THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms G Race **Collingwood Business Solutions Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 24-26 April 2019

EMPLOYMENT JUDGE GARNON Members Ms C Hunter and Mr M Radcliffe
Appearances
For claimant Ms R McCartney Solicitor
For respondent Mr B Frew of Counsel

JUDGMENT

The claims are not well founded and are dismissed

REASONS (bold print is our emphasis and italics are quotations)

1. Introduction

1.1. The claims are constructive unfair dismissal (section 94 Employment Rights Act 1996 (ERA); indirect sex discrimination (s19 Equality Act 2010 (EqA); pregnancy/maternity discrimination (s 18 EqA); detriment under s47C ERA and regulation 19 of the Maternity and Parental Leave Regulations 1999 (MAPLR); disability discrimination (ss 15, 19 and 21 EqA); victimisation (s 27 EqA).

1.2. A lengthy list of issues was reproduced in a case management summary by our Employment Judge , but many become otiose having regard to our findings of fact.

1.3. It was important to give judgment orally at the end of the hearing so due to shortage of time we did so briefly. These reasons are the longer authoritative ones .

2. Findings of Fact

2.1. We heard the evidence of the claimant and two witnesses she called under witness orders Ms Leanne Donnelly and Ms Victoria Steinson. For the respondent we heard Mr Stephen Frederick Harris, Head of Claims, Ms Rebecca Hall, the claimant's line manager, Ms Laura Beth Gaskell, Head of HR from June 2017 who had known the claimant when they both worked for a different employer, Mr Michael Harris a deputy team leader, and Mr Gary Fothergill who heard the claimant's appeal against the outcome of a grievance she raised.

2.2. The claimant was born on 17 October 1986. She was employed as a Claims Handler from 21 September 2015. She commenced maternity leave on 27 January 2017 and her first child was born on 9 February 2017 so she had had 15 months experience in the job. During

much of that time she sat between Ms Hall and Mr Michael Harris able to ask them questions whenever she was in doubt. She asked many questions which was not resented. She lacked confidence in her own judgment without checking with somebody more senior, but was a valued employee who caused no performance concerns .

2.3. She was scheduled to return on 1 November 2017 after the 39th week of maternity leave but she could have taken 13 weeks more additional maternity leave without pay.

2.4. During maternity leave she fell pregnant with her second child who was due 12 February 2018. In June 2017 she submitted a request to work part-time because her childcare options were limited. She offered to work any 3 days at hours to suit the business. Mr David Watson, then Head of HR, chaired the meeting. Ms Hall was there too. Mr Watson denied the request saying part-time working would not be acceptable. Ms Ashleigh Holland and Ms Leanne Gilks, had come back to work part-time following maternity leave. Ms Gaskell explained times had changed It is hard to recruit Claims Handlers, work has increased and the respondent finds issues of continuity make it less efficient to have two part timers job sharing than one full timer. It was refused for potentially valid reasons and the claimant did not appeal, which would have gone to CEO, or bring any legal proceedings. It was her decision to return, as she has the right to do, to the job she held before.

Disability and Knowledge

2.5. The claimant has a history of depression since she was 15 traced back to her sister becoming a heroin addict . Some days she did not want to get out of bed, as well as wanting to run away or end things. On her own evidence the symptoms of her depression were not of relevance to this case because they did not interfere with her work in the time she was there.. The claimant has suffered anxiety since she was 23. She says "*When my anxiety is bad I struggle to speak to other people and find it difficult to be in social situations or concentrate on matters. I sometimes simply want to shut down*". As will be seen, on 1 & 2 November 2017, she was very anxious and probably did not express herself as fully or clearly as she now believes she did.

2.6. Depression and anxiety are two distinct types of mental impairment but often co-exist . The claimant was prescribed Sertraline to deal with the effects of both conditions. During her pregnancies she stopped taking her medication because it was not good for the baby. When giving evidence here, she was taking it.

2.7. In 2015 she may well have had some conversations with Ms Hall about being managed by medication, but nothing specific. People may simply have an anxious disposition, and that is how her colleagues and managers thought of her.

2.8. She developed sciatica when first pregnant and was off work 7 - 21 November 2016 and 8-12 December 2016. At its peak, the pain was severe. At that time, the respondent provided a back rest for her chair to assist with her comfort. Only those who saw her at the end of her last pregnancy would have known about this and there is absolutely no reason they should deduce, as we have from asking her, any possibility this would be a recurring effect. Ms Gaskell was not even there at the time. When the claimant returned to work in late 2017 the chair she had previously was not there anymore. She told Ms Gaskell **with whom she was friendly** who said she would re-order the part for the chair but that was not in the run-up to her Keeping in Touch (KIT) days so, when she went in for them, this had not happened. We do not accept she was disabled by sciatica for reasons we will explain in our

conclusions, but even if she was, the respondent's managers did not know and could not reasonably have been expected to know she had anything more than back pain which had no long term effect and no likelihood of recurrence.

2.9. Ms Gaskell has been the HR & Operations Manager since 10 July 2017. She looks after approximately 98 employees . The business departments are Claims, IT, HR, Marketing. The claimant was in the "First Response Team" (FRT) which consisted of 1 Team Leader, Ms Hall, 1 Deputy Team Leader, Michael Harris, and 9 Team Members including herself.

2.10. A KIT day is to help an employee to return to their role. Activities could include meeting with the team, potentially call listening, ensuring any emails are up to date. Employees can elect to take up to 10, at any time of their choice, and be paid . The claimant could have eased herself back into work at her own pace by taking earlier KIT days and thereby she would not have been so out of touch with what we find were a limited number of new developments which took place while she was absent. She arranged two KIT days Wednesday 25 and Thursday 26 October 2017 so she says " *to re-familiarise myself with the systems and work so I could* ***hit the ground running*** *on 1 November 2017. I was nervous and anxious about the prospect of returning to work*".

2.11. The respondent has two premises close together. Ms Gaskell was at the one where her office was **not** based on all the critical days, giving training sessions, so if the claimant wanted to see her, or Ms Gaskell had to deal with any emails, it could only be when she came in first thing in the morning or at lunchtime or before she went home.

The Two KIT Days 25 & 26 October 2017

2.12. The claimant assumed she would sit at her usual desk, which was available but was told to sit at one in a corner facing a wall next to her best friend (m who was not in that day) but with her back to the team . She could and did speak with team members across the floor. The desk was being used to store 3 spare monitors.The chair was, she says, " broken", but in oral evidence said there was material missing from the arms and it tilted when sat upon. Her computer had been placed on that desk, but was not set up so she could log on.

2.13. Ms Hall has been an employee since November 2011. She telephoned the claimant on 18 August, 26 September and 23 October 2017 to arrange the KIT days.. During the call on 18 August, she explained during her KIT days the claimant would sit with her team, check her emails and get her computer up and running. She has prepared KIT days in the past and usually allows an employee to take their time easing themselves back to work. She has been on maternity leave in the past so is well aware of how overwhelming it can feel to return. No-one expected the claimant to "*hit the ground running".* Ms Hall raised an IT helpdesk ticket on 18 August saying the claimant would be returning in October and to get her PC ready. Whenever she chased IT, they said it was "in hand"

2.14. Ms Hall knew the claimant could be nervous and anxious so wanted the day not to be too intense. Ms Hall says she and the claimant spent an hour early in the day chatting about her maternity leave and personal matters. We find Ms Hall is wrong about the timing and duration of this conversation. In what were probably three of four shorter exchanges through the day Ms Hall advised her about updates which would take place gradually over some time, that most procedures had not changed so there were many familiar practices in place and a full workstation and pregnancy risk assessment would take place after she returned to work on 1 November 2017. Ms Hall had spoken to a member of the IT team

prior to the claimant's return to remind them to remove unwanted items from the desk. On 25 October there were monitors still on the desk and another IT helpdesk request was sent that day for their removal, which happened within a day. A back rest was also ordered.

2.15. Early on 25 October 2017 she advised the claimant to circulate amongst the team. She was aware her friend Ashleigh Holland had been updating her in general terms whilst she was on maternity leave. The claimant was worried about a new policy called Weflex. Ms Hall told her not to worry as she would be trained on it in due course and it was easy. She also mentioned as the claimant had been away her security passwords would need to be updated by the IT department. Waiting for a password re-set and updates took some time which could not be avoided. The IT request for updating was made at 9.20 am and resolved at 12.16. In the interim period she was to sit with her colleagues. The important point which emerged from the claimant's oral evidence is that when she was conversing with colleagues their telephones kept needing to be answered. The claimant recalls speaking to Ms Hall who had to interrupt the conversation an urgent telephone call was coming into her . In short, the team was as busy as usual, so unable to devote full attention to the claimant, but they were far from "ignoring" her .

2.16. Once the IT system was set up, the claimant was told to read her emails, around 3,600 accumulated during maternity leave, including some important matters and trivia such as the sandwich van having arrived. No-one had prepared a document setting out important changes, a training plan or arranged a formal meeting with her manager and/or HR. Ms Hall had produced a training plan (see page 60) which was, as Ms Hall says, just a "shopping list" of new matters to be covered. The claimant was never given a copy, nor told it existed, but we find no reason why she should have been or would have derived any benefit from seeing such a bullet point list of items.

2.17. Two people may give very different accounts of the same events but neither of them be lying. The truth of the matter is that the claimant returned to a workplace which was as busy as usual. What Ms Hall sees as not being too intense in her approach, the claimant sees as being ignored or as she puts it "*I was being forgotten about*." Around 12.00pm the claimant told Ms Gaskell, Ms Hall had not spoken to her . Ms Gaskell said she would speak with Ms Hall who, so the claimant recalls, later came to speak to her about her outstanding holidays but did not mention updates. Ms Hall noticed after the lunch break the claimant at her desk writing on post it notes. She said she wanted to clear up her emails and was also looking at booking some holidays into the diary. Ms Hall allowed her to continue doing what she was comfortable with. The claimant left at the end of that KIT day and it appeared to Ms Hall was ready to return the next day.

2.18. On 26 October 2017 Ms Hall noticed the claimant was not in the office at 9 am. The claimant had gone to see Ms Gaskell saying she felt under pressure and was struggling with the idea of coming back to work for a whole day. Ms Gaskell said as this was a KIT day, she had the option to split this into a half day if she preferred. This was agreed also by Ms Hall without question who said she would leave the activities she had planned for that afternoon for another time. The claimant was told to sit with a colleague Tracy, and listen to her calls but given no headset to enable her to hear the caller. Ms Hall told the claimant next week she should sit with Michael Harris **as Ms Hall was on annual leave**. The claimant was pleased by this.

Return to Work

2.19. On Wednesday 1 November 2017 , the claimant returned to work on a full time basis. Wednesdays are normally a quiet day especially in comparison with Mondays and Friday afternoons. No one could reasonably have foreseen what a bad day this was for the claimant to come back. While Ms Hall was on annual leave, Ms Nichola Lodge, of the same managerial rank as Ms Hall but in a different department, was overseeing the FRT. She would be able to see from her computer how it performing. Michael Harris has been an employee since 2009. His statement says he was aware the claimant " *suffered from anxiety*" . This is a phrase used by many of the respondent's witnesses. Ms McCartney attributed a significance to using that phrase as opposed to describing the claimant as an anxious person. We disagree with her submission that this indicates a change of direction of the witness's evidence. Anxiety is not an impairment, it is a symptom. All human beings are prone to anxiety and it is a common turn of phrase to say it is something they "*suffer*". What sets it apart from an anxiety disorder is the proportionality of the anxiety to the events which are occurring. Michael Harris and all the respondent's witnesses are adamant they did not know the claimant was anything more than a naturally anxious person . We accept that.

2.20. Ms Hall had instructed Michael Harris to ease the claimant into work slowly and gently as she did not want her to become overwhelmed. The plan for the first few days was she would sit alongside him and listen to calls. Ms Hall need not have troubled to instruct Mr Harris because he came across to us as an empathetic and caring person who would have done so anyway. From starting work at about 9am, the claimant was sitting with him listening to him taking calls. He was giving her a "running commentary", to an extent he accepts was perhaps too detailed, of what he was doing and why. This meant he had less time to answer calls himself. FRT had several absences due to illness and annual leave.

2.21. In the document bundle we have the critical email trail. At 10:42 am Ms Lodge emailed Michael Harris asking why holiday had been agreed for one employee when they were already three people down and had "dropped" six calls that morning, Dropping calls means the inbound caller becomes so tired of waiting for an answer they hang up. It is a serious matter. At 10:50 Mr Harris replied he did not know when Ms Hall had agreed that other person's holiday. He then added
We are short staffed and I have Gemma sitting with me today although I am jumping on the phones also with Gemma listening. Will utilise back-office if that's okay if gets too busy but hopefully should settle down.

2.22. Utilising the back-office means putting calls through to a department which is not the FRT. It is something which would be done only if there was no other reasonable option. At 10:53 Ms Lodge, who would not normally have anything to do with the claimant managerially or know she had only worked a half day on 26 October replied:
Does Gemma actually need to sit with you all day? She was in for two days last week so must have re-familiarised herself with how things work so why not give her all of the non reported claims to set up & make the outgoing calls as I can't see any reason why she can't manage that?

2.23. To input non-reported claims involved entering details onto the system. It is a simple task, that has been in place from the outset of the business and had not changed whilst the claimant was on maternity leave so was familiar to her. What had troubled the claimant on the two KIT days was the thought of having to take incoming calls. An incoming call contains the unexpected from sometimes irate customers. A person making an outgoing call knows what they are going to be talking about so it is easier and less stressful than taking incoming calls which are the normal duties on the FRT. The claimant was seated next to Michael

Harris reading the emails from Ms Lodge so he went to speak with Ms Lodge. She decided the claimant should enter non reported claims and make outgoing calls. Michael Harris did not say this should not be done because he did not think it would be too much for the claimant. He returned and, apologetically, said she would have to work on her own. When he asked her to and explained there was help and assistance available if she got stuck, she said she could manage. She was not asked to take inbound calls. The claimant did not say she would struggle or did not want to do outbound calls.

2.24. The claimant 's statement says " *This felt like Nichola was not at all concerned about my anxiety or need for support after nine months absence from work*". Viewed objectively we wholly disagree. Ms Lodge was making a normal and reasonable response to an urgent situation of calls being dropped. The claimant's statement focuses on the mere fact it had been agreed beforehand she would work with Michael Harris. In every office on a regular basis, there are times when plans have to be changed to meet circumstances. Often people will not like it but those with no mental impairment adapt and take the change in their stride. The claimant did not. She explained that to her change of plan was a really big issue which made her feel those around her were not concerned about her at all.

2.25. This simple departure from plan made her upset. She sent Ms Gaskell an email at 11:28 simply saying "*Can I please speak to you when you are back*". Ms Gaskell replied at 12:55 "*I'm back now* ***for five*** *if you want to pop in*". The claimant broke down crying over the thought of speaking to customers. She says Ms Gaskell "*ignored this*" but she did not. Having to return to her training duties, Ms Gaskell told the claimant she would speak to Steve Harris The claimant was due to take her lunch so Ms Gaskell told her to go and the problem would be picked up when she returned. Ms Gaskell spoke to Steve Harris saying the claimant had concerns. . He agreed to speak with her.

2.26. The claimant went on her break with Ms Steinson who, when later interviewed in the grievance process, gave a version she confirmed as correct when she gave her evidence here, that the claimant said she felt it was all too much and did not feel ready to come back to work.She felt secluded, stuck in the corner and not getting what she saw as the right support.

2.27. When she returned from her lunch break she was told Steve Harris was looking for her. The mere fact she was being asked to see the Head of Claims made her anxiety levels soar. She went to his office and her statement says " *he was quite dismissive , made me feel like I had done something wrong for speaking with Laura. , He did not check Nichola's emails . He said "don't ever go to HR again" as "they do not know our operational processes". He showed no sympathy at all that I was upset and instead appeared to be questioning why this was*". In her oral evidence she said he asked her " *What are you crying for* ?"

2.28. Steve Harris version is different. He clearly recalls when the claimant entered he could see she had been crying but she no longer was. His concern was to give her reassurance. He noticed, in his words, "*her lip quivered*" so he said "*I don't want you blubbering on your first day back* " and told her he did not want her to worry if she made a mistake keying in non-reported claims or how long it took her to do it . When she was keying them into the system it took her an hour to do what she would normally have done in 15 mins and this worried her, but not Mr Harris . He recalls at the end of their discussion, she smiled.

2.29. Although Mr Harris denied, when the Employment Judge put it to him, he ever mentioned she should not go to HR or "operational matters" we think he did. Earlier in his

evidence, he said if an operational matter arises an employee should go first to a line manager, then if dissatisfied to him and, only if that failed, was there any need to go to HR. That day the claimant's first port of call had been her friend Ms Gaskell . Her line manager for the day was Michael Harris but he was doing as instructed by Ms Lodge. If the claimant had concerns Mr Stephen Harris would have the authority to overrule Ms Lodge. He probably said *"don't go to HR on operational matters* meaning " *it is more effective for you to come to me first*". That apart, we prefer Mr Harris' account. We do not accept he chastised her, but we do accept she felt as if he had. As with much of this case, it is a question of the claimant's genuine perception being at odds with our objective judgment of what happened in reality. At no point in her evidence did we disbelieve the claimant's word as to her genuine perception.

2.30. The only point of contention which arose when we were discussing the issues at the outset of the hearing was that, on our reading , the claimant was always suggesting the arrangements for her return to work were not as good as they would have been had she not been pregnant for the second time and therefore only returning for 8 to 10 weeks before going off on maternity leave again. This was part of her s18 claim. Mr Frew contended that was not pleaded but Ms McCartney said it was. Our view was that even if it was not, it was adding nothing to the facts pleaded simply giving a different legal label to them and should be allowed as an amendment. The person we asked about this was Mr Michael Harris because he was closest to the grass roots work of the FRT. We believed him entirely when he explained it was better by far for the team to have the claimant, an experienced claims handler, back at work, even if for only 8 to 10 weeks, than not to have any help at all. Accordingly, in our judgment, it was right to explore this possibility but the respondent's witnesses wholly satisfied us the short period of the claimant's return to work had no effect whatsoever on the arrangements they made to welcome her back.

2.31. For the rest of the afternoon of 1 November the claimant worked imputing unreported claims and making a few outgoing calls. She gave no outward sign of distress while doing so. When she left work on 1 November she spent that evening feeling very anxious about returning to work the following day. We asked her, if what the respondent had done was wrong in her view, what would she have had them do, and she could really not answer. She said it would have been nice if someone like Ms Hall had introduced her to the new members of the team, but there were only two or three new members. Our Employment Judge asked if she expected the respondent to take somebody off their main work effectively to chaperone her during the KIT days and on her return to work. She responded that of course she did not. However, the more we listened to her the more we believed that is the only step which may have calmed her anxiety and even she agrees it would not have been a reasonable step for the respondent to take.

2.32. It is plain not everything went according to plan on 1 November , but the change of plan instigated by Ms Lodge was a perfectly reasonable response to the circumstances which prevailed. To any pregnant woman who did not have some mental impairment nothing which happened on that day or on either of the KIT days would have appeared to be anything other than a minor change which she would take in her stride . To the claimant the abandonment of the forward plan sent her anxiety levels soaring. This is typical of the reaction of a person who is not merely of an anxious disposition but has what a psychiatrist would describe as an anxiety **disorder**. However, bearing in mind the knowledge the various managers had, none of them could, in our judgment, reasonably be expected to know the claimant had such a disorder and was likely to be placed at more than a trivial disadvantage by the requests made of her to adapt to the circumstances which prevailed.

2 November

2.33. When the claimant arrived at work she could not feel her baby moving. She did not log on but spoke to a colleague saying she was worried. The timings for this day are critical. The claimant spoke with the midwife first at about 9:20 am. Her statement says the midwife told her she should go to see her immediately. When she gave oral evidence she said in the first conversation the midwife suggested drinking cold water and jumping up and down in case the baby was asleep. The claimant did try this but it brought about no change. She spoke to the midwife again at about 9:40 am, when they arranged to meet at the claimant's home at noon. The claimant rang her father to get him to pick her up which he did at about 11.40 am.

2.34. The claimant's statement and oral evidence Is she spoke with Michael Harris at 9:30 asking if she could leave immediately and he responded the phones were very busy that morning so could she wait until lunchtime. Her statement says:
"*I was shocked when he told me to wait as he was unsure about how this would be viewed by management. This distressed me even further as I felt like I was between a rock and a hard place facing the choice of putting my baby at risk or my job. I did not have the confidence to raise this with Steve Harris or Nicola Lodge, the only other managers present, due to the way they had treated me since my return. Michael told me to wait until lunchtime before I went to see the midwife and, against my better judgment, I accepted this. I was distracted all morning and frightened for the safety of my baby. I felt that no one was there to support me or be concerned with my wellbeing*".

2.35. Michael Harris is adamant when the claimant first spoke to him she had already arranged for her father to collect her. At no point did he say she could not leave until lunchtime. He points out it makes no sense that he would ask if she could wait until lunchtime because although the phones were busy ,the claimant was not taking incoming calls anyway and none of the tasks she was to do that morning could not wait. He says he did go to see Steve Harris almost immediately after the claimant spoke to him, to say the claimant needed to leave early to which Steve Harris replied that was absolutely fine. Steve Harris also recalls this conversation and that it took place at about 10.30.

2.36. The claimant left as planned with her father. The midwife could not find the baby's heartbeat so she was taken to hospital At an interview Ms Gaskell later conducted with Ms Lodge as part of the grievance investigation, Ms Lodge said Ashleigh Holland spoke to Ms Lodge at about 1 pm that day showing her texts received from the claimant saying she was going to be taken to hospital to be checked as she had not felt the baby move for a couple of days. At hospital, by about 4 pm, she was informed her baby had died.

2.37. The claimant did not hear from the respondent in the days that followed. Her husband, Andrew, sent an email to the CEO, Steve Welton, on 7 November . Mr Race wrote "*Makes me sick the way she has been treated by Collingwood and claims managers and to not even have so much as a phone call message or email from the company following her baby girl's death is disgusting. And to think Collingwood state there are investors in people what a joke*." It is understandably an angry email.

2.38. The absence of contact from the respondent is understandable On 8 November Ms Gaskell emailed asking if the claimant was "free for a chat" (page 62 - 63). At this point, the claimant was really struggling and did not feel strong enough to have a conversation. This is exactly why Ms Gaskell had not contacted her earlier. Had she done so she may well have felt under more pressure. The claimant remained off work until her employment ended.

2.39. Having had no reply to her 8 November email Ms Gaskell emailed on 20 November 2017. The claimant responded she was not up to speaking. Ms Gaskell replied she need not until she felt able. She left it up to the claimant to contact her as after reading how she was feeling it seemed the best option. Ms Gaskell emailed again on 9 January 2018 asking her to make contact when she was ready to meet (page 66). The claimant replied by email on 11 January 2018 saying she would get back to her. Later that day, Ms Gaskell received the grievance, pages 70-71, which she acknowledged and said she would deal with quickly.

Grievance

2.40. The claimant says she hoped that by raising a formal grievance her employer would realise their mistakes and the effect they had on her." She says:" *I wanted to ensure that this sort of treatment did not occur in the future as the pain of losing a child is indescribable*".

2.41. She was invited to a grievance meeting to be held on 23 January 2018 with Ms Gaskell. The claimant says this automatically prevented her from getting a fair hearing and a balanced outcome due to Ms Gaskell's prior involvement . We disagree. That involvement was merely to liase between the claimant and her managers and there were no decisions made by Ms Gaskell. The claimant feels this meeting was set up entirely to help her employer deny they had done anything wrong, rather than to actually listen to her concerns and deal with them. We totally disagree with that perception too.

2.42. Her husband accompanied her at the meeting and recorded it. After comparing the recording with the meeting notes, the claimant says things have not been included properly or at all or reworded deliberately to deflect criticism from her employer. The transcript was available to us but Mr Frew objected to us looking at it until Ms McCartney put to any of the witnesses differences which were of any significance. Ms McCartney did not do so, probably because there are no significant differences. Minutes are minutes not a transcript. Examples in the claimant's statement include failing to note she spoke to Ms Gaskell at lunchtime on the first KIT day about her chair affecting her sciatica, and feeling alone and isolated by being made to sit in the corner. She says this has been left out of the meeting notes on purpose, to try and cover up any wrongdoing. We cannot agree. They were left out because they are not in contention.

2.43. After the meeting, Ms Gaskell interviewed Ms Hall on 25 January 2018, Ms Lodge and Michael Harris on 26 January 2018, Leanne Donnelly Tracy Harrison and Victoria Steinson on 19 February 2018. At some point she took a statement from Mr Steve Harris too.

2.44. The only fault we find with Ms Gaskell's handling of the grievance is lack of "challenge" to what the witnesses said but it is not unusual for a grievance investigator not to cross examine those she is interviewing . Ms Gaskell gave her findings in an outcome letter dated 23 February 2018 (pages 92-95). She did not uphold the grievance due to being unable to find the evidence to support the allegations listed in it. She felt the steps taken were the correct steps for the events taking place at that time. The claimant's statement says
I did feel sickened at the lack of sympathy, support and care that had been demonstrated towards me. …The outcome letter contained a number of inconsistencies which did not make sense to me. These made it seem that my employer was simply trying to put forward the version of events that painted them in the best light, rather than any meaningful attempt to investigate my concerns.
All the outcome letter does is to say it cannot find evidence to support the claimant's allegations such as being ignored and isolated . Neither can we.

2.45. Ms Gaskell sent all correspondence to the claimant on 23 February and gave her the option to appeal by 5 March 2018 which was above the 5 working days in the company handbook. By email dated 28 February 2018 the claimant requested additional time for an appeal which was granted. The claimant appealed on 6 March 2018 and was invited to a meeting on 21 March 2018.

2.46. Mr Gary Fothergill is now the Finance Director and has been an Accountant with the respondent since August 2015. He had no previous experience of running an appeal but had advice from the respondent's solicitors. He says the purpose of the appeal was to allow the claimant the opportunity to discuss all the matters again and for him to then investigate any matters he deemed necessary.. The points the claimant wanted him to address were:- (a) no return to work plan; (b) she requested to see the work plan; (c) she had been delayed from seeing the midwife; (d) she had been left in a corner to read emails; (e) she had been made to sit at desk with IT monitors under it; (f) she had a broken chair; (g) she was asked to go on the phones and did not feel like she was ready and under undue pressure to not make mistakes and (h) **the company should implement a formal return to work policy.**

2.47. Mr Fothergill read through the original grievance, the statements made by Steve Harris, Michael Harris, Rebecca Hall, Nichola Lodge, Leanne Donnelly, Tracy Harrison and Victoria Steinson and compared those statements to the points raised in the appeal letter and the additional points brought up in the appeal meeting. He interviewed Ms Gaskell on 28 March, Ms Hall on 29 March and spoke to the Head of the IT helpdesk find out what time the IT ticket was raised to move the monitors and when it was resolved. He obtained a copy of the return to work plan Ms Hall had prepared and established the corner desk was in a team of 8 people. He then says
*After careful consideration, I set out my findings in the outcome letter dated 5 April 2018 (**pages 112-113**). I did not uphold the grievance for the reasons I state in my letter. My conclusions were based on the evidence that was collated during the investigation of the grievance and consideration of the documentation.*

2.48. The claimant's statement says :
The appeal meeting was, in my view, an attempt to make me feel like I had been listened to without having to actually look into any of my concerns. We spoke at length about my concerns over the grievance process and said that I wished to ask a number of questions to people involved in the process, including Michael Harris. Gary Fothergill (who heard the appeal) said he would be interviewing relevant parties again following the appeal and I believed that my concerns would now be investigated.

Despite concerns being raised about Steve Harris' conduct, it does not appear he was interviewed, either as part of the initial grievance or at the appeal stage. Laura Gaskell says in her letter rejecting my grievance Steve Harris was spoken to and gave a statement, yet this has never been disclosed

Michael Harris was not re-interviewed I raised evidence in the appeal meeting that would have made such an interview necessary and believe that this was not done as my employer feared Michael would support my version of events when questioned again.

My appeal was not upheld and I was informed on 5 April 2018. Much like the outcome letter, this contained inaccuracies and appeared my employer was attempting to rewrite what had happened.

I know of a number of colleagues would support my statements, however, my employer failed to undertake a full and effective interview with these people, presumably because this would affect their ability to deny all responsibility. These were Tracy Harrison, Vicky Steinson and Leanne Donnelly,

My employer later disclosed statements to me from these colleagues. In these interviews my employer failed to ask these witnesses any relevant questions I have been forced to apply for a witness summons so that Leanne Donnelly

My employer also failed to ascertain from Tracy Harrison that I was not given a headset in order to enable me to effectively listen to her calls. I believe that this was done to brush my concerns under the carpet and support my employer's agenda of clearing their name at all costs.

The reason Tracy Harrison was not spoken to is that the fact the claimant was not given a headset was accepted. The witnesses the claimant has called have not supported her position. Neither have Steve or Michael Harris.

2.49. There is an understandable element of the claimants criticism of Mr Fothergill .He is an accountant and he had no idea, until the Employment Judge explained it to him , of the difference between an appeal which is an effective rehearing and one which is a review only. The latter involves looking at the initial grievance stage and, unless there is some obvious defect, accepting the same evidence as gathered at that stage and upholding the decision. Mr Fothergill found no obvious defect and upheld the decision without feeling the need to re-interview all the witnesses the claimant suggested. He did not identify as a partial upholding of the appeal the result he wrote in reply to the emboldened point (h) in paragraph 2.46 above which is that the company is now going to put in hand the creation of formal return to work plans in respect of all employees returning from long-term absence by reason of maternity or anything else. If we had found Ms Gaskell's handling of the first stage was defective, what Mr Fothergill did would not have cured it . However, we found no such defect.

Resignation

2.50. After a long delay during which the claimant must have struggling with anxiety and her tragic loss, by email dated 29 June she resigned. Her statement reads

I was disappointed at the lack of accountability or understanding shown by my employer during the grievance process. it was clear throughout the grievance process my employer had no intention of doing so and simply wished to absolve themselves of all liability.I understood that I would face significant difficulties by leaving work, both from a financial and emotional perspective. For this reason, I discussed my options with my husband as I did not feel that I could go back to work for my employer given the treatment I had suffered. I made the difficult decision to resign from my employment on 28 June 2018 as I felt I had no other option but to do so.

We accept her view the respondent had treated her badly was the reason she resigned.

3. The Relevant Law

The Statutory Provisions of the EqA

3.1. The EqA in s39 includes

(2) An employer (A) must not discriminate against an employee of A's (B)—

*(b) in the way A affords B access, or by **not affording B access**, to opportunities for promotion, transfer or training or for receiving **any other benefit**, facility or service;*

(c) by dismissing B;

(d) by subjecting B to any other detriment.

3.2. Section 4 provides "sex" , " pregnancy and maternity" and "disability" are a "protected characteristic"

3.3. Unlawful discrimination requires a discriminatory **act** and a **type** of discrimination**.** Office of National Statistics –v-Ali and Chapman-v-Simon held each act and type of discrimination is separate from the others and must be pleaded The relevant types follow.

3.4. Section 15 says
(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.

(2) Subsection 1 does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability

In Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305 Langstaff P explained there must be "something" arising in consequence of the disability and the unfavourable treatment must be "because of" that "something". In Charlesworth-v-Dransfield Engineering Simler P agreed this approach .

3.5. Section 18 includes
(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

3.6. Section 19 says .
*(1) A person (A) discriminates against another (B) if A **applies** to B a **provision, criterion or practice** which is **discriminatory** in relation to a relevant protected characteristic of B's.*

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

The relevant protected characteristics include disability and sex but **not** pregnancy/maternity. However relying on the principle established in Webb -v- EMO Air Cargo that, because only women can be pregnant or mothers, the application of a provision criterion or practice (PCP) which places pregnant women or mothers at a particular disadvantage may constitute indirect sex discrimination.

3.7. Section 39 (5) imposes a duty to make reasonable adjustments and section 20 says
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a ***provision, criterion or practice*** *of (the employer) 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****.*

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take ***such steps as it is reasonable to have to take to avoid the disadvantage.***

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

The second and third requirements are the obvious ones in relation to the claimant's workstation . No PCP need be identified.

3.8. Section 21 says :
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

3.9. Para 20 in Schedule 8 includes
(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
(b) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

3.10. Section 27 says
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Section 39 (4) then says

An employer (A) must not victimise an employee of A's (B)—

(c) by dismissing B

(d) by subjecting B to any other detriment.

Disability and Knowledge

3.11. Section 6 includes

(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
(2) A reference to a disabled person is a reference to a person who has a disability.

Section 212 defines "*substantial*" as " *more than minor or trivial*"

3.12. Schedule 1 has effect and includes

(1) The effect of an impairment is long-term if—
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is ***likely to recur.***
5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.

"Measures" can include medication or other treatment. SCA Packaging –v-Boyle 2009 ICR 056 held "likely" means "could well happen " .

3.13. Section 136 includes

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

3.14. Section 123 says :

(1) Proceedings on a complaint within section 120 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.

Case Law

3.15. The conceptual differences between types of discrimination must be grasped Mummery L.J. said in Stockton Borough Council-v- Aylott

26.. In the case of direct discrimination on a prohibited ground the aim is to secure equal treatment protection for the individual person concerned on the basis that like cases should be treated alike. The essential inquiry is into why the disabled claimant was treated less favourably than a person not having that particular disability.

27. In the case of indirect discrimination the aim is to secure equal treatment results for members of a group to which that individual belongs. The essential inquiry is into whether the members of that group, who appear not to have been discriminated against on the ground of disability, have not in fact had equal treatment protection on the basis of the prohibited ground as a result of the disproportionate adverse impact of a neutrally worded provision, criterion or practice.

Whatever the protected characteristic, discrimination occurs when one treats people whose circumstances, apart from the protected characteristic are the same differently OR when one treats people the same when their circumstances, because of the protected characteristic, are different. The first covers s15 s18 and s27 as well as s.47C ERA all of which require us to look for the "reason why" the respondent acted as it did. The second covers s19 and s20/21 and require us to decide what PCP's existed , which were applied to the claimant and whether doing so placed her at a disadvantage . It matters not why they placed her at a disadvantage (see Essop-v Home Office and Naeem-v- Secretary of State for Justice)

3.16. In the first category, the protected characteristic does need not be the only or even the main reason. It is sufficient it is a significant in the sense of being a more than trivial factor. As explained in Ladele-v-London Borough of Islington direct evidence of the reason why is rare and tribunals frequently have to infer it from all the material facts. If the claimant proves such facts then the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities the treatment was not on the prohibited ground. If it fails to establish that, the Tribunal must find there is discrimination. Elias LJ said

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in Brown v Croydon LBC [2007] ICR 897 paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

3.17. The question of acts " extending over a period" has been considered in a number of cases. The most important are Cast-v-Croydon College 1998 IRLR 318 and Hendricks-v-Commissioner of Police for the Metropolis 2003 IRLR 96. A common cause of error on this point stems from the substitution for the statutory words of the phrase "continuing act ".As made clear in Cast, there is a distinction between a continuing act and a one-off act which has continuing consequences. In Sougrin v Haringey Health Authority [1992] IRLR 416, the Court of Appeal held an employer's refusal to upgrade a black nurse was a once and for all event, which took place on the dismissal of an appeal against that decision. The resulting,

ongoing payment of a lower salary was not a continuing act extending over a period, but the continuing consequence of the one-off decision. The same principle was confirmed in Tyagi-v-BBC World Service. If one looks at the acts listed in section 39, the one engaged by the refusal of the claimant's request for part time working is paragraph (b) not (d) which talks of any **other** detriment. The act is complete when the respondent refuses to afford the claimant benefit of part-time working. Valuable guidance on when it is just and equitable to consider a claim which is out of time is British Coal Corporation v Keeble [1997] IRLR 336. The length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom and the extent to which the quality of the evidence is impaired by the passage of time are all relevant considerations.

3.18. In Richmond Adult Community College v McDougall the Court of Appeal resolved a tension between two EAT decisions , Latchman v Reed Business Information Systems and Greenwood v British Airways. Latchman held the determination of the question of disability where there is a recurring effect or a disputed long term effect should be done by putting oneself back in the position at the time of the acts of discrimination complained of and asking what a properly informed person with medical advice would have predicted at that time. Greenwood had indicated one could have the benefit of hindsight in effect and look at what had happened since the acts complained of. Latchman was held to be right.

3.19. Vicary v British Telecom made clear the decision as to whether a person is disabled is for the Tribunal to make and not for any medical expert. College of Ripon and York St John-v-Hobbs held disability may be cause or effect . In Morgan v Staffordshire County Council, Sir John Lindsay said: *"There will be many cases where the illness is sufficiently marked for the claimant's GP by letter to prove it in terms which satisfy the DDA."* It is possible to prove a disability without medical evidence particularly since the requirement originally included in the Disability Discrimination Act 1995 (DDA) to establish a clinically well recognised mental illness was removed. The analogy is with Hampshire County Council and Wyatt where Simler P (as she then was) held it is possible to establish psychiatric damage without medical evidence. However, proof of any impairment without medical evidence is difficult.

3.20. Under s 15 the respondent may avoid liability if it shows it did not know, and could not reasonably have been expected to know , the claimant had a disability. The duty to make reasonable adjustments only arises where the employer has actual or constructive knowledge of the adverse effects too. In Secretary of State for Work and Pensions –v-Alam, Lady Smith said the issues to be addressed on the latter claim are:

1. *Did the employer know **both** that the employee was disabled **and** that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: "no" then there is a second question, namely,*

*2. Ought the employer to have known **both** that the employee was disabled **and** that his disability was liable to affect him in the manner set out in section 4A(1)?*
If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments.
The reference is to s 4A(1) is in the DDA which was the equivalent of s 20(3) of the EqA

3.21. Walker-v-Northumberland County Council was a personal injury case cited with approval in Hatton-v-Sutherland and Somerset County Council-v-Barber 2002 IRLR 263, where Hale LJ , as she then was , uttered words in the different legal context of whether a harmful reaction to the pressures of the workplace is reasonably **foreseeable** (not a requirement in discrimination cases see Essa-v-Laing) *w*hich are helpful especially in

assessing deemed knowledge and whether any term of the claimant's contract has been fundamentally breached (see later)

25. The answer to the foreseeability question will therefore depend upon the inter-relationship between the particular characteristics of the employee concerned and the particular demands which the employer casts upon him…. A number of factors are likely to be relevant.

26.These include the nature and extent of the work being done by the employee. Employers should be more alert to picking up signs from an employee who is being over-worked in an intellectually or emotionally demanding job than from an employee whose workload is no more than normal for the job or whose job is not particularly demanding for him or her. ..Also relevant is whether there are signs that others doing the same work are under harmful levels of stress.

27.More important are the signs from the employee himself. Here again, it is important to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may, but usually does not, lead to damage to health.

28. Harm to health may sometimes be foreseeable without such an express warning. Factors to take into account would be frequent or prolonged absences from work which are uncharacteristic for the person concerned

29. But when considering what the reasonable employer should make of the information which is available to him, from whatever source, what assumptions is he entitled to make about his employee and to what extent he is bound to probe further into what he is told? Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job. It is only if there is something specific about the job or the employee or the combination of the two that he has to think harder. But thinking harder does not necessarily mean that he has to make searching or intrusive enquiries. Generally he is entitled to take what he is told by or on behalf of the employee at face value. .. Otherwise he would risk unacceptable invasions of his employee's privacy.

3.22. Ridout v TC Group [1998] IRLR 628 was decided shortly after the DDA came into force. The claimant had photo sensitive epilepsy, a rare condition. She ticked her application form for a job to the effect she had that disability. When she attended for interview she was put in a room with no windows illuminated by fluorescent strip lights. She attended wearing a pair of sun glasses hanging on a cord around her neck. She did not say the lighting in the room was a problem for her although she did comment on the lighting as she walked into the room in terms which the Tribunal found could merely have been to explain why she had dark glasses . The respondent did not realise it should take any further steps. Morison P said:

"We accept what Counsel for the appellant was saying that Tribunals should be careful not to impose on disabled people … a duty to 'harp on' about their disability … It would be unsatisfactory to expect a disabled person to have to go into a great long detailed explanation as to the effects their disablement had on them merely to cause the employer to make adjustments which he probably should have made in the first place. On the other hand, a balance must be struck. It is equally undesirable that an employer should be required to ask a number of questions about a person suffering from a disability as to whether he or she feels disadvantaged. .. It would be wrong if, merely to protect themselves from liability, the employers … were to ask a number of questions which they would not have asked of somebody who was able-bodied. ***People must be taken very much on the basis of how they present themselves****".*

3.23. In Newham Sixth Form College v Sanders Laws L.J. approved Environment Agency v Rowan [2008] ICR 218 saying a Tribunal considering a reasonable adjustments claim should usually identify:
(a) the provision, criterion or practice applied by or on behalf of an employer, or
(b) the identity of non-disabled comparators (where appropriate) and
(c) the nature and extent of the substantial disadvantage suffered by the claimant.'

3.24. Lady Hale said in Archibald-v-Fife Council:

57. … the Act entails a measure of positive discrimination, in the sense that ***employers are required to take steps to help disabled people which they are not required to take for others****. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.*

58. … ***The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take. They are not expected to do the impossible.***

The test of what is reasonable is objective (Smith-v-Churchills Stairlifts). Project Management Institute v Latif 2007 IRLR 579 explained the claimant must establish the duty has arisen and facts from which it can be reasonably inferred it has been breached. By the time the case is heard, there must be evidence of some apparently reasonable steps that could be taken and the Tribunal must decide if the respondent's given reasons, if any, for not doing them are objectively reasonable

3.25. A practice must be more than an isolated act as Langstaff P said in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 *…"Practice" has something of the element of repetition about it.* Shanks J said similarly in Carphone Warehouse Ltd v Martin UKEAT/0371/12:*" a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer.*

3.26. In Newham v Sanders Laws L.J. said

14. In my judgment these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable.

The Statutory Provisionsof the ERA and MAPLR

3.27. Section 47C ERA includes

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—

(a) pregnancy, childbirth or maternity,

(b) ordinary, compulsory or additional maternity leave,

3.28. MAPLR includes in Regulation 19

(*1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).*

(2) The reasons referred to in paragraph (1) are that the employee—

(a) is pregnant;

(b) has given birth to a child;

(d)took, sought to take or availed herself of the benefits of, ordinary maternity leave;

(e)took or sought to take—

(i) additional maternity leave;

3.29. Section 95(1)(c) ERA provides an employee is dismissed if: -
"*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*."

3.30. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract, Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27. The conduct of the employer must be more than just unreasonable to constitute a fundamental breach.

3.31. In WA Goold (Pearmak) Ltd v McConnell 1995 IRLR 516, the EAT held an employer is under an implied duty to 'reasonably and promptly afford a reasonable opportunity to employees to obtain redress of any grievance they may have. Other implied terms are that employers will take reasonable steps to ensure health and safety (Waltons and Morse -v- Dorrington) and take complaints, in that case of harassment, but it could be of discrimination or victimisation, seriously, (Bracebridge Engineering v Darby)

3.32. Where the employer has not breached any express or other implied term, an employee may rely on the implied term of mutual trust and confidence.In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT said: -"*It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term,* ***it is not necessary to show the employer intended any repudiation of the contract****. The ..Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that* ***its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer****. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

3.33. The House of Lords in Malik v BCCI. said that if conduct, **objectively considered,** was likely to cause serious damage to the relationship between the employer and the employee, a breach was made out irrespective of the motives of the employer. The conduct

must be without "reasonable and proper cause" and that too must be objectively decided by the Tribunal. It is not enough the employer thinks it had reasonable and proper cause. Bournemouth University v Buckland 2010 ICR 908

3.34. An employer is liable for the acts of its managers towards subordinates done in the course of their employment whether the employer knew or approved of them or not Hilton International v Protopapa.

3.35. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period, Lewis v Motorworld Garages [1985] IRLR 465 This is sometimes called the last straw doctrine, and was explored in London Borough of Waltham Forest v Omilaju [2005] IRLR 35. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term. Viewed in isolation it need not be very unreasonable or blameworthy conduct, though an entirely innocuous act cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in the employer.

3.36. Resignation is acceptance by the employee that the breach has ended the contract. Conversely, he may expressly or impliedly **affirm** the contract and thereby lose the right to resign in response to the antecedent breach. There is a lengthy explanation of the principles in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, which the Court of Appeal confirmed in Henry v London General Transport [2002] IRLR 472. Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign (see Omilaju), the employee cannot resign in response to that breach.

3.37. Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part the effective cause of the employee's resignation, there is no dismissal, see Jones v F.Sirl Furnishing Ltd and Wright v North Ayrshire Council .We never reach this point if there has been no fundamental breach.

4. Conclusions

Indirect sex discrimination and Time Limits

4.1. Ms Gaskell admitted the respondent is now only recruiting full-time workers and that was the reason for the refusal of the claimant's request in June 2017. The requirement for all staff to work full time is a PCP. The respondent applies it to men and women. It puts women at a particular disadvantage because women are more likely to need to work part time due to childcare commitments. The PCP put the claimant at that disadvantage. As Ms McCartney submits the respondent would be able to meet business demands by recruiting additional part time workers and as such is not able to justify the PCP by showing it to be a proportionate means of achieving a legitimate aim. The respondent's witnesses were unable to offer an adequate explanation as to why two part time workers could not carry out the same work as one full time worker. However, there was no act extending over a period but an isolated refusal with continuing consequences. The act was in June well more than 3 months before the claimant commencing Early Conciliation. There is no evidence her ability

to decide what to do about the refusal was impaired during those three months. It is not just and equitable in the circumstances to permit the claim.

4.2. That apart, though Mr Frew's submissions on time-limit points were well formulated, having regard to the claimant's state of mind in the period between 25 October and the ending of her employment we would not have found against her purely on time limit issues on any of her other claims.

Disability

4.3. We had no medical evidence but accepted the claimant's evidence of her symptoms and the medication she has been prescribed. In late 2016 she had a painful, but short term, episode of sciatica which is caused by pressure on the sciatic nerve. The World Health Organisation (WHO) defines an impairment as "*Any loss or abnormality of anatomical and physiological or psychological structure or function*". Pregnancy may cause pressure on the sciatic nerve. The claimant has been told fairly recently the episode she had in 2016 may well recur. However, without medical evidence, we cannot find that at the time of the acts complained of a properly informed medical practitioner would have been more likely than not to have made that prediction. Therefore, on the authority of Richmond-v- McDougall , we do not find she was disabled by sciatica at the relevant time.

4.4. In contrast, having regard to her history of mental health issues, medication she had been prescribed and most importantly what we find to be a completely genuine but disproportionate reaction to the events around her, we conclude a properly informed consultant psychiatrist at the time would have diagnosed her as having an anxiety **disorder**. The relevant part of the WHO definition is "***abnormality*** *of psychological function*". As we hope our findings of fact make clear, how she perceived people's actions and motivations on 25 & 26 October 1&2 November, objectively judged, was not normal. Her managers were making a point of **leaving her alone** to readjust to the workplace at her own pace, but she saw this as them ignoring or forgetting about her. That she was put on the desk in a corner next to her best friend, the desk was not clear, the chair did not have a backrest, and the IT department had not got around to setting up her computer before her first KIT day were viewed by her not as the minor slip-ups they were, but as action targeted at her, and by people including those with whom she had previously been friendly such as Ms Gaskell. The possibilities include (a) she was not telling the truth about how she felt (b) she is by personality an attention seeking person and (c) her feelings were entirely out of proportion to what was happening around her due to some abnormality of psychological function. None of the respondent's witnesses suggested from their previous knowledge of her she was untruthful or an attention seeking person. Once we accepted, as we did, her description of how she felt was genuine, the likelihood is she did have an abnormality. It must also be remembered at the time she was not taking the prescribed medication to control her anxiety.

4.5. However, as for the respondent's knowledge, none of its managers knew or could reasonably be expected to know the claimant suffered depression when they had seen no sign of it. There is no way they could have known she was suffering from an anxiety disorder that required them to do more than they did. On that basis alone, her claims under section 15 and 20/21 must fail.

4.6. Even if that were not the case, the plans for her KIT days and return to work were not formal but the respondent took such steps as it was reasonable to take to ease her back into

work. The claimant could have come in for another eight KIT days. The arrangements for the two she did attend could have gone better, but such matters as the desk being cluttered and her password being re-set were objectively trivial and quickly resolved. A DSE and Pregnancy risk assessment would have happened, had her return lasted a few days longer.

4.7. On 1 November changes were made because of the dropped calls. At lunchtime she told Ms Steinson she had come back too early . Her claim in regard to refusal of her request for part time working is out of time but. even if it had been granted. it would have made no difference. Her problem was any departure from plan was causing her anxiety to an extent that would not happen to a person who did not have an anxiety disorder. The claimant's problem was returning to work itself, whether for 3 or 5 days a week. Nothing short of taking someone like Michael Harris off line to chaperone her return would have helped. That was not a reasonable step, even if a duty to take such steps arose. She was given work which she could do , needed doing and meant she did not sit with nothing to do.

4.8. The respondent was making allowances for her current pregnancy , that she had been away and had a nine month old baby at home. Nothing the respondent did which the claimant perceived, even wrongly, as unfavourable was **because** she was pregnant for the second time or had been away on maternity leave and/or her forthcoming second maternity leave or anything arising in consequence of her disability. Neither did the conduct of the respondent amount to a detriment under s 47 C ERA and Regulation 19 MAPLR.

4.9. As for the claim of indirect disability discrimination, Ms McCartney has specified several PCP's. Following Carphone Warehouse-v-Martin the following do not amount to a PCP at all
The requirement to work without support
The requirement to work at an inadequate work station
The requirement to work without a risk assessment being carried out
The requirement to return to work without a plan in place or offer of training
The following did not happen
The requirement to carry out her role in full
The requirement to remain at work when she was given medical advice to go to hospital

4.10. We cannot find the claimant raising concerns with various people on her two KIT days and 1 November about her treatment amounted to a protected act. Her grievance did. It is possible some managers believed her going to see Ms Gaskell indicated she had or was about to do a protected act. However, the claimant was not treated unfavourably or subjected to detriment by Mr Stephen Harris or any other manager for this reason. Though she perceived she was being told off she was not.

4.11. The events of 2 November were tragic but acts cannot be judged solely by their consequences. A motorist may collide with a pedestrian causing his death. However, the motorist may have been driving perfectly well when the pedestrian stumbled off the pavement into his path. Another motorist may drive like a maniac while drunk and hit nobody. The criminal law looks at the driving of the motorist not the death of the pedestrian. In this case we must do likewise.

4.12. Finding facts can involve deciding who is telling the truth. However two people maybe telling the truth but simply have different recollections of events or different perceptions of what people meant or intended. We do not doubt the claimant's truthfulness or the genuineness of her recollections . We do not believe she actually did speak to Michael

Harris before she arranged with her midwife to meet at noon. Somebody on that morning may well have spoken to the claimant about the phones being busy, but the claimant was not taking incoming calls anyway. Michael Harris did not prevent her leaving. By the time he checked with Stephen Harris, the claimant had already arranged to meet the midwife and Stephen said of course she could go. The death of her baby was not something for which any individual was responsible.

4.13. The grievance was fairly well handled by Laura Gaskell. The outcome was not a cover-up. The handling of the appeal by Mr Fothergill was not thorough enough to cure any defects in the earlier stages, but there were none to cure. Very recently in Baldeh v Churches Housing Association of Dudley and District Ltd the EAT held an employer may have acquired actual or constructive knowledge of a disability it did not have at the start of the acts complained of by the time it rejected an appeal. Even if that were so in the case of this respondent, by the time of the grievance and/or appeal hearings , it did not need to rely on lack of knowledge, as nothing it did constituted any form of discrimination.

4.14. Ms McCartney correctly submits **unreasonable** rejection of a request to work part-time is capable of amounting to a fundamental breach of contract (Shaw v CCL Ltd (UKEAT/0512/06). However, first we do not find it was “unreasonable” though we may well have decided differently. More importantly, the claimant clearly affirmed the contract and there being nothing to re-active her right to resign cannot rely solely on that breach. From then, no conduct of the respondent amounted to a repudiatory breach of any of the implied or express terms in the claimant's contract entitling her to resign in response. She did resign in response to what she believed to be such a breach, but objectively there was none.

4.15. The claims have been well argued on her behalf and every legal route which could possibly have worked has been explored but none of the claims are made out as a either a fundamental breach of contract entitling her to resign or any form of discrimination. The claims are therefore not well-founded and are dismissed..

TM Garnon Employment Judge
Date signed 8 May 2019