" -for which he quite properly apologised in writing to her shortly after the meeting- was intended to illustrate that the effect of her disability was not otherwise obvious to him. Though the wording was regrettable, we do not think it deserves strong censure in context.

86. The claimant asserts (at para 11(l)(iii) of the List of Issues) that Mr Ashford refused to consider questions she put to him. We do not think this is a fair or accurate criticism. It is not supported by the notes of the appeal hearing, and it is refuted by Mr Ashford in his evidence, which we accepted on this point where it was in conflict with the claimant's. There were matters he said he would look into further (namely, details of the "equity and inclusion" training received by staff, which Mr Hare requested) - but that does not constitute a refusal. It could have been something to be revisited at any reconvened appeal hearing (which did not happen, for the reasons explained below.)

87. On 25 May 2018, Mr Ashford telephoned the claimant and told her he wanted to obtain advice from OH before reaching a decision on the impact of her MS on performance, and on possible reasonable adjustments. We consider that was an entirely sensible proposal.

88. On 13 June 2018 Mr Hare wrote to Mr Ashford complaining about the “inexplicable unfair and delaying treatment being dished out” to the claimant, and that the decision would arrive “suspiciously over 3 months from the receipt of the earlier decision of your colleague Paul Frost”. Mr Hare suggests in his email that the request for a further occupational health report “undertaken by the same person who provided you with you with the OH report dated 26 April 2018 “all appears rather odd and discriminatory”. He makes various other criticisms as well. We consider them to be unfounded.

89. On 28 June 2018, the claimant was again seen by OH, who reported “an increase in anxiety and depression symptoms” and that the claimant had stated her MS symptoms “had increased since the performance plan was instigated in terms of fatigue, cognitive changes and pains in her legs”. The OH physician records the claimant’s perception that “many of the ‘reasonable adjustments’ had been implemented towards the end of the PIP process rather than the outset”. The physician opines that it is likely the PIP process “has exacerbated” some of the claimant's MS symptoms (albeit she is not entirely clear which symptoms). She does not fully engage with what (if any) reasonable adjustments ought to be made in her opinion.

90. On 12 July 2018, having received that report, Mr Ashford wrote to the claimant to inform her that he wanted further clarification from occupational health. As we see it, that was a reasonable thing for him to do, for the reasons he sets out in his letter. Similarly, we consider the correspondence on 19 July 2018 from human resources to OH seeking further clarification regarding any reasonable adjustments was appropriate.

91. On 23 July 2018, Mr Ashford emailed the claimant a copy of the OH advice, and offered her the opportunity to comment on it before the appeal panel reconvened to come to a decision.

92. However, in response to that email, by a letter dated 26 July 2018 the claimant gave notice of resignation.

93. The letter is not very easy to read. In it, the suggestion is made that the 'final straw' which prompted the resignation was Mr Ashford's failure to provide his decision within the 7 days for which the respondent's procedure provides. We do not consider this to be a good point, for the reasons already explained. In particular, we consider it was obviously sensible for Mr Ashford to seek further OH input before reconvening the panel to make a decision -to have done otherwise may well have exposed him to justifiable complaint- and to write to the claimant in the terms set out in his 23 July letter.

94. The claimant, or at least the author of the letter who may have wrote it on her behalf, makes various other assertions regarding "breaches to my contract". In particular, it is asserted that "outdated versions of the performance improvement policy were applied" in the claimant's case. In cross examination before us, however, the claimant accepted in cross examination (and we agree) that 'with hindsight' it made no difference which version of the policy was used.

95. It is suggested that Mr Frost did not send an outcome of the disciplinary hearing on 27 February 2018 quickly enough; also, that because of Mr Frost's wheelchair comment, "his admitted view of my disability is a further matter to cause me to resign". We have dealt with each of those points above.

96. It is also suggested in the letter that "the disciplinary PIP process took no account of my MS which is clear discrimination and that such failings not helped at all by employing possibly deliberately outdated PIP versions" [sic]. As we see it, it is incorrect to suggest that outdated versions of the policy were used (deliberately or otherwise) -or that the choice of version made any difference. See further above. In fact, the claimant accepted as much in her evidence.

97. Finally, the author of the letter appears to rely on the actions of Mr Jones in 2014 (as to which, again see above) and an assertion -which we do not consider to be justified, for the reasons set out above- that "no reasonable adjustments were considered at the meeting on 9 May 2016" [sic- should be 2017].

98. By the time of her resignation, the claimant had (as set out above) accepted and commenced new, permanent employment in a different post. Had that role suited her, she would have remained in the respondent's employment. On her own evidence, however, she resigned after six weeks of working in that role, because it 'wasn't for her'.

99. In view of the claimant's resignation, the appeal panel did not reconvene.

MATERIAL LEGAL PRINCIPLES

100. The following principles are of relevance:

CONSTRUCTIVE DISMISSAL

101. The burden of proof is on the employee. They must show:
    a. Repudiatory breach on the part of the employer.
    b. Acceptance of that breach (as opposed to waiver/affirmation.)
    c. Resignation in consequence of the employer's repudiatory breach.

Repudiatory Breach

102. In the case of alleged breach of the T&C term, the employee must show that the employer has, without reasonable and proper cause, conducted itself in a manner

which is calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. **Malik v. BCCI**[2].

103. A breach of the T&C term must by definition be fundamental in nature. See further Cox J in **Towry EJ Ltd v. Bennett and others**[3], which illustrates how serious a breach of the T&C term must be:

> *"It is well established that the test to be applied in determining whether there has been a breach of this term is an objective one. The question is whether, viewing all the circumstances from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. All the circumstances must be taken into account, in so far as they may be said to bear on an objective assessment of the intention of the contract breaker".*

104. The question of whether or not there has been repudiatory breach (e.g. breach of the T&C term) should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'. **Western Excavating (ECC) Ltd v. Sharp**[4]. Moreover, the employer's conduct must "*be sufficiently serious to entitle [the employee] to leave at once*". *Ibid*, para 15 *per* Lord Denning MR.

105. Because the test as to whether or not there has been repudiatory breach is objective, "*there will be no breach simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely that belief is held*". Harvey Div D1, para 433.

106. Repudiatory conduct may consist of a series of acts which cumulatively amount to a breach of the T&C term. (Moreover, if an employer acts in breach of an *express*

[2] [1997] ICR 606 (HL) at 621.
[3] [2012] EWHC 224 (QB).
[4] [1978] QB, 761, CA.

term in circumstances which also amount to a breach of the T&C term, but if the employee affirms breach of that *express* term, the employee will still be able to treat that act by the employer as a part of the series of actions which, taken together with other actions by the employer, cumulatively amount to breach of the T&C term.)

Affirmation

107. Assuming a repudiatory breach can be established, the employee has a choice whether or not to treat themselves as discharged from the contact.

108. An unaccepted repudiation "is a thing writ in water". **Brandeaux Advisers (UK) Ltd v. Chadwick**[5], *per* Jack J. Hence the employee "*must make his mind up soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract*". *Per* Lord Denning MR, *Western Excavating*, para 15.

109. If an employee either affirms the contract or waives the breach, this will negate their right to claim constructive dismissal. Affirmation can be implied. Hence, for example in **WE Cox Toner (International) Ltd v. Crook**[6], the applicant delayed resigning for 4 weeks once told that his grievance would not be remedied. This resulted in a finding that he must be taken to have affirmed the contract.

'Last straw'

110. The 'last straw' does not need to be a breach of contact. **Lewis v. Motorworld Garages Ltd**[7]. However, where a 'last straw' is relied upon, the final act must "contribute something" to the breach of the T&C term. See **Omilaju v. Waltham Forest LBC**[8]:

[5] [2011] IRLR 224.
[6] [1981] IRLR 443.
[7] [1985] IRLR 465, at para 36(c).
[8] [2005] ICR 418, at 488 *per* Dyson LJ.

"... [The] essential quality [of a 'last straw'] 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...

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... 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. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these 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.... (underlining added).

Resignation in response

111. The alleged repudiatory breach must be the effective cause of the resignation - though it need not be the sole cause. **Jones v Sirl and Son (Furnishers) Ltd**[9]. See also **Nottinghamshire CC v. Meikle**[10].

DISABILITY DISCRIMINATION

Knowledge

112. The question of whether an employer could reasonably be expected to know of a substantial disadvantage is a question of fact for the tribunal.

[9] [1997] IRLR 493, EAT.
[10] [2004] IRLR 703, CA.

113. The key authorities on constructive knowledge concern constructive knowledge of *disability*, as opposed to knowledge of *substantial disadvantage*. E.g. see **Jennings v Barts and the London NHS Trust**[11], to which we were referred by Mrs Smeaton. However, we agree with her that the approach must essentially be the same in a case such as this.

114. The duty on the employer is to take reasonable steps to ascertain whether the employee is disabled or is likely to be placed at a substantial disadvantage by the application of a PCP. The duty is no higher than that.

115. A reasonable employer ought to form their own judgment on the issue and not, for example, unquestioningly to adopt an unreasoned opinion from Occupational Health on the issue. Advice from OH is, however, plainly relevant. See **Donelien v Liberata UK Ltd**[12].

116. The EHRC Equality Act 2010 Code of Practice on Employment also provides this guidance, at paragraphs 6.19 and 6.20:

> *"6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.*
>
> *6.20 The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to*

[11] UKEAT/0056/12, [2013] EqLR 326 at paragraph 89.
[12] [2018] IRLR 535 at paragraph 32, CA.

mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment (emphasis added)."

Adjustments

117. There is no onus on the claimant to suggest what adjustments should be made, and a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that a claimant has asked for it at the time (**Southampton City College v Randall**[13]). However, there must at least be facts before the tribunal from which, absent any innocent explanation, it could be inferred that a particular adjustment could have been made. See **Project Management Institute v Latif**[14]). Were this not so, the Respondent would be placed in the impossible position of having to prove the negative proposition that there was no reasonable adjustment that could have been made.

118. Moreover, in **Newcastle City Council v Spires**[15], the EAT emphasised the importance of tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them.

Section 15 Equality Act 2010

119. The unfavourable treatment relied upon is being placed on the PIP(s). The 'something arising' is said to be (a) increased levels of stress and anxiety and (b) cognitive issues.

[13] [2006] IRLR 18.
[14] [2007] IRLR 579, EAT.
[15] UKEAT/0034/10.

Unfavourable treatment

120. In **T-System Ltd v Lewis**[16], "unfavourable treatment" was expressed by the EAT as "*that which the putative discriminator does or says or omitted to do so say which places the disabled person at a disadvantage*".

121. Such treatment will be intrinsically unfavourable or disadvantageous. See **Williams v Trustees of Swansea University Pension and Assurance Scheme and another**[17].

'Something arising in consequence'

122. The question of causal link is a question of objective fact for the Tribunal to decide in light of the evidence. The causal connection between the 'something' that causes unfavourable treatment and the disability for the purposes of claims under section 15 of the Equality Act 2010 may involve several links. See **City of York Council v Grosset**[18].

123. The 'something arising' must have a significant or material influence on the unfavourable treatment (**Baldeh v Churches Housing Association of Dudley & District Limited**[19]).

APPLICATION TO FACTS

Constructive dismissal

124. As regards the constructive dismissal claim, we reject the assertion that the T&C term was breached, for the reasons alleged (cumulatively or separately) or at all. In particular:

[16] UKEAT/0042/15 (22 May 2015, unreported), at paragraph 24.
[17] [2019] 2 All ER 1031 at paragraph 28.
[18] [2018] 4 All ER 77, at paragraph 50.
[19] UKEAT/0290/18/JOJ at paragraph 11.

a. (Paras 11(a)-(e), (h) & (i) of para 11 of the List of Issues): We do not consider that for the respondent to follow the PIP process as set out above (using the 'trigger points' it did), or for it to give the claimant the various graduated warnings set out above in accordance with the policy, was in any way unfair or inapt- still less, a breach of the T&C term. As we have found, the process was intended to be -and was- supportive. She was given more than ample opportunity for improvement, and the process was extended to give her further leeway. We accept that it would have been of concern to the claimant that she was put on the various PIPS and given warnings. We also accept that she had good intentions, and that a lot of her calls were in fact compliant. But she needed to perform more consistently to the requisite standard - for the sake of patient safety -which (as she rightly accepted) was of paramount importance. The series of errors made by the claimant over a sustained period was worrying, and warranted the respondent's concerns and actions as set out above.
b. (Paras 11(f) of para 11 of the List of Issues): It was appropriate to remove the claimant from call handling duties on an interim basis in the light of the above, and to proceed to a formal capability hearing. The claimant accepted her removal at the time, in any event.
c. (Paras 11(g) & (j) of para 11 of the List of Issues): We have addressed both these 'delays' above. Though there were some delays in the process, this was (in whole or in part) for the reasons we have explained above. We do not find such delays in any event can be said to amount to breach of the T&C term.
d. (Para 11(k) & (l)(i)-(v) of para 11 of the List of Issues): We do not consider any of these are viable criticisms, for the reasons we have explained above. (As already indicated, the claimant herself abandoned several of those complaints in her evidence to us any event.) Moreover, even if (which we doubt) the "unreasonable delay" in producing an appeal outcome could be said to constitute a 'last straw', the claimant had already accepted and commenced another job -which would have made it very hard for her successfully to argue that the 'last straw' "contributed something" to the termination.

Discrimination claim

125. As regards the s.15 Equality Act 2010 claim:

a. We were not given any evidence to show -and we do not accept- that "increased levels of stress and anxiety", or "cognitive issues" of the kind set out at para 1(b) of the above List of Issues, arose in consequence of the claimant's disability -at least, before early 2018. The various pre-2018 OH reports did not support any such connection, and we were not taken to any other medical reports or notes which did so, either. The claimant did not herself assert there was any such connection until at least late March 2018 - by which time, of course, she was on her final PIP(3), and due to attend an appeal hearing.

b. Hence, even it can be said that being put on any of the PIPs was *per se* "unfavourable", we do not find that she was treated unfavourably by being placed on any of the PIPs in consequence of her disability.

c. Even if this is wrong, we consider that placing of the claimant on each of the above PIPs was a proportionate means of achieving a legitimate aim: namely, trying to ensure that her performance improved to the requisite standard (and that she had in place the support to facilitate that improvement) for the sake of delivering a safe and efficient emergency service.

126. As regards the s.20 Equality Act claim:

a. The respondent knew the claimant had MS. But we do not consider the respondent knew or ought to have known that the claimant's MS was causing her any *material* disadvantage until at least about late March 2018. The respondent was entitled in our view to rely on what OH reported, and on what the claimant herself said, or -despite multiple opportunities- did not say, to OH/the respondent about her MS, other issues, and their *sequelae.*

b. We do not consider that the PCP which the claimant relies upon put her at a substantial disadvantage in comparison to non-disabled persons during any or most of the relevant period, for the reasons set out at para 125(a) above. But

even if this is wrong, we do not think the respondent had the requisite actual or constructive knowledge of that disadvantage.

c. Moreover, even if the claimant had the requisite substantial disadvantage at the material time, and even if the respondent ought to have known about it throughout, we do not accept it would have been reasonable to allow the claimant to have had up to 3 non-compliances per month before "performance management action" was taken. This would not have accorded with the need to ensure patient safety. And, as we have said, the intention of the PIPs was to secure improvement whilst providing support.

d. Further to this, we agree, as Mrs Smeaton pointed out, that many other adjustments were made by the respondent to assist the claimant, even if not expressly because of the material effects of her disability. Amongst other things:

    i. she was granted a flexible working request so that she did not have to work full night shifts, in order to assist with MS-related fatigue;

    ii. she was put on extended phased return to work programmes following periods of sickness absence;

    iii. the PIP3 was extended on multiple occasions to give her as much opportunity as reasonably possible to improve her performance; and

    iv. the PIP3 was put on hold during her phased return to work.

e. We also have no doubt that, had OH reported for the purpose of any reconvened appeal hearing that the claimant should at that point (e.g.) be moved to a less stressful job, the respondent would have accommodated her so far as possible. However, for the reasons set out above, any such recommendation had been pre-empted by the claimant's own decision to seek work elsewhere.

127. **To conclude**: It follows that the claims must fail.

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Employment Judge Michell, Cambridge

Date: 2 March 20

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS