EMPLOYMENT TRIBUNALS

Claimant: Miss H Quinn

Respondent: Chief Constable of Merseyside Police

HELD AT: Liverpool **ON:** 8, 9 and 10 January 2018
11 January 2018
(in Chambers)

BEFORE: Employment Judge Shotter
Mrs J L Pennie
Ms D Kelly

REPRESENTATION:

Claimant: Mr J Halson, Solicitor
Respondent: Mr D Tinkler, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed and her claim for constructive dismissal is not well-founded and is dismissed.

2. The claimant was not subjected to unlawful discrimination. Her claims for indirect discrimination contrary to section 19 of the Equality Act 2010 and failure to make reasonable adjustments contrary to sections 20 and 21 are not well-founded and are dismissed.

REASONS

Preamble

1. By a claim form received 13 April 2017 (ACAS early conciliation certificate issued 15 March 2017) the claimant brought complaints of constructive unfair dismissal, indirect discrimination contrary to section 19 of the Equality Act 2010 ("EqA") and failure to make reasonable adjustments contrary to sections 20 and 21

EqA. The claimant relied upon the disability of generalised anxiety disorder and recurrent depressive disorder. It was accepted by the respondent that the claimant was disabled for the purpose of section 6 EqA.

<u>The pleadings</u>

2. Within her grounds of claim, the claimant alleged she had been bullied by her line manager, Lynn Drohan in 2014, about which she had raised a grievance in February 2016 which was not found in her favour, and which she appealed. The claimant further maintained that she had requested a move from headquarters (where Lynn Drohan had line managed her) on the basis that Lynn Drohan was "still based there" and the claimant feared the effect on her own health by the worry about "bumping" into Ms Drohan and by the prospect of seeing her there (paragraph 31).

3. The claimant further alleges that she resigned on 11 November 2016 when she had been told that she had to report to headquarters in six weeks, claiming the failure to tackle bullying and to make reasonable adjustments to enable her to permanently work away at a site away from Lynn Drohan cumulatively amounted to a breach of the implied contractual term of trust and confidence, and she resigned in consequence of that breach.

4. The claimant further maintained that the respondent had indirectly discriminated against her by imposing a provision, criterion or practice ("PCP") that placed the claimant at a disadvantage because of her disability and that the disadvantage was the anxiety of worrying that she would come across Lynn Drohan at work and the consequential effect on the claimant's health. The respondent denied they had applied a PCP requiring the claimant to work at headquarters when Lynn Drohan continued to work in the same building. The PCP relied upon by the claimant was set out in section 40 of the grounds of complaint, namely having to work at police headquarters.

5. The claimant maintained that a request to work permanently at a site other than police headquarters amounted to a reasonable adjustment as defined by section 20 EqA.

6. The respondent denied the claimant's claims in their entirety, maintaining the claimant was not subject to bullying as alleged at all and that the claimant's allegations, having been subject to a "thorough investigation." As a result of the concerns raised by the claimant, she was allocated a new line manager and from October 2015 redeployed to a different post where she would have no further contact with Lynn Drohan.

7. It was maintained that the claimant had waited too long between October 2015 (when she ceased to have any contact with Lynn Drohan) and her date of resignation. With regard to the second alleged breach of contract, it was denied the respondent required the claimant to work at the same site as Lynn Drohan, and that Lynn Drohan prior to the claimant's resignation had left headquarters to take up a post in Maghull Police Station.

8. With reference to the indirect disability discrimination complaint, the respondent maintains that if it was found the respondent required the claimant to work in headquarters, it was a proportionate means of achieving a legitimate aim.

9. At a case management preliminary hearing on 21 July 2017 leave was given to the claimant to amend her claim at paragraph 35 to read the failure to tackle bullying suffered by the claimant and the failure to make a reasonable adjustment to enable her to permanently work at a site away from police headquarters instead of Ms Drohan, was amended. The Tribunal accepted submissions made by Mr Tinkler on behalf of the respondent that the amendment arose directly as a result of the respondent's response to paragraph 21, maintaining Ms Drohan had left headquarters and it was denied the respondent required the claimant to work at the same site as Ms Drohan. The Tribunal found this to have been the case, and the claimant was aware of this state of affairs before her resignation.

10. The Tribunal heard oral evidence form the claimant, and on behalf of the respondent it heard oral evidence from A/Detective Simon Fitzpatrick, Kate McNichol, records and property manager based at St Anne's Police Station and the claimant's line manager during her phased return, and Inspector Simon Thompson, grievance officer. There were issues on credibility and conflicts in the evidence, and on balance, the Tribunal preferred the evidence given by the respondent's witnesses supported by contemporaneous documentation, rather than the claimant's recollection which could not be relied upon for the reasons set out below. In addition, the claimant's credibility was undermined by her pleadings, which she amended so as to deal with the respondent's pleaded case that Lynn Drohan, the manager who had allegedly bullied the claimant, had left headquarters and thus the barrier to the claimant's return had been removed. It is notable the claimant's claim form makes no mention of this, and as set out in paragraph 31 of the grounds of complaint, the claimant pleads that Lynn Drohan was "still based there" despite the claimant's state of knowledge before she resigned, which was that Lynn Drohan had moved to Maghull Police Station and was no longer working in headquarters.

11. A number of issues were agreed between the parties, which are as follows –

<u>Constructive dismissal claim</u>

(1) Did the respondent fail to tackle an issue of alleged bullying?

(2) Did the respondent fail to enable the claimant to permanently work at a site away from headquarters?

(3) Did either (1) and/or (2) amount to a fundamental breach of contract which entitled the claimant to resign and claim constructive dismissal?

(4) Did the claimant resign in response to either (1) and/or (2)?

(5) Did the claimant delay too long and/or affirm the fundamental breach of contract(s) before resigning?

<u>Indirect discrimination claim</u>

(6) Did the respondent apply a provision, criterion or practice ("PCP") whereby the claimant was required to work at headquarters?

(7) Did the alleged PCP put the claimant at a substantial disadvantage?

(8) Can the respondent show that the PCP was a proportionate means of achieving a legitimate aim?

Reasonable adjustments claim

(9) Did the respondent apply a PCP whereby the claimant was required to work at HQ?

(10) Did the alleged PCP put the claimant at a substantial disadvantage?

(11) Did the respondent fail to take reasonable steps to avoid the substantial disadvantage?

12. It was agreed that if the claimant was to succeed in her reasonable adjustments claim, it would follow that she would also succeed in the constructive dismissal claim.

13. The Tribunal was referred to an agreed bundle of documents, witness statements together with additional documents marked C1 and R1 produced during the hearing and written closing submissions made on behalf of the respondent. The Tribunal has taken into account written and oral submissions together with case law to which it was referred, which it has dealt with below. The Tribunal does not intend to repeat the oral submissions in their entirety and has attempted to incorporate them into this judgment with reasons. The Tribunal has made the following findings of the relevant facts.

Findings of Fact

Fairness at Work (Grievance) Policy and Procedure dated 12 January 2016

14. The claimant was employed as a Police Community Support ("PCS") and Traffic Officer from 30 March 2009 based at Eaton Road Police Station in Liverpool at a grade C. She was issued with a number of policies and procedures some of which included within the agreed bundle. The Tribunal was referred to only one policy, namely the Fairness at Work (Grievance) Policy and Procedure dated 12 January 2016. In the policy statement it was provided that:

> "The policy is not intended to provide a means of establishing guilty of apportioning blame or to provide for means of punishment for any party involved".

15. The aim of the policy was to resolve issues of concern at the earliest opportunity providing a speedy and effective resolution to workplace disputes at the lowest possible management level. The policy provided for an informal and formal resolution, together with mediation which was the respondent's preferred normal management process. In that process an employee was required to complete a form G1 to formally invoke the grievance, whereby a meeting took place to discuss the grievance, agreed outcomes and further actions required. The management process by the line manager must be completed within 14 days of receipt of the form G1, and any extension to timescales must be agreed in writing with the aggrieved person as soon as practicable. Paragraph 6.1.3 provides that:

> "Where it appears to the manager receiving the grievance that consideration should be given to criminal or disciplinary proceedings, they must consider the issues in accordance with the requirement set out in section 10 of this policy and procedure (Employment Tribunal time limits)."

16. The appeal procedure was set out. The policy provided at paragraph 6.1 upon completion of the grievance the line manager: "Will confirm in writing to the appropriate parties, the outcomes of the grievance meeting(s) including the proposed resolution. It may appropriate to agree that the progress of the resolution is monitored and this may include setting a review period."

The claimant's absences.

17. The claimant was absent from late 2012 to January 2013 with stress and anxiety, and on 30 December 2013 she was diagnosed with general anxiety disorder and recurrent depressive disorder, the disabilities she relies upon in this proceedings.

18. On 6 January 2013 Dr Roy, Occupational Heath doctor, recommended medical redeployment (as previously requested by the claimant) as the claimant could no loner continue working in her role of PSC, and 3 March 2014 the claimant commenced working in the Estate and Facilities Management department in based in police headquarters as a facilities support assistant on a grade B with 12-months pay protection at grade C, line-managed by Lynn Drohan.

19. From 18 to 23 February 2014 the claimant was absent with a panic attack. The attendance support programme completed by Lynn Drohan. During the early period the claimant had no issues with Lynn Drohan who in accordance with the claimant's request sought to have 2 sickness absences removed under the EqA. The emails to which the Tribunal was taken in the bundle, e.g. Lynn Drohan to Belinda Baccio sent 23 September 2014, reveal Lynn Drohan was aware of the claimant's medical condition, had given her repetitive straightforward tasks to assist, and sought advice and support "to ensure I am doing everything right to ensure Hannah is supported….Hannah is an extremely personable member of staff and is a valued member of the team however her real self doubt and anxieties are causing difficulties for both her and myself."

The claimant's request to be moved.

20. In early November 2014 the claimant asked to be managed by someone other than Lynn Drohan. She requested to be moved "**to the other side of the office to the vacant desk"** [my emphasis] raising a number of criticisms against Lynn Drohan, alleging she was "nice one minute and rude and abrupt the next…which made receiving training from her impossible…I've heard rumours that my line manager has had similar issues with x7 previous members of staff…I believed if I was to be moved and managed by a different manager, my ability to learn would be increased." The claimant was not alleging she had been bullied and was not requesting a move away headquarters, contrary to the case presented during this liability hearing.

21. The respondent acted quickly, and by the 20 November 2014 the claimant was placed under the full line management responsibility of Neil Thomas, she was

not line managed by Lynn Drohan, and had moved into a different desk away from Lynn Drohan as requested by the claimant. There was no suggestion Neil Thomas was a temporary line manager as maintained by the claimant; the clear evidence before the Tribunal was the claimant was no longer line-managed by Lynn Drohan.

22. On 25 November 2014 Belino Baccino referred the claimant to occupational health, recording the claimant found some of the roles difficult and she "has also experienced some difficulties with her line manager during her time at EFM, e.g., when Hannah asked questions in relation to her role and not being supported appropriately which has made her more nervous. Hannah's line manager has been changed. A risk assessment was put in place in October this year and Hannah has since been given more structured/repetitive tasks unofficially." Advice was sought on long-term adjustments.

<u>Occupational health Report dated 22 January 2015 and the claimant's move</u>

23. In an Occupational health Report dated 22 January 2015 the claimant was found fit for full duties with adjustment that provided; "management are to accommodate/maintain adjustments across the longer term..." In short, there was no issue with the adjustments already put in place.

24. On 19 February 2015, a period when the claimant was line managed by Neil Thomas, the claimant wrote to her union representative complaining that she had "experienced difficulties with Lynn Drohan" citing an example of her "sigh[ing] loudly at me when I had problems with my memory." She referred to 7 previous members of staff having similar issues with Lynn Drohan. By the 19 February 2015 the claimant had not been line-managed by Lynn Drohan for approximately 3-months and there was no allegation that she had been bullied. At no stage during her employment did the claimant complaint to the union or respondent that she continued to have problems with Lynn Drohan after she had ceased to line manage her. In oral evidence on cross-examination that claimant referred to two incidents that took place on some date between November 2014 to March 2015 that were not referred to in the grounds of complaint or witness statement, namely, that Lynn Drohan had stared/looked at her whilst she was waiting for the lift, and in the corridor Lynn Drohan had made a noise in her throat and put her hands up when she passed the claimant. These alleged incidents were not raised with the respondent at any stage during the claimant's employment, which the Tribunal finds surprising given the claimant's position prior to her resignation that she could not work in headquarters even though Lynn Drohan had cease to work there, in fear that she may still come across her.

<u>The claimant's grievance</u>

25. The claimant started to complete a grievance form G1 on 27 February 2015 which she did not send to the respondent until February 2016, one year later. Her evidence on this was confusing as the form referred to an attached document which the claimant stated had been prepared on a later date in response to an email concerning an Occupational health referral that referred to her as paranoid, which she refuted, but nothing hangs on this.

26. Some 12-month prior to submitting the grievance the claimant requested to leave the Estate and Facilities management department and work under a new

manager in a working area away from her team, on the basis that "the breakdown in the previous relationship with her team leader has gone so far as merely being in the same room caused Hannah anxiety."

27. The claimant was referred to occupational health on 10 March 2015 by Neil Thomas, who wrote; "The previous team leader had minimal impact on her role…we have changed desk position and outlook. We have changed line management to avoid/reduce contact…in truth Hannah is aware of the former team leader's position in the office and draws a negative inference from any/every comment where possible…Hannah has very negative thoughts about her former teal leader and they are not reducing. The negativity has transferred to an additional colleague to her admin team and this has led to further paranoia." The reference to paranoia is repeated, together with his belief that the claimant's perceptions create an "uncomfortable working environment that is an unhealthy one" for her. He sought advice on whether the claimant should be medically redeployed to a new start "where her managers should be fully briefed and the role should be matched to avoid a repetition of the issues she found on being posted to EFMD…I am requesting that Hannah is medically redeployed to a new role, I have discussed this matter with Hannah who is in agreement."

28. The claimant was aware of Neil Thomas's referral to occupational health, and this resulted in an email sent 11 March 2015 in which the claimant disagreed with the suggestion that she was paranoid.

29. The claimant attended occupational health on 28 April 2015. It is evident from Roy Sujay's email; sent 6 May 2015 she was not in agreement with medical redeployment, which was an option open to her, due to a concern that her grade could be adversely affected as it had been when she moved from a grade C to B.

30. A meeting between the claimant and management was advised. The claimant emailed Roy Sujay on 6 May 2015 informing him that Belinda Baccino had made it clear to she could no longer be accommodated in her role. During this period the claimant had been liaising with UNISON about moving roles, and in an email to head of Employee Relations she requested a move "as soon as possible." This request was repeated in emails sent 2 and 22 July 2015 as the claimant was concerned about the effect of cuts on the prospect of redeployment if she remained in the Estate department.

25 June 2015 the claimant was put on the redeployment register

31. In a letter dated 25 June 2015 the claimant was informed by the respondent that she was subject to redeployment and had been put on the redeployment register in accordance with the respondent's Redeployment Policy & Procedure for Police Staff which required that she be matched to a suitable post taking into account the adjustments made previously The claimant continued to put her grievance together in accordance with an email sent to UNISON 14 August 2015, and she asked UNISON to make inquiries to have her moved out of the Estates department on her return from a one week holiday in order that she could be based elsewhere whilst her grievance was being investigated.

32. The claimant was not initially matched with the role of Intelligence Indexer at the National Ports Analysis Centre (NPAC) due to her medical requirements,

particularly, whether or not she was capable of decision making, a decision the claimant disputed. As a result on 27 August 2015 the claimant underwent a capability assessment with Dr Roy, who confirmed she should be redeployed and was capable of decision making.

The role of Intelligence Indexer within NPAC accepted on 2 October 2015

33. By 9 September 2015 the claimant was matched to the role of Intelligence Indexer within NPAC, and following a security clearance check on 27 September 2015 offered the post of Intelligence Indexer on 2 October 2015 with a start date of 19 October 2015, which she accepted. The claimant's grade C and equalisation allowance continued until March 2016 whereupon the claimant was to revert to the basic grade B salary applicable to the post of grade B Intelligence Indexer.

34. In her new role the claimant was managed by Paul Fern, who she described as a good line manager. Paul Fern granted the claimant time in order that she could put her grievance together, and in or around 22 February 2016 the claimant submitted her grievance for the first time. In order to resolve the grievance the claimant confirmed that she wanted a grade C role, her pay protection having run out after 12 months and not 24 months as mistakenly thought by the claimant. She concluded "it is also my aim to ensure nobody else has to suffer as I did, but I do need to try and ensure I do not suffer further, so I would like to discuss the financial situation that I have been left in and the stress and worry this causes me. The Tribunal were of the view, at his stage, the claimant was predominately concerned with the financial situation despite the loss of grade C was unconnected to the Lyn Drohan grievance, having arisen when the claimant took medical redeployment no longer being able to carry out the role of PCS. The claimant's grievance was the vehicle by which the claimant sought to recover her grade C, evidenced by the communications which followed as set out below.

Grievance investigation by Inspector Simon Thompson

35. Inspector Simon Thompson was tasked with investigating and making a decision on the claimant's grievance in accordance with the respondent's Policy, which was followed the claimant having decided not to go down the respondent's preferred route of mediation. The claimant was interviewed at least 4 times, each meeting taking a minimum of an hour. In addition, she provided at various intervals, evidence concerning other employees complaining about Lynn Drohan which she had gathered. The first investigatory meeting took place on 2 March 2016. When asked what outcome she wanted, the claimant reiterated her requirement for a grade C role appropriate with regard to travel and location. The claimant had prepared a lengthy grievance document and on discussion with her, Inspector Simon Thompson reached a view that it would take time, and this was not a grievance that could quickly be dealt with quickly. Accordingly, it was agreed the time for the grievance to be dealt with was open-ended. In relation to this agreement the Tribunal preferred on the balance of probabilities, the contemporaneous documentary evidence and the numerous references to the grievance investigation being open-ended to the claimant's evidence that she did not agree this.

36. On receipt of the claimant's grievance Inspector Simon Thompson was concerned with its contents and referred the matter to the respondent's Professional Standards Department ("PSD") for investigation, but it was returned without any

explanation given to him, with the instruction that it should be dealt with as a grievance. It is notable that the two grievances finally dealt with by Inspector Simon Thompson were his first, he had no training and HR was not present during the interviews although they were available on the telephone to provide support.

37. There were a number of communications concerning the grievance investigation over a period of time, for example, on 20 May 2016 and 13 June 2016 reference was made to a request by the claimant that Inspector Simon Thompson interview Kelly Woods and Maureen Kilfoyle, whose statements the claimant had obtained herself and already provided. Inspector Simon Thompson interviewed 16 people, a number more than once as a result of the second grievance being raised by Dawn Houghton (who was known to the claimant and had liaised with her) concerning similar complaints against Lynn Drohan.

38. As time passed the claimant became aware of other employees and ex-employees who had criticisms about Lynn Drohan, she was aware of their statements alleging bullying and wanted to ensure Inspector Simon Thompson interviewed all the witnesses, convinced in her own mind by now that what other employees said was true and Lynn Drohan was a bully in the workplace. It is notable the claimant made no such allegations in her communications with UNISON concerning her grievance in February 2015 after a period of some 3-moths had lapsed since she had been line managed by Lynn Drohan and some 15 months before her grievance was lodged. Over time, the claimant's grievance became intertwined with the complaints she had taken as true during discussions between her and other employees/ex-employees, for example, in an email dated 20 May 2016 the claimant received a statement from Maureen Bails alleging intimidation, an allegation that had not been made by the claimant early on in the grievance process. The claimant did not seem to appreciate that her grievance was a separate matter to grievances held by other people, and so the Tribunal held. Inspector Simon Thompson, on the basis that the witnesses did not corroborate the incidents alleged by the claimant, (for example, Lynn Drohan accusing the claimant of speaking aggressively in front of her colleagues) took the view that witness evidence of others referred to him by the claimant did not deal with the claimant's particular situation and did not corroborate her allegations. Nevertheless, he continued to fully investigate and objectively consider the evidence put before him by the claimant over a substantial period of time.

39. The claimant was signed off with stress on 18 March 2016 until she returned to work on 5 October 2016, a period just shy of 7 months.

40. Detective Inspector Simon Fitzpatrick managed the claimant's sickness absence, and along with Paul Fern attended a number of welfare meetings in the claimant's home. In addition, a number of telephone conversations that were set out in a notebook/logged and these were within the trial bundle, and read by the Tribunal. The Tribunal intends only to deal the welfare meetings and telephone conversations relevant to the issues. In a telephone conversation with the claimant held on 5 May 2016 the claimant explained she had no issue with NPAC and had developed physical symptoms as she may "bump" into people that form part of her grievance at headquarters. The telephone conversation was recorded which reflects the claimant's grade C was discussed, she was asked if she required counselling support to which the claimant responded in the negative, confirming she had received therapy.

41. By the 1 June 2016 Inspector Simon Thompson had completed the investigation into the claimant's grievance only; Dawn Houghton's grievance was still in the process of being investigated

42. In an internal email sent 1 June 2016 Inspector Simon Thompson wrote regarding the claimant's grievance that "when I first met Hannah I asked her what she wanted from the investigation. Her reply was she wanted to be given a grade C, she never mentioned seeing any justice against those she had accused…this is going to be a long investigation and Hannah has agreed to an open timescale…I was presented by Lynn with another large folder…since then I have had numerous emails from staff working in Estates. I have a number of people still to see. The outcome I can already tell you will highlight some managerial issues within estates but no evidence of direct bullying against Hannah…This has not been the easiest to investigate…" The Tribunal accepted Inspector Simon Thompson's evidence as credible that he had finished the investigation into the claimant's grievance allegations, but was unable to inform her of the outcome due to the ongoing investigation into the second grievance which may have been prejudiced. It is the Tribunal's view that a more experienced investigator could have informed the claimant of the outcome on the basis that it remained confidential pending resolution of the other outstanding grievance, bearing in mind the anxiety caused to the claimant by the outstanding grievance. Inspector Simon Thompson, in an attempt to make the right decision in relation to both grievances, chose not to do so. On balance, his decision in this regard had no bearing on and was not motivated by the claimant's disability, and as matters subsequently transpired, his decision was correct given the claimant's requests for further witnesses to be interviewed.

43. In an email sent 13 June 2016 from the claimant to Inspector Simon Thompson she referred to being uncomfortable with an open-ended grievance and made it clear it was causing her stress, and she requested being moved to a different site "at least until conclusion."

44. During this period the claimant was in communication with and taking advice from ACAS.

Return to work plan dated 27 June 2016

45. In a return to work plan dated 27 June 2016 the claimant was expected to return to work at NPAC based in headquarters on a phased return with adjustments. A copy was given to the claimant on 29 June 2016 by letter from Paul Fern, who requested a face-to-face meeting with her, which she had previously refused. The claimant's response was that she had been signed off work for 8-weeks, and a MED3 was submitted citing stress at work with no adjustments possible as the claimant was unfit for work.

46. On 7 July 2016 the claimant was referred to occupational health by Paul Fern, who wrote "Hannah stated that she wanted a financial benefit out of the grievance and this should be a return to grade C and for Lynn Drohan to be held to account…**She is unable to come into HQ now or at any time during the future in case she meets Lynn Drohan. She was also concerned about meeting her in other locations within Merseyside Police** [my emphasis]. Hannah said if the grievance does not go well…she said she could not see herself coming back to work even if the grievance outcome was in her favour as she felt that her name and

reputation had been tarnished by HR…if the grievance outcome was not what she was hoping for then she would be going to an independent solicitor…and that we would see her on TV…she wasn't going top do anything until she knows what the outcome is…Hannah wanted me to note that the length of time the process had taken had been horrendous and this had added to her stress…she had no issues with the NPAC office or any of the staff in it." HR advice on adjustments and temporary redeployment was sought.

47. The claimant emailed Paul Fern on 23 July 2016 stating she was not well enough for home visits and that "I am being forced to leave…I cannot return to work at a site with a bully who's made my life hell." The claimant believed following her discussion with various employees and ex-employees that Lynn Drohan had bullied for "years and she's not been dealt with now, 6 months after I submitted a grievance. With 2 grievances and numerous statements I honestly don't know why she hasn't been dealt with."

48. The Tribunal found on the balance of probabilities the claimant had decided to take steps that would result in her resignation, and this decision was causally linked to the fact disciplinary action had not been taken against Lynn Drohan, who had not been dismissed as a result. This continued to be the claimant's position thereon in.

49. Paul Fern was entitled to conclude from his communications with the claimant she wanted the grievance outcome to be a return to work on a grade C, and if the outcome was not as she hoped or even if it was n her favour, she would not be returning to work.

50. In an email dated 23 July 2016 sent to UNISON and copied to the respondent's employee relations department, the claimant confirmed she had received advice that it was "perfectly reasonable for me to be placed at an alternative site away from the bullies…My GP also told me to be moved to a different site…I will not be able to return to work until this is in place." The claimant indicated that was too ill for home visits, and remained off work with no adjustments proposed by the GP. By this stage it is clear the claimant was in receipt of legal advice concerning constructive dismissal. She did not resign.

51. Employee relations responded to the claimant's email on 25 July 2016 indicating that the respondent was waiting on the occupational health report concerning reasonable adjustments that could include a recommendation of a return to work at a different location on a temporary basis. It is made clear the claimant could not perform her current role at a different location due to security considerations. It is accepted by the claimant her substantive role could only be carried out in headquarters and so the Tribunal found. The claimant was informed a temporary alternative location could be facilitated if supported by her GP. It is clear from the claimant's email sent 27 July 2017 that a temporary relocation at St Anne's Station was discussed with her, and she was positive about this.

52. During this period the claimant continued to receive information from employees concerning Lynn Drohan, for example, Elaine Rule's email and witness statements sent on 28 July 2017. As a result the claimant's grievance investigation was further extended.

Reduction in pay

53. In a letter dated 10 August 2016 the claimant was informed her entitlement to full pay would cease on 16 September 2016 and reduce to half pay, and half pay would cease 17 March 2017. The claimant was upset about this and it gave her further impetus to seek employment outside the respondent.

54. Detective Inspector Simon Fitzpatrick was informed by the claimant in a telephone call held 12 August 2016 that she was unhappy a placement had not been found for her "somewhere in the force." She complained Lynn Drohan should have been suspended or moved from Estates, a temporary move to St Anne's Station had been suggested and "due to lack of communication…she feels that **whatever the outcome** [my emphasis] she will need to look for employment outside Merseyside Police." This was the third time the claimant had clearly indicated her intention not to continue with her employment and the respondent was entitled to take this at face value.

55. In an email sent 12 August 2016 by Inspector Simon Thompson the claimant was invited to a meeting to discuss her grievance. He wrote "We have already agreed your grievance would be open ended, I have an email from you of confirmation of that. The reason was….the number of witnesses you requested, which I have done."

Grievance outcome 15 August 2016

56. On the 15 August 2016 the claimant was sent the Grievance Report and Outcome in relation to her grievance. Dawn Houghton's grievance outcome was issued on the same date, but in a different report to Dawn Houghton. Inspector Simon Thompson did not find bullying had taken place, and the Tribunal accept his evidence on cross-examination that had he found bullying the issue would have been referred to Professional Standards Department a second time. There was no reason to disbelieve him given the fact he had already referred the matter once. It was appropriate for Inspector Simon Thompson to deal with the claimant's grievance as a grievance and not a disciplinary given the fact that the claimant, supported by UNISON, submitted a grievance form and the Tribunal did not accept submissions made on behalf of the claimant that it should have been otherwise.

57. Having taken evidence from 16 employees and ex-employees more than once (which were not set out within the bundle in their entirety) Inspector Simon Thompson made no findings of facts as this was beyond his remit. He concluded the claimant was not the only person accusing Lynn Drohan, but there was no corroboration to the actual allegations made by the claimant. The evidence before him was Lynn Drohan's style of management was "very poor." Inspector Simon Thompson concluded "there was no getting away from the fact that there are serious managerial issues within Estates that need to be urgently addressed however this is a grievance report and the conclusion can only offer suggestions…I don't think this was the right environment for Hannah to be placed into, by the time Hannah arrived there had been a three year history of issues. That being said I have spent a long time dealing with this grievance and whilst I cannot find actual evidence of direct bullying against Hannah Quinn I have found plenty of evidence of very poor management." He was critical of the support provided to the claimant given her disability, and Lynn Drohan's line manager, Belinda Baccino's failure to support Lynn

Drohan. Inspector Simon Thompson recommended "a complete review of the management structure within Estates and urgent management training for Belinda Baccino and Lynn Drohan". He concluded "neither of Hannah's outcomes can be achieved through this process. A grade C role cannot be recommended and I cannot find direct bullying from Lynn Drohan, just evidence of very poor management from Belinda Baccino and Lynn Drohan."

58. In Dawn Houghton's grievance report Inspector Simon Thompson's conclusion was there had been an issue within Estates since 2011 that has never been managed or dealt with correctly. He wrote; "…I can only recommend a complete review of the management structure within Estates and urgent management training for Belinda Baccino and Lynn Drohan…I personally don't think Lynn Drohan is a capable line manager, her style of managing staff is nothing short of appalling. I strongly recommend that she is removed from any line management duty until a full assessment of her as a manager, takes place." Inspector Simon Thompson did not find there had been evidence of direct bullying. The claimant was provided with a copy of this report by Dawn Houghton in or around 23 August 2016, and she would thus have been aware of the very strong criticism made about Lynn Drohan's lack of capability.

59. The Tribunal found the reports produced by Inspector Simon Thompson were full and frank, and indicative of a lengthy and detailed investigation having taken place, including taking into account emails/evidence from staff who had witnessed nothing but a professional attitude from Lynn Drohan in addition to those employees/ex-employees who criticised her.

60. In an email sent 17 August 2016 from the claimant to Inspector Simon Thompson she refused to accept Lynn Drohan was a bully, and appealed the grievance outcome. On the basis of the grievance report the claimant made representations to remain on full pay in an email sent 23 August 2016 that requested a return to work plan.

61. On the 25 August 2016 the claimant was signed off unfit for work with no adjustments recommended for a period of 6-weeks.

Return to Work Plan

62. On 26 August 2016 a return to work plan was produced and sent to the claimant. This is a key document in the case provided to the claimant on 28 August 2016 concerning her re-location at St Anne's Police Station to be discussed with the claimant's GP. The respondent's aim was for the claimant to return to work on 5 September 2016 on a 4 week phased return culminating in week 5 when the claimant was to "return to full hours **if not appropriate OHU referral can be requested"** [my emphasis]. The return to work plan provided the claimant would "discuss any issues with your line manager. **This programme was for 4-weeks maximum after which you will return to your core duties and shifts if appropriate if not then a review with OHU can be arranged…You will not return to your full role as Indexer within NPAC initially but to assist with your rehabilitation back into the workplace you will perform tasks relating to the Evidence Management role. Provision was made for various assessments and weekly management meetings** [my emphasis]."

63. The claimant, who was supported by UNISON, would have reasonably understood if she was unable to return to her substantive role after week 5 at St Anne's Police Station an occupational health referral could be requested concerning the prospect of her returning to NPAC in headquarters.

64. The Tribunal finds the return to work plan is clear in its effect. The claimant/respondent could request an OHU referral if she was unable to return to the NPAC. The respondent was hopeful the phased return could result in the claimant returning to her substantive post that had not been backfilled, and the Tribunal accepted as credible Detective Inspector Simon Fitzpatrick's evidence that he would not have forced the claimant to take up her substantive post. The claimant confirmed under cross-examination Detective Inspector Simon Fitzpatrick had acted in her best interests and was a good manager, and so the Tribunal also found.

65. The claimant was unhappy with the return to work plan because she did not want to return to work, as evidenced by her earlier references to an intention not to do so. She informed Paul Fern of her feelings; "dismayed" and upset with the vagueness of the work plan in an email sent 27 August 2016. She requested clarity on what would happen after the 4 weeks, relieved to hear that she was to return to work at St Anne's Police Station. As indicated to the respondent in earlier communications, the claimant was concerned with the uncertainty of job cuts in the financial climate affecting the police, and this also formed part of her thought processes.

66. Paul Fern sought advice which he received in an email sent 27 August 2016, another key document given the claimant's evidence that no discussion took place between her and Paul Fern in accordance with that advice. The advice given by Angie Norstrom, HR, was as follows "…she can be reassured in that she is being accommodated at SAS…in the current change everyone is facing moves so uncertainty is affecting everyone. **However her circumstances will be taken into account when/if there are any considerations to move her from the SAS posting** [my emphasis]…Reassure her of the counselling that is offered…that may assist her in….moving forward as her reputation whilst working with yourself was that she was a good working employee."

67. In a follow up email sent 30 August 2016 from Paul Fern to Angie Norstrom he records a telephone conversation with the claimant held on 30 August 2016. It is clear from the contents of the email Paul Fern repeated the advice received on 27 August 2016. Fundamentally, he recorded "I then moved on to try and reassure Hannah that SAS would accommodate her and her circumstances would be taken into consideration should it be necessary to move Hannah from her posting at SAS. Hannah stated she would not come back to HQ until Lynn Drohan had been dismissed…she wanted a permanent post based at SAS."

68. The claimant disputes Paul Fern had this discussion with her, although she conceded she may have mentioned she wanted Lynn Drohan dismissed. The Tribunal did not hear from Paul Fern, who had since resigned from the respondent. It would have been preferable had the conversation been recorded in a letter or communication sent directly to the claimant, it was not. On the balance of probabilities, the Tribunal preferred the evidence taken from contemporaneous emails to that given by the claimant from her recollection of events that took place over 12-months ago, which was not entirely reliable. There was no suggestion Paul

Fern, who the claimant described later as a good manager, would intentionally process internal emails with a view to defending these proceedings, and there was no suggestion of this. The contemporaneous emails follow logically, and it is undeniable that there were communications with the claimant during this period, and no notes of these were taken by her.

69. The claimant emailed the respondent on 31 August 2016 concerning the return to work plan, requesting an extension of the 4 weeks on the basis that "I am too concerned to return to headquarters **whilst those in my grievance remain on site** my emphasis]."

70. The claimant was informed on 8 September 2016 she would be placed on half pay from 16 September 2016.

71. The claimant did not commence work at St Anne's Police Station on 5 September 2017.

72. On 9 September the claimant consulted her doctor concerning the return to work plan. In an email to Paul Fern of that date she informed him of this and stated "I did feel that I am forced to return to the same site as the bullies now I have submitted a grievance, **I would be in fear everyday of seeing Lynn Drohan and I fear I would suffer panic attacks** [my emphasis]." In another email sent 9 September 2016 to Paul Fern she wrote "My Dr is an agreement with me that **I should not work from the same site as Lynn Drohan**…I would feel better about returning to work if I was working from a different site, but this so far has been refused long term therefore preventing me from returning to work." The claimant seemed to miss the point that as a reasonable adjustment she had been offered a return to work at a different site, namely, St Anne's Police Station and despite agreeing to this, had not done so and remained signed off work without any adjustments recommended by the GP in a MED3.

73. By the 14 September 2016 the claimant's position was raised at governance with senior HR, who determined the return to work plan agreed with the union stood.

74. In an email sent 14 September 2016 Angie Rostrum wrote to Paul Fern "Hannah is capable of her role, she will be in the main building whilst Lynne is in the Annex which minimises the chances of them meeting and the fact that there is over a 1000 people working in HQ." An occupational health referral to a mental health nurse was suggested. Detective Inspector Neil Fletcher on 16 September 2016 proposed that the opinion of both the GP and mental health nurse should be assessed in the context of the claimant's issues and that "Dr Roy and governance should be appraised accordingly with a view to ratifying a course of action."

75. Prior to the claimant returning to work at St Anne's Police Station she applied for two external vacancies. The claimant was invited to interview for the role of data entry clerk at clinical trials centre in Alderhey on a 12-month contract (which has since been extended), on a lower rate of pay having made the decision to leave her employment, as previously indicated in the earlier communications. The claimant gave evidence that she made this decision on the basis the respondent would expect her to take up the substantive post after 4 weeks at St Anne's Police Station, when she would have preferred to transfer permanently to St Anne's Police Station. In oral evidence she confirmed this decision was not connected to the grievance outcome,

which had not resulted in her resignation at the time. The claimant confirmed to the Tribunal her resignation was in response to the respondent's insistence that she return to her substantive post in headquarters, and she was concerned about the effect Lynn Drohan existence would have on her health.

76. A home visit took place with the claimant on 22 September 2016, Detective Inspector Neil Fletcher and DS Simon Fitzpatrick. The claimant was informed the governance panel "has considered her issues and believes there is a limited chance of her having contact with Lynn due to the size and set up of HQ…starting at SAS…will include a phased return approach over a 4 week period with a view to returning to HQ." The claimant requested an extension of 5-weeks so as to "look for employment elsewhere **as she will not be returning to HQ while Lyn Drohan is employed there**" [my emphasis]. The claimant agreed to an occupational health referral to a mental health nurse indicating she "cannot see herself working at Merseyside Police following the outcome of the appeal" as recorded in the contemporaneous note. The claimant in oral evidence denied making the last comment, the Tribunal took the view that the contemporaneous evidence was more reliable and was supported by earlier communications from the claimant in which she made it clear she would no longer be working for the respondent whatever the outcome of the grievance.

77. On the 22 September 2016 the claimant agreed to return to work in accordance with the return to work plan at St Anne's Street on 6 October 2016, which she did, the claimant having been informed earlier that she would be placed on half pay from 16 September 2016 and she knew if she did not return her pay would be decreased.

<u>Grievance appeal outcome on 26 September 2016</u>

78. The claimant was provided with the appeal outcome on 26 September 2016 decided by Steve Fletcher, head of vehicle fleet management. A number of observations were made including a finding that staff in Estates and Management fell into entrenched factions and the claimant's redeployment was "far from the ideal solution."

<u>Occupational health referral</u>

79. The claimant was referred to occupational health on the 27 September 2016 by Detective Inspector Simon Fitzpatrick requesting advice on the claimant's anxiety issues at the prospect of returning to work at HQ and adjustments.

80. On the 3 October 2016 the claimant produced a GP report dated 29 September 2016 that confirmed the claimant was "still being treated for her chronic symptoms (anxiety and depression), she is unlikely to handle any undue stress if she returns to the same place of work where she was subject to bullying. It is noted in her past medical history that she has had fleeting suicidal thought…I worry that her symptoms will return if she is returned to headquarters…I would be grateful if you could reassigned her elsewhere to allow her to return to work…" In the accompanying email the claimant referred to a home visit " a week ago" when she was advised that the "force Dr and HR had decided that they feel I can return to headquarters as the amount of times I will see Lynn Drohan will be limited. **I tried to**

explain that for me it will be the constant everyday of seeing her" [my emphasis]. The claimant was aware of the fact Lynn Drohan was no longer based at headquarters, having been transferred to Maghull Police Station and it must logically follow there was no prospect of a "constant everyday" prospect of them meeting and the claimant, would have known this.

Lynn Drohan's move to Maghull Police Station

81. Detective Inspector Simon Fitzpatrick took part in a telephone call on 5 October 2016 with the claimant, during which he was informed Lynn Drohan had moved to Maghull police station away from headquarters. A note of the conversation was taken which records the claimant's discussion about her visit to the mental health nurse who gave his opinion that the GP's letter stating she should not go to work at headquarters was "not enough not to work at HQ." the claimant did not make any mention of her fears that Lynn Drohan would still visit headquarters, and the prospect of this prevented the claimant from working there.

82. The claimant got on well with Detective Inspector Simon Fitzpatrick and it is incomprehensible to the Tribunal why at that early stage she did not explain to him that even though Lynn Drohan was no longer working in HQ, the claimant's experience was that she would still be visiting HQ as part of Estates and the position had not changed. It is notable that at no point did the claimant inform the respondent of this concern, and on the face of it, the respondent was entitled to assume, based on the claimant's earlier communications, that the barrier to a turn to HQ, namely Lynn Drohan, had been removed. The claimant did not give the respondent (with particular reference to the trusted managers Detective Inspector Simon Fitzpatrick and Kate McNichol) an opportunity to address this specific concern either via the managers she trusted and liked, or through occupational health because she made no mention of it, despite the clear indication in the return to work plan that the claimant would "discuss any issues "with her line manager

83. The Tribunal finds by 3 October 2016 at the latest the claimant was aware Lynn Drohan had moved away from headquarters and there was no evidence, medical or otherwise, before the respondent that the claimant was unable to take up her substantive post taking into account the fact that the barrier to her return, Lynn Drohan, had been removed.

St Anne's Street Station 6 October 2016

84. The claimant commenced working at St Anne's Street Station on 6 October 2016. She got on well with her new line manager, Kate McNichol, and the reasonable adjustment was successful as the claimant returned to work without any difficulties. There were no vacancies for permanent employment at St Anne's Street. Detective inspector Neil Fletcher had requested Angie Nostrom ensured "SAS were flexible around the 4 week period if required" indicating that it "may take longer than 4 weeks…to ensure Hannah is fully supported and given every opportunity to overcome her anxiety." He did not anticipate the claimant's imminent return to headquarters.

7 October 2016 return to work meeting

85. On 7 October 2016 a return to work meeting took place with the claimant and DS Simon Fitzpatrick when a conversation took place concerning Lynn Drohan. There is no note of this and a dispute has arisen as to whether a further discussion took place concerning Lynn Drohan's move to Maghull, which the claimant denies was discussed at that stage. The note found at page 715 in the bundle makes no reference, and Simon Fitzpatrick relies on his recollection of that meeting. It is the Tribunal's view that nothing hangs on this because it is not disputed Simon Fitzpatrick did not know about Lynn Drohan's move until he was informed by the claimant in an earlier telephone conversation, and it is not disputed the claimant at no stage indicated to anybody at the respondent she was concerned Lynn Drohan would still visit headquarters. The claimant's position was a blanket refusal to work in headquarters. The phased return at St Anne's Street Station had been increased from 4 to 6 weeks and the respondent was aware during this period the claimant was actively looking for work outside Merseyside Police.

86. In an email sent to DS Simon Fitzpatrick at 9.08 on 11 October 2016 the claimant questioned his decision to referrer her to occupational health, confirmed she was looking for work outside the respondent and wrote "Against my doctors advice I have been told I have to return to Headquarters in 6 weeks time. This is impossible, I therefore have no option. I am also appalled at the grievance result which is shameful given the overwhelming evidence." The claimant made no mention of her concern that Lynn Drohan would visit headquarters and that is why she was unable to return there.

Occupational health referral 13 October 2016

87. 6 days after the return to work interview on 13 October 2016, and one week after the claimant commenced working at St Anne's Street Station, DS Simon Fitzpatrick referred her to occupational health for a review of the work place assessment and advice on short-term adjustments that would facilitate her return to work as an intelligence indexer in HQ. He referred to the claimant "highlighting issues that affected her prior to NPAC and she feels are still in place. Should it be agreed a medical assessment is required Hannah still maintains that she is unable to attend at HQ as she may come into contact with the subject of her grievance." Under the heading "Actions" already taken reference was made to temporary redeployment and a risk assessment in place "however this needs to be informed by a medical assessment." The claimant was aware of the referral and should have appreciated, given the contents of the return to work plan and earlier discussion; she was to remain at St Anne's Police Station pending medical advice." The reality of this passed the claimant by, as she had made a decision to resign and it mattered not to her that further medical investigation was to take place, reasonable adjustments were to be considered and Lynn Drohan had left headquarters.

The offer and acceptance by the claimant of the new job outside the respondent.

88. On the 14 October 2016 the claimant was interviewed, and offered the job on the 17 October 2016, which she accepted.

89. On the 27 October 2016 Stephen Humphries, mental health nurse, reported he had seen the claimant on two occasions and understood she was "returning to

her position at HQ. I have seen the risk assessment and the management plan to support her return to HQ, and it is my consideration that it's robust and with Hannah's cooperation, I can see no reason why it would not be effective." The Tribunal does not know if the claimant had informed occupational health Lynn Drohan no longer worked at headquarters. As there is no mention of this in Stephen Humphries' email, the assumption is that she had not.

Resignation 11 November 2016

90. The claimant handed in her notice on 11 November 2016 referring to the respondent's "zero tolerance to bullies…does not match up with reality. It is untenable to expect me to return to a see where I will see those who feature in my grievance…I am therefore forced to leave like others before me." The claimant does not set out her concern that Lynn Drohan, despite being based in Maghull Police Station, could still visit headquarters.

91. The claimant continued to be employed at St Anne's Street Station until the expiry of her notice period on 9 December 2016, the effective date of termination, commencing in her new employment on 12 December 2016. The reasonable adjustment that had been put in place so as to able the claimant to return to work continued until she left to take up her new job, and the claimant was not asked to return to her substantive role based at headquarters.

92. On 18 November 2016 the claimant spoke with DI Simon Fitzpatrick reporting her absence as she was felling unwell and depressed, upset at the grievance outcome and the fact she was resigning when it should have been Lynn Drohan going and not her. A contemporaneous note was taken of the conversation, which the Tribunal accepts as credible, supported by earlier notes and communications between the parties. The Tribunal took the view, based on all of the contemporaneous evidence, the claimant's decision to resign flowed from the fact that Lynn Drohan was found not to have bullied her, she was not disciplined and dismissed; dismissal being the only means by which the respondent could guarantee the claimant would not come across Lynn Drohan. In short, the grievance outcome was the motivating factor for the claimant's decision to resign; she had indicated as much early on 7 July, 23 July 2016 and12 August 2016 before the grievance outcome on 26 August 2016 return to work plan, as a result of Lynn Drohan not being dealt with.

93. On 18 November 2016 the claimant was referred again to the health nurse in occupational health by DI Simon Fitzpatrick, and the appointment was cancelled at the claimant's request on 21 November 2016 at the claimant's request due to her resignation. In the email to DI Simon Fitzpatrick the claimant wrote "Thank you for your support Simon, I know it's genuine and I did appreciate it." The 3-page management referral is clear, DI Simon Fitzpatrick was seeking advice on his concerns that the claimant's health problems were affecting her role or capability, and whether any short or long-term adjustments could be advised to "help facilitate a return to work or rehabilitation."

Law

Constructive dismissal

94. Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the 1996 Act") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employers conduct.

95. The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: -

95.1 Was there a fundamental breach on the part of the employer?

95.2 Did the claimant terminate the contract by resigning?

95.3 Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation?

95.4 Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end?

96. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that 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 effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

97. The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he see fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the

relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

98. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a “last straw” incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F “The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?”

99. In Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

100. The Tribunal was referred to the EAT decision in Mrs A Jones v F Sirl & Sons (Furnishers) Ltd [EAT/155/95 that referred to concurrent causes operating on the mind of the employee whose employer had committed fundamental breaches of contract entitling him to put an end to it. The Employment Tribunal must ask itself what was the effective cause of resignation.

Duty to make reasonable adjustments

101. The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 (“EqA”). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment (2011) is to be read alongside the EqA. The Code states that a PCP should be construed widely so as to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

102. Paragraph 20 of Schedule 8 states the duty to make reasonable adjustments will not arise unless the employer knows or ought reasonably to know of the disabled persons disability and that disabled person is likely to be placed at a substantial disadvantage.

103. The Tribunal were referred to The EAT judgment in Ms M Rider v Leeds City Council UKEAT/0243/11/LA in which it was held the requirement that the claimant

return to her substantive post placed her at a substantial disadvantage compared to other employees without her disabilities.

104. The Tribunal was also referred to the EAT decision of <u>Secretary of State for Work and Pensions (Job Centre Plus) v Higgins</u> [2013] UKEAT/0579/12 it was held at paragraphs 29 and 31 of HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage. HHJ David Richardson clarifies at paragraph 34 that "the purpose of identifying a PCP is to see if there is something about the employer's operation which causes substantial disadvantage to a disabled person in comparison to persons who are not disabled. The PCP must therefore be the cause of the substantial disadvantage – Para. 35.

105. At Para. 49 HHJ David Richardson emphasises that S.20 (3) sets out the fundamental test to be applied by the Tribunal in determining whether an employer is under a duty to make reasonable adjustments. The duty to take the step arises if it is a step which is reasonable for the employer to have to take to avoid the disadvantage and the Equality and Human rights Commission's Code of Practice on Employment at Para. 6.28 makes reference to the factors, including "whether taking any particular steps would be effective in preventing the substantial disadvantage." As in the case of Mr Higgins, one of the key issues is how far the step or steps would have been effective in preventing any substantial disadvantage to the claimant caused by the PCP? At Para. 56 HHJ David Richardson indicated if an employer grants a reduction in hours which the employee says he is capable of working, it would not "generally also be necessary…to give some explicit guarantee of future review. If, at the end of the period, the employee continuous to be under a substantial disadvantage, the duty to make an adjustment will still be applicable and can be judged in the circumstances at that time."

106. Para 6.33 of the EHRC Code of Practice on Employment and the examples which include transferring the disabled worker to a existing vacancy and assigning them to a different place of work, training or home working.

107. In the well known case of <u>Archibald v Fife Council</u> [2004] IRLR 651, a House of Lords decision in which it was held that the duty to make reasonable adjustments is triggered where an employee becomes so disabled that she can no longer meet the requirements of her job description, and the duty to take such steps as is reasonable could include transferring without competitive interview a disabled employee "upwards, sideways or downwards."

108. The Tribunal was referred to <u>Leeds Teaching Hospital NHS Trust v Mr P Foster</u> [UKEAT/0552/10, a case in which the EAT found that if there was a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but that does not mean that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one. At paragraphs 21 and 22 Mr Justice Keith clarified that as the Trust was a significant employer in the area it was open to the Tribunal that there was a good prospect that a post would become available had the claimant been placed on

the redeployment register, and the burden of proving that there was not such a good chance passed to the respondent.

Indirect discrimination

109. S.19(1) of the EqA states that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. A PCP has this effect if the following four criteria are met:

111.1 A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic (S.19(2)(a))
111.2 the PCP 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 the characteristic (S.19(2)(b))
111.3 the PCP puts, or would put, B at that disadvantage (S.19(2)(c)), and
111.4 A cannot show that the PCP is a proportionate means of achieving a legitimate aim (S.19(2)(d)).

Burden of proof

110. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

111. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds. In the present case, the Tribunal took the view Ms Quinn had not satisfied it, on the balance of probabilities, there were primary facts from which inferences of unlawful discrimination can arise. If we are wrong on this point, in the alternative, it is satisfied on the balance of probabilities, the respondent has provided an explanation untainted by disability discrimination, taking into account all of the facts set out above.

Conclusion – applying the law to the facts

Constructive dismissal

112. With reference to the first issue, namely, did the respondent fail to tackle an issue of alleged bullying the Tribunal found, on the balance of probabilities that it did not fail to tackle the alleged bullying issue. As submitted on behalf of the respondent by Mr Tinkler, the respondent had responded quickly to the claimant's request for a new line manager at the outset, when the claimant was not alleging she had been bullied. When she indicated she wanted to leave Estates altogether it was suggested that medical redeployment was the quickest way to achieve that goal, her request was accommodated and the claimant was redeployed to NPAC, again at a time when the claimant had not made any accusations of bullying. The real issue for the claimant during this period was the fact no disciplinary action was taken against Lynn Drohan, who was not dismissed, and this was how she wanted Lynn Drohan to be "tackled."

113. In submissions made on behalf of the claimant by Mr Halson, it was submitted the respondent did not tackle the bullying issue, and took an inordinate amount of time to deal with it. Chief Inspector Thompson, who heard the grievance, was only able to offer suggestions and make no findings of fact, and he can be criticised for not giving the claimant the opportunity to comment on responses, or show her the witness statements. It was further submitted Chief Inspector Thompson set the bar unrealistically high by requiring corroboration when five or six employees made similar allegations to those of the claimant. Chief Inspector Thompson was also criticised for the length of time it took him to inform the claimant of the outcome, and there was a failure to suspend Lynn Drohan.

114. The Tribunal did not accept all of the criticisms made of Chief Inspector Thompson. Mr Halson is correct that Chief Inspector Thompson was unable to make findings of fact as set out in the respondent's procedure; however, this did not prevent him from making severe criticisms of management, particularly Lynn Drohan's failure in this regard. Chief Inspector Thompson heard evidence from 16 employees, a number of who had discussed their case with the claimant beforehand, and yet none could corroborate the claimant's allegations. One of the allegations, namely, that Lynn Drohan had accused the claimant of aggression, was on the claimant's account witnessed by a number of her colleagues and it was not unreasonable for Chief Inspector Thompson to seek some form of corroboration. He also had before him documentary evidence from employees confirming Lynn Drohan was a good manager, and yet he was able to objectively consider all of the evidence before him and make the very strong criticisms about management in both reports. The fact that this was insufficient for the claimant is beside the point, she was not the person carrying out the investigation, weighing and assessing the evidence before reaching the conclusions set out in the reports.

115. With reference to Chief Inspector Thompson's failure to provide the claimant with all the witnesses' statements, the undisputed evidence before the Tribunal was that she had not asked to see it. The claimant had a number of the witness statements in her possession; she was the person who collated them and found the witnesses which neatly leads the Tribunal to another issue raised, which was the time it took to complete the grievance investigation.

116. As indicated earlier, Inspector Simon Thompson can be criticised for the way in which he delayed informing the claimant of the grievance outcome in the knowledge it was causing her stress to such an extent she was absent from work and had requested to be moved to a different site. Such a delay could theoretically amount a breach of the implied term of trust and confidence, but given the particular facts of this case it did not. In short, on the balance of probabilities, the Tribunal found Inspector Simon Thompson's decision that it was not appropriate to inform the claimant of his conclusion due to ongoing grievance of Dawn Houghton, did not give rise to a breach of contract and /or unlawful discrimination. There was a period of approximately 2-months which could have been avoided; however, as the claimant produced more evidence to be investigated, that delay was irrelevant. The objective test is set out in the Court of Appeal judgment in the case of Paul Buckland cited above. Taking into account the respondent's conduct as a whole the Tribunal determined, on the balance of probabilities, whether it is such that its effect, judged reasonably and sensibly, is such that the claimant cannot be expected to put up with it. The Tribunal took the view that she could not, viewed objectively, properly conclude the respondent was repudiating the contract. On an objective assessment, taking into account the factual matrix, it cannot be objectively said the respondent's conduct was likely to destroy or cause serious damage to the relationship between employer and employee. Accordingly, no breach of the implied term of trust and confidence arose.

117. The Tribunal found the claimant's grievance was subject to a thorough investigation, contained robust criticism of management and urgent recommendations, and as submitted by Mr Tinkler, the claimant did not criticise the process followed by Inspector Thompson in dealing with her grievance, either in the ET1 or witness statement.

118. Reference was made on behalf of the claimant to the three matters put to Chief Inspector Thompson intending to show that the claimant had been bullied, and Chief Inspector Thompson's findings was flawed. These were the allegations that:

(1) Lynn Drohan asked the claimant whether she was slow because she was ill;

(2) An allegation that Lynn Drohan told the claimant Belinda Bekino had not wanted her to be appointed; and

(3) An allegation that Lynn Drohan had accused the claimant of being "a bit aggressive" in front of colleagues.

119. Given the claimant's input into the number of witnesses and her insistence that Chief Inspector Thompson interview them, it was unsurprising the investigation took as long as it did. Chief Inspector Thompson, having considered all of the evidence put before him in respect of both grievances that included the witnesses referred to him by the claimant, and in the absence of any corroborative evidence with regard to three matters, it was entirely reasonable for him to conclude the allegations amounted to very poor management rather than bullying. Chief Inspector Thompson's grievance investigation and outcome, and the failure on the part of the respondent to discipline and dismiss Lynn Drohan (one of the outcomes sought by the claimant after she had liaised with other employees and ex-employees becoming

more and more convinced over time that Lynn Drohan was a bully) did not amount to a breach of the implied term of trust and confidence.

120. Chief Inspector Thompson's decision that the claimant's application to revert to a grade C could not be met; an outcome sought by the claimant, for the avoidance of doubt, did not amount to a breach of contract.

121. With reference to the second issue, namely, did the respondent fail to enable the claimant to permanently work at a site away from headquarters, on the balance of probabilities the Tribunal finds that it did not fail, and the reasonable adjustment put in place for the claimant to work on a phased return at St Anne's Police Station without giving the claimant the assurance she wanted concerning permanently working away from headquarters, was not a breach of the implied term of trust and confidence.

122. In submissions made on behalf of the claimant it was submitted Lynn Drohan had not been "sacked" and remained working in headquarters, and by 25 June 2016 it was a "terrifying prospect" for the claimant to return to work in headquarters whilst Lynn Drohan was still there. It was argued that by 23 July 2016 the claimant appreciated the long-term situation she was facing, namely, that the respondent expected her to return to her substantive post and relocation was temporary for four weeks before a return to headquarters. The respondent, it was argued, had come to a firm conclusion evidenced by the decision made at governance when senior HR officers concluded the return to work plan still stood, and the claimant had to return to headquarters because of the low risk. The issue was not how frequently the claimant would come across Lynn Drohan, but the anxiety that the effect of possibly coming across Lynn Drohan everyday had on the claimant. The Tribunal did not accept the evidence it heard reflected the situation described by Mr Halson, based on the contemporaneous documentation as opposed to the claimant's recollection of events at this liability hearing for the reasons set out above.

123. It was submitted by Mr Halson the claimant's view was that the respondent's communications were unambiguous, and it had failed to enable the claimant to permanently work away for headquarters. The respondent's failure pointed to a fundamental breach of the implied term of trust and confidence that went to the root of the contract, and this was "all part of a continuum", evidenced by the letter at page 676 of the bundle dated 2 November 2016 from the claimant to PSD when she wrote:

> "Could you please advise if it is possible for PSD to start an investigation? I'm due to leave the organisation soon as a result of all of this. I am aware that others have voiced in their statements that they were also forced to leave."

124. It was further submitted that the claimant's trust and confidence in the respondent eroded over a period of time and was finally broke by the respondent's failure to enable her to return to work permanently away from headquarters, and she had been "forced out of her job by bullying". The claimant was the first person to put a grievance in (five other employees had allegedly experienced "similar things"), the respondent owed her a duty of care to protect her and there ought to have been a "considerable consideration" of this given to the claimant. The Tribunal was unable to construe what was meant by what is meant by the "considerable consideration" that should have been given; the claimant did not give evidence on this point and the

Tribunal was satisfied, on balance, the respondent had taken all the necessary steps.

125. The oral and written communications that took place concerning the claimant's return to work at St Anne's Station must be considered in context. Discussions took place around the return to work plan and the claimant was given assurances, as set out in the finding of facts above. Had she stood back and considered the matter objectively, it was clear the respondent wanted her to return to the substantive position in headquarters and genuinely believed this was possible based on the claimant's previous communications concerning her inability to work in headquarters at the same time Lynn Drohan was based there. It was also made clear to her a referral to occupational health would be made if she felt unable to return with a view to exploring adjustments and before the claimant was ever transferred back to headquarters. It is notable the claimant refused to attend the occupational health appointments as she had made up her mind to resign and take up another job.

126. With reference to the third issue, namely, did either (1) and/or (2) amount to a fundamental breach of contract which entitled the claimant to resign and claim constructive dismissal, the Tribunal found on the balance of probabilities, there was no fundamental breach of contract for the reasons already stated..

127. With reference to the fourth issue, namely, did the claimant resign in response to either (1) and/or (2), given the Tribunal's findings that there was no breach of contract there is no need for it to consider the fourth issue. If the Tribunal is wrong on the breach of contract point, in the alternative, it would have gone onto find she resigned in response for (1) for the reasons set out above having clearly indicated such an intention prior to the St Anne's Station adjustment being offered and Lynn Drohan no longer working at headquarters.

128. It was submitted on behalf of the claimant with reference to whether or not the claimant had resigned in response, that she was faced with the possibility of returning to headquarters, going off sick or looking for another job. Reference was made to the Employment Appeal Tribunal decision in Mrs A Jones v F Sirl & Son (Furnishers) Limited cited above, which the Tribunal took into account. It was further submitted the claimant had left her employment for a temporary job on lower pay and this was not the operative cause of the resignation, which the Tribunal accepted. It was submitted the cause of her resignation was a return to headquarters and not the indignation at the way the claimant's grievance had been dealt with, as argued by the respondent, a conclusion the Tribunal did not accept based on the contemporaneous evidence before it, having concluded the claimant was aggrieved by the fact Lynn Drohan was not found to have been a bullied, disciplined and dismissed. It did not accept, as submitted by Mr Halson, the real reason for the claimant's resignation was the respondent's failure to allow her to relocate permanently away from headquarters.

129. Based on the evidence before it, the Tribunal preferred the submission made by Mr Tinkler, that the claimant resigned during the currency of a phased return to work when she was working at a location which satisfied her, for a line manager with whom she had a good relationship, and there was no evidence the claimant was told she would have no choice but to return to work in headquarters at the conclusion of her phased return. The evidence before the Tribunal suggested the respondent was

flexible; it is undisputed that the phased return was increased when requested, and the return to work plan specifically referred to Occupational Health involvement at the end of the phased return. The claimant had been advised and rejected the possibility of making a request of welfare redeployment. At the liability hearing in oral evidence the claimant had said she rejected a suggestion of welfare redeployment because of the risk that she may have suffered a reduction in her grade.

130. The Tribunal accepted Mr Tinkler's submission even if there was a set intention on the part of the respondent that the claimant return to headquarters, this could not amount to a fundamental breach of contract which entitled the claimant to resign and claim constructive dismissal on the basis that Lynn Drohan was no longer at headquarters, the claimant had worked for six months between October 2015 and March 2016 at headquarters without any reported incidents between her and Lynn Drohan, notwithstanding that they were both working in headquarters, and mental health doctor's advice was that a return to headquarters was appropriate with the claimant's cooperation. It was submitted that the claimant has not established she resigned in response to the breaches. She confirmed on 22 September 2016 she could not see herself returning to work following the outcome of her grievance appeal, which suggests the claimant resigned because Lynn Drohan was not found to have been a bully and/or dismissed and so the Tribunal found.

131. With reference to the fifth issue, namely, did the claimant delay too long and/or affirm the fundamental breach of contract(s) before resigning the Tribunal found in the alternative, had the claimant succeeded in proving the respondent was in breach of contract (which she did not) the claimant had not delayed or affirmed the breach and she had resigned too early. In closing submissions made on behalf of the claimant with reference to the issue of delay, it was submitted the respondent's position had not changed since July and she had resigned on 11 November 2016, during which period there was an opportunity for the respondent to change its mind. There was no undue delay on the part of the claimant, who was hopeful that the respondent would change its view.

132. The Tribunal took the view the claimant should have waited until the occupational health advice given in the light of Lynn Drohan's move to Maghull police station, and respondent's continuing obligation to make reasonable adjustments.

133. In conclusion, it is clear from the factual matrix, the claimant was moved away from Lynn Drohan when requested, and after a job match on 9 September 2015 she was matched to the role of Intelligence Indexer within NPAC, and following a security clearance check on 27 September 2015 offered the post of Intelligence Indexer on 2 October 2015 with a start date of 19 October 2015 which she accepted. By this stage the claimant had had no dealings with Lynn Drohan for a period in excess of 12 months, and at no stage did she report to any manager difficulties she had encountered with Lynn Drohan during the period when she was no longer being managed by her. The Tribunal was satisfied, on the balance of probabilities; the respondent took the appropriate steps to address the claimant's request for a move, and the claimant's grievance. Taking both grievance reports into account it is clear to the Tribunal the matter was looked at objectively, and the conclusion damming to the respondent and two individual managers. The Tribunal cannot look behind the report and conclude the investigating officer was wrong, and as a result of his investigation taking into account the number of people interview, bullying must have taken place.

The investigating officer looked at a wide range of evidence and still he did not find bullying; it cannot be a breach of contract, let alone a fundamental breach, for an investigating officer (who has all the relevant information before him) to reach a different view of the evidence than the claimant.

134. The claimant was still in a phased return for an extended 6-week period, and during this period she resigned. The Tribunal cannot say, on the balance of probabilities that the respondent failed to enable the claimant to permanently work at a site away from headquarters. The Tribunal recognises, despite the considerable size and resources of the respondent, it is unrealistic for an employee who cannot drive (as was the case with the claimant) to expect a permanent new role to be offered to her within a period of 6-weeks. Had the claimant stayed at work, and had the respondent insisted on her return to her substantive post at HQ without taking into account up-to-date medical advice (including the up-to-date position concerning Lynn Drohan) the claimant may have had a stronger case. The evidence before the Tribunal is that the claimant would have been given leeway on the time at St Anne's Street, the process had not been completed and the respondent was not in fundamental breach of contract. If we are wrong on this point, neither amounted to a fundamental breach in any event, and there was no evidence of a course of conduct (which in itself does not need to be a breach of contract) cumulatively amounting to a fundamental breach of contract entitling the claimant to resign and claim constructive dismissal following a "last straw" incident. There were no cumulative series of acts taken together, that contributed, however slightly, to the breach of the implied term of trust and confidence. It is clear in Omilaju as cited above, an entirely innocuous act on the part of the respondent cannot be a final last straw, even if the claimant genuinely but mistakenly interprets the act as hurtful and destructive on her own trust and confidence in the employer. The contemporaneous evidence shows the claimant resigned because she was unhappy with the grievance outcome, the fact Lynn Dorhan had not been dismissed when she had bullied in the claimant's view, a number of employees, and the fact that claimant was expected, at some stage, to return to her substantive post and she did not achieve her aim of an increased grade C.

135. In conclusion, for all of these reasons the claimant was not unfairly dismissed and her claim for constructive unfair dismissal is well founded and is dismissed.

Indirect discrimination claim

136. With reference to the first issue, namely, did the respondent apply a provision, criterion or practice ("PCP") whereby the claimant was required to work at headquarters the Tribunal found on the balance of probabilities there was no such requirement, evidenced by the fact the claimant did not work in headquarters prior to the effective date of termination. The 26 August 2016 return to work plan set out the respondent's aim that the claimant was to return to work at headquarters in her substantive post after a 4-week phased return. However, the claimant continued to be based at St Anne's Station from 6 October 2016 until 9 December 2016. The Tribunal has set out above in the finding of facts the provision made by the respondent for occupational health referral, for the claimant's personal circumstances to be taken into account "should it become necessary" to remove her from St Anne's Street, and the steps taken to instruct occupational health for advice, including advice on what reasonable adjustments were necessary.

137. With reference to the second issue, namely, did the alleged PCP put the claimant at a substantial disadvantage; there is no requirement for the Tribunal to deal with this. In the alternative, if we are wrong on the PCP issue, the Tribunal would have found on balance that given the particular circumstances of this case, as set out above, the claimant was not placed at a substantial disadvantage given the fact she did not return to headquarters, and had she done so, Lynn Drohan was no longer based there. The Tribunal has dealt with substantial disadvantage further below.

138. With reference to the third issue, namely, can the respondent show that the PCP was a proportionate means of achieving a legitimate aim, in the alternative, the Tribunal would have found on the balance of probabilities that it can in the particular circumstances of this case for all of the reasons set out above. .

139. The final element in the S.19 statutory test — whether the PCP is justified in accordance with S.19(2)(d) EqA, provides that it will be discriminatory if 'A cannot show it to be a proportionate means of achieving a legitimate aim*'*. Had the claimant succeeded in establishing on the balance of probabilities the other elements of the test (which she did not) and if the Tribunal is wrong on this point, it would have gone on to find requiring the claimant return to work in headquarters was a proportionate means of achieving a legitimate aim. In order to arrive at this decision the Tribunal carried out a balancing exercise, weighing the respondent's need to impose the PCP against any indirectly discriminatory impact.

140. The EHRC Employment Code provides that the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration — para 4.28. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test — para 4.29. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not have been achieved by less discriminatory means — para 4.31.

141. With reference to indirect discrimination and a proportionate means of achieving a legitimate aim, it was submitted on behalf of the claimant that a permanent transfer was a proportionate means of achieving a legitimate aim. The claimant had been absent from her contractual substantive role since March 2015, and a transfer to a substantive post away from headquarters on a permanent basis would enable the respondent to fill in her post. The respondent is a large organisation with over 1000 employees at headquarters, and there was no reason why an adjustment could not be made. There was no attempt by the respondent to look for other opportunities, taking into account the respondent's size and what they had done for the claimant in the past, there was likely to have been more opportunities available for her.

142. With reference to the decision in Higgins, it was submitted on behalf of the claimant that the facts are different. In that case the Tribunal did not identify a disadvantage for the claimant. In Ms Quinn's case, her disadvantage is anxiety. By the summer of 2016 she was anxious and pressing for commitment which was not provided to her by the respondent. The prospect of returning to headquarters never went away, she remained anxious to such an extent that she would have gone off sick, and this is what compelled the claimant to seek alternative employment outside

the respondent. The Tribunal took the view that the problem with the claimant's case in this regard was that she did not inform the respondent her anxiety continued at the thought of Lynn Drohan returning to visit headquarters, and all of the evidence before it pointed to the claimant being unable to return due to Lynn Drohan working in headquarters; that barrier had been removed and thus the claimant should have been able to return to work in her contractual substantive role.

143. The principle of proportionality requires an Employment Tribunal to take into account the reasonable needs of the employer's business, making its own judgement on the working practices and business considerations involved, as to whether the discriminatory proposal or measure is reasonably necessary. In the case brought by Miss Quinn the Tribunal took the view the respondent's requirement that she work in headquarters (after Lynn Drohan had left) was on the face of it reasonable requirement given the fact the claimant's substantive post, which remained vacant, and for which she had been trained and received security clearance, could only be carried out at headquarters due to security considerations. The Tribunal accepted the evidence put forward on behalf of the respondent that despite the considerable size of its undertaking, there was no guarantee it could find the claimant a suitable position given the fact that she was restricted to an area within travelling distance from home, as the claimant was unable to drive.

144. Had the claimant established the PCP the Tribunal would have found its discriminatory affect was minimal given four key factors; Lynn Drohan no longer being employed at headquarters, the claimant making no mention of the fact that she was concerned Lynn Drohan may visit, the respondent had invited the claimant to apply for medical redeployment, which the claimant refused to do despite having done so in the past (this always remained a possibility in the future) and finally, the respondent would not have taken the step of insisting the claimant return to her substantive role until medical evidence via occupational health had been obtained. In short, requiring the claimant to return to her substantive role in a department which was down one person, was on balance, justified and the grounds relied upon as justification were of sufficient importance to override the disparate impact of the difference in treatment.

<u>Failure to make reasonable adjustments</u>

145. With reference to the first issue, namely, did the respondent apply a PCP whereby the claimant was required to work at headquarters, the Tribunal found on the balance of probabilities that it had not for the reasons already stated.

146. The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

147. Paragraph 20 of Schedule 8 states the duty to make reasonable adjustments will not arise unless the employer knows or ought reasonably to know of the disabled persons disability and that disabled person is likely to be placed at a substantial disadvantage. The Tribunal found that had the respondent applied a PCP relied upon, namely requiring the claimant to work at headquarters, there was no satisfactory evidence before the Tribunal other than the claimant's say so, from

which is could be said if the claimant were to return to her substantive post this would have placed her at a substantial disadvantage compared to other employees without her disabilities, bearing in mind the disadvantage to the claimant was coming into contact with Lynn Drohan. There was no evidence relating to the identity of the persons who are not disabled in comparison with whom comparison is made as required by the EAT decision in Secretary of State for Work and Pensions (Job Centre Plus) v Higgins cited above. Bearing in mind the fact that Lynn Drohan was no longer working in headquarters, it was difficult to see how there was something about the respondent's operation which caused substantial disadvantage to a disabled person in comparison to persons who are not disabled.

148. The adjustment sought, i.e. not to work in headquarters, has to be judged against the statutory requirement that it must prevent the PCP applied by the respondent from placing the claimant at a substantial disadvantage when compared with persons who are not disabled. As was made clear by Mr Justice Elias in the well known case of Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT (to which the Tribunal was not referred by the parties) adjustments that do not have the effect of alleviating the disabled person's disadvantage are not reasonable. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment, and in the case of Miss Quinn, a reasonable adjustment was made following which she was able to return to work successfully. The adjustment of essentially assuring the claimant that she would permanently not be required to work in headquarters would not have had the effect of alleviating the claimant's disadvantage (had she suffered one, which the Tribunal did not accept) was (a) not reasonable on the basis the claimant, throughout the relevant period of her employment, made it very clear her objection to working in headquarters centred around the presence of Lynn Drohan. When Lynn Drohan moved to Maghull Police Station before the claimant had successfully returned to work in St Anne's Station, as far as the respondent was concerned, there was no longer a barrier to her return. As indicated earlier, at no stage did the claimant advise the respondent of her position that Lynn Drohan had stared at her while she was waiting for a lift, and made a noise in her throat and gestured with her hands as she passed the claimant in the corridor when the claimant was working in headquarters, and more importantly, that the claimant remained concerned Lynn Drohan would visit headquarters.

149. Further, the Tribunal took the view that there was no guarantee had the adjustment sought by the claimant would have achieved the effect she wanted, namely, not "bumping" into Lynn Drohan at work and more importantly, even if the assurance had been given it would have made no difference as the claimant had decided well before she returned to work at St Anne's Station to resign, and she remained of this view to the date of resignation and effective date of termination. It is notable that the claimant, who was aware from the return to work plan, a referral to occupational health could be made concerning her substantive role, and she had received assurances on 30 August 2016 from Paul Fern that "SAS would accommodate her and her circumstances would be taken into consideration should it be necessary to move [her] from her posting at SAS," resigned after the 13 October 2016 occupational health referral.

150. With reference to the reasonable adjustments claim, the alleged PCP, being the requirement of the claimant to return to work in headquarters, it was submitted by

Mr Tinkler that the claimant cannot pass the first hurdle, namely establishing that the PCP was applied to her; the Tribunal agreed. Mr Tinkler was of the view the claimant has not established there was a settled intention to require the claimant to return to work to headquarters in the future, and it can only be said that the respondent had hoped the claimant would be able to return to work. The respondent relies on four matters, which are as follows:

(1) The return to work plan was conditional and expressly stated OHU referral would be made if it was not appropriate for the claimant to return to headquarters at the end of the phased return.

(2) The claimant had been told her personal circumstances would be taken into consideration should it be necessary to move the claimant from her posting at SAS.

(3) The claimant's phased return to work was extended in accordance with he wishes, and there was no evidence that the respondent would not have been willing to provide further extensions. The respondent confirmed phased returns had been extended for other employees.

(4) The claimant cannot establish that she was subject to a substantial disadvantage. The adjustment made for the claimant (the placement in SAS) was effective in removing the substantial disadvantage of a return to work at headquarters. In accordance with the judgment in **Higgins**, if at the conclusion of the claimant's phased return she was required to return to headquarters, the duty to make reasonable adjustments would have been assessed at that point. At the material time, because of the adjustment, the claimant cannot establish the requisite substantial disadvantage.

151. Mr Tinker also submitted the claimant did not say that the proposal she return to headquarters caused her to suffer a disadvantage such as, for example, she was unable to work in any role because the fear of a return was so great. The Tribunal was satisfied, on the balance of probabilities, it is undisputed the claimant returned to SAS, which she left when she accepted a new job, and thus she cannot establish that the requirement to return to headquarters cause her to suffer a substantial disadvantage.

152. Had the claimant established that the PCP relied upon applied to her, and had she established it caused her to suffer a disadvantage (which the Tribunal found she had not), she had failed to identify steps which the respondent could reasonably have made to avoid the disadvantage. There was no evidence that had the claimant sought an extension of the period before which she was required to return to headquarters would not have been granted, extensions had been sought and granted until the effective date of termination. Mr Tinkler submitted with some justification, the fact that the claimant cannot say that she would not have been afforded an extension of time was demonstrative of the fact that she cannot show that she had suffered a substantial disadvantage.

153. The claimant’s repeated position was that she could not return to headquarters because Lynn Drohan was there, and this was endorsed by the claimant's GP. However, prior to her resignation she was aware Lynn Drohan was no

longer working at headquarters, and her oral evidence was that this made little difference as there remained a risk that she may “bump” into Lynn Droham during one of the visits. There was no credible evidence before the Tribunal that, for example, the promise of a permanent placement at SAS would have avoided the disadvantage and reference was made by Mr Tinkler to the claimant's comment on 18 November 2016 at page 712 that she could not cope with going outside SAS due to the fear of seeing Lynn Drohan. It was outside the control of the respondent, who was unable to give the claimant the guarantee she sought, which was that she would never see Lynn Droham again.

154. With reference to the second issue, namely, did the alleged PCP put the claimant at a substantial disadvantage the Tribunal found for the reasons set out above, she had not.

155. With reference to the third issue, namely, did the respondent fail to take reasonable steps to avoid the substantial disadvantage, the Tribunal found on balance, that it had not.

156. The claimant’s substantive role was in headquarters, and as a matter of contract that is where she would have been expected to attend work. The claimant was placed at St Anne’s Street for a period in excess of the original 4-weeks, and whilst the respondent aimed to get the claimant back into work at headquarters, there was no requirement that she do so. The claimant did return to work and resigned before the process had finished, the respondent having made reasonable adjustments by the St Anne’s Street phased return, which was reasonable and successful, and in this respect the Tribunal accepted the submission put forward on behalf of the respondent.

157. In conclusion, the claimant was not unfairly dismissed and her claim for constructive dismissal is not well-founded and is dismissed. The claimant was not subjected to unlawful discrimination. Her claims for indirect discrimination contrary to section 19 of the Equality Act 2010 and failure to make reasonable adjustments contrary to sections 20 and 21 are not well-founded and are dismissed.

30.1.18
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
9 February 2018

FOR THE TRIBUNAL OFFICE