EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs J Rogers	AND	The Centre for Health and Disability Assessments Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 18, 19 and 20 February 2019

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R A Clarke
Mr T A Slater

Representation

For the Claimant: Mr Small of Counsel
For the Respondent: Mr Adkin of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Mrs Julie Rogers, who has resigned her employment, claims that she has been unfairly constructively dismissed, and that she was discriminated against because of a protected characteristic, namely her disability. The claim is for direct discrimination, discrimination arising from disability, indirect discrimination, and because of the respondent's alleged failure to make reasonable adjustments. The respondent concedes that the claimant is disabled, but denies that the claimant was dismissed, and asserts that there was no discrimination.
2. We have heard from the claimant. For the respondent we have heard from Mrs Cathryn Pearce, Mrs Hannah Jones, and Miss Rachel Forbes.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence,

both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The Government provides benefits for people who are out of work because of long-term illness or as a result of disability or other health conditions. The Government's preferred method of assessing eligibility for these benefits is through an independent health assessment service. The respondent company provides this service under contract with and on behalf of the Department for Work and Pensions (DWP). The respondent employs health care professionals who conduct one-to-one assessments with applicants who are claiming disability benefits in order to prepare reports which are then sent to the DWP. The DWP then use these reports to determine the applicants' benefit entitlement. The applicants are often vulnerable, and it is essential for the DWP to have informed and accurate reports upon which to make their assessment decisions. For these reasons the DWP requires the respondent to maintain agreed performance levels, and there is a strict quality assurance system in place to ensure the accuracy and consistency of the reports prepared on behalf of the DWP. The quality assurance system analyses and grades sample reports, and marks them as A, B, or C, with A meeting all expectations, and any report marked C being deficient in one or more serious respects.
5. The claimant Mrs Julie Dawn Rogers commenced employment on 10 January 2015 with ATOS Healthcare who provided these services to the DWP. Her employment was transferred to the respondent on 1 March 2015 when it took over the contract to provide the assessment reports from ATOS. The claimant is a Health Care Professional and was employed as a Registered Nurse - Disability Analyst, and her role was to conduct one-to-one assessments with applicants seeking employment and support allowance, and to produce reports for the DWP. These reports were then used by the DWP to determine the applicants' entitlement to benefit or otherwise.
6. The general system was that applicants for benefit would arrange appointments with the respondent, and attend at their premises for the assessment. It was usually not possible to tell exactly how long an assessment might last, because it would depend upon each individual applicant's circumstances. Nonetheless in general terms the respondent expected its healthcare professionals to complete on average six assessments a day. Normally this would mean three assessments for the morning session, and three assessments for the afternoon session. This included writing the resulting report. Obviously in the normal seven hour working day, if each assessment report took longer than an hour, the expectation of six assessments and reports might not be met. If 90 minutes were to be allowed for an assessment, report, and break before the next assessment, then it would not be possible to complete six assessments within a seven hour working day.
7. From the start of her employment and at all material times the claimant suffered from a complex multilevel spinal condition. This gave rise to chronic continual and restricting pain. The claimant manages this pain with various medications throughout the day. Her condition restricts her ability to walk, sit, and to carry out other normal day-to-day activities.
8. The claimant underwent some initial pre-employment health screening in November 2014 and disclosed details of her disability at that stage. The claimant requested a workstation assessment but this was not carried out until May 2015. Following this assessment certain reasonable adjustments were recommended, which included a varidesk, in other words a desk with an adjustable height which would enable the claimant to change her desk position and work more comfortably. On 30 July 2015 the claimant was signed off work following a hospital admission for back pain. The claimant attended an assessment with the respondent's Occupational Health Department (OH) in November 2015 which confirmed that the claimant remained unfit for work as she waited appointments with a neurologist and a rheumatologist. Eventually a personal appointment and assessment with OH was arranged and this took place on 16 February 2016. Dr Reynolds reported as follows: "Whilst at work I do not think that any restrictions are necessary but I do think that there needs to be some restriction on the amount of travelling that is expected of Ms Rogers … It is difficult to predict whether Ms Rogers will be able to render reliable service and attendance into the future. Given the chronic nature of her condition there must remain some doubt as to whether she will be able to sustain regular work … Mrs Rogers may well

find it difficult to meet performance targets due to her pain problems … I would sincerely hope that Mrs Rogers is fit to continue in her current role."

9. The claimant had remained absent on long-term sickness absence from July 2015 until March 2016. Shortly after her return to work a workstation assessment took place on 14 April 2016 and this recommended that an ergonomic chair and varidesk should be provided. The recommendation with regard to the desk was either a sit to stand desk, or a varidesk. Mr Foord was the claimant's line manager at this stage and he ordered the equipment, which included the varidesk as recommended. Towards the end of April 2016 Mrs Cathryn Pearce, from whom we have heard, took over as the claimant's line manager, but Mr Foord continued to chase the delivery of the equipment which had been ordered.
10. Mrs Pearce soon realised that for some reason the equipment which had been ordered had failed to materialise. She raised the matter with her area manager Mr Lucas and the HR Assistant Ms Pike. At the end of June 2016 Mrs Pearce decided to re-order the varidesk, ergonomic chair, and other equipment which had been recommended. The claimant then commenced a further period of sickness absence on 14 July 2016. With the agreement of the HR Department Mrs Pearce decided to put the claimant on medical suspension on full pay because the equipment had still not arrived, and the claimant had eroded her entitlement to contractual sick pay.
11. By September 2016 the necessary equipment was all in place and the claimant returned to work on 12 September 2016. The claimant and Mrs Pearce have a return to work meeting on 13 September 2016 and the minutes of that meeting record: "As the biggest issue was the varidesk which is now in situ, Julie has returned to work. I will review how Julie is coping with the installation of the equipment in two weeks and take necessary action depending on the outcome of that review … Julie wants it noted that the amount of time she has had to wait for the installation of her equipment from February 2015 is totally unacceptable."
12. The claimant asserts that she was unable to use the varidesk comfortably, because to vary its height she had to lean forwards and take hold of a handle on either side with each hand and press it and then vary the level of the desk. She says that this aggravated her back pain. The claimant asserts that she told Mrs Pearce this at the return to work meeting on 13 September 2016. We prefer Mrs Pearce's evidence that she was not aware of this until November 2016, because there was no mention of it in the detailed notes of the meeting in September 2016. The claimant also asserts that she requested a further workstation assessment for this reason, which Mrs Pearce denies. Again we prefer Mrs Pearce's evidence which is backed up by the contemporaneous minutes, and Mrs Pearce's confirmation that she agreed to keep the matter under review.
13. Unfortunately by October 2016 it became clear that the claimant's performance was not acceptable and that she was struggling to meet the necessary clinical quality in her assessment reports. On 17 October 2016 a senior member of the audit team reported to Mrs Pearce that she was concerned about the calibre of the claimant's work in that she was considered to be "high-risk" and her work was effectively graded as C. On 3 November 2016 the claimant was informed of the concerns about the quality of her reports, and that she was placed on a quality support plan which provided support and assistance to the claimant in the hope of improving her reports.
14. The respondent has in place a performance procedure which envisages Performance Improvement Action Plans (PIAPs). This is effectively a capability procedure which provides a framework for performance targets together with agreed support and assistance, but which ultimately might lead to capability or disciplinary procedures for continued poor performance. There are effectively two levels under this procedure. The first is an informal PIAP which is managed and supervised by the employee's line manager. Only to the extent that this is unsuccessful, would an employee then progress to the more formal PIAP procedures, which involve the HR Department, and which ultimately might result in a capability or warning procedure.
15. Apart from the quality support plan in early November 2016, the claimant was also placed on an informal PIAP. This was to enable Mrs Pearce to assist the claimant in trying to improve the clinical quality of assessment reports and to monitor her performance. They

discussed the quality targets, namely that the respondent expected 95% of reports to be it grade A and B, and at least 70% of reports of grade A, on average for each calendar month.

16. The claimant was then absent from work from early December 2016, and returned on 3 January 2017. In the meantime, the claimant had attended a further OH assessment and a report dated 19 December 2016 recorded that the claimant's caseload had currently been adjusted to four assessments per day and that she was managing to work. The report recommended that it was essential that the claimant should have adequate positional breaks during the working day, and that "if operationally practical I would recommend Mrs Rogers completes no more than four cases per day and works from her main assessment centre base of Redruth on a permanent basis."
17. Mrs Pearce agreed that the claimant could return on a phased return to work with a reduced requirement to undertake assessments and prepare reports, and the informal PIAP continued with continued monitoring of the claimant's performance. Unfortunately, there were continued concerns about the claimant's performance and further reports which were assessed at grade C, and on 20 January 2017 the claimant was informed that she would progress to a formal PIAP. At a meeting on 20 January 2017 the claimant was informed that there was a business expectation of supplying five or six assessments with quality reports every day. Mrs Pearce told the claimant that she felt that she was not taking full responsibility as a professional for her performance, including the quality of her reports. On 23 January 2017 the claimant commenced a further period of sick leave, which on this occasion was certified as being for stress.
18. The claimant attended another Occupational Health assessment on 25 January 2017 which addressed the matter of the claimant's work related stress. The main recommendation was that there needed be a "full and frank dialogue between Mrs Rogers and her employer about the issues in the workplace". The report also recommended that the claimant returned to work on 50% of normal hours and duties for the first week to be followed by one-to-one reviews with her manager.
19. The claimant remained off sick, and Mrs Pearce requested that she attended for a welfare meeting which took place on 10 March 2017. The claimant reported that she had attended counselling sessions which she found to be helpful and the claimant Mrs Pearce discussed the fact that the claimant had previously had difficulty manually activating the varidesk. Mrs Pearce therefore decided to request a further workstation assessment. Unfortunately the claimant's attendance was required for the workstation assessments, and she was unable to attend because of her illness. Mrs Pearce requested workstation assessments on 24 January 2017, 13 March 2017, 23 March 2017, 7 July 2017, 31 July 2017, 9 August 2017, 19 September 2017, 29 September 2017 and 11 October 2017. These appointments for the workplace assessments were repeatedly cancelled because the claimant remained on sickness absence and was unable to attend.
20. Mrs Pearce also referred the claimant to OH again, and Dr Boakye completed a report following his assessment on 30 March 2017. He recommended a phased return to work programme; a meeting to discuss her perceived difficulties; a review of her workstation; a stress risk assessment; and the possibility of involving the Access to Work scheme so that they might fund the workstation assessment and any necessary equipment by way of adjustments. As it happens, the respondent's system of requesting adjustments involved making recommendations to the DWP who would pay for the necessary equipment if the recommendations were accepted. Given that the respondent was trying to arrange workplace assessments, and the DWP previously paid for the equipment which had been recommended, the respondent saw no need to duplicate the process by approaching the Access to Work scheme.
21. The claimant returned to work on 16 June 2017. Mrs Pearce met with the claimant on her return, and following their meeting there was an agreed phased return to work with reduced output for five weeks. The number of assessments expected of the claimant was to be increased gradually to five per day (rather than the normal average of six) following completion of the phased return to work, with agreement that the PIAP should remain informal. Because of impending annual leave and other commitments Mrs Pearce did not arrange the individual stress risk assessment immediately, but did so shortly thereafter and

this was completed on 10 July 2017. As a result of this certain steps were implemented to minimise the risk of unnecessary stress and to assist the claimant.

22. Mrs Pearce continued to hold regular performance meetings with the claimant but unfortunately the quality of assessments remained below the standard required. On 27 July 2017 the respondent decided the matters would now need to progress to a formal PIAP. The claimant was then absent on certified sick leave again from 31 July 2017 and the formal PIAP was never implemented. The claimant did not return to work until 29 December 2017, although Mrs Pearce maintained contact with the claimant throughout this period.
23. During this time the claimant had requested parking facilities near the respondent's office. Unfortunately, the building was owned or controlled by HMRC and DWP, and the respondent did not have access to any parking on site for any of its employees. Nonetheless Mrs Pearce was able to arrange temporary disabled parking on site for the claimant during summer periods of absence of employees from the other departments. This occurred in August 2017, and at about that time the claimant also submitted a formal written grievance.
24. The gist of the claimant's grievance was that the delay in installing the appropriate equipment had affected the claimant's concentration and performance at work and that she did not feel supported. The grievance was rejected, and the outcome letter dated 15 September 2017 confirmed that all recommended adjustments had already been implemented, and that the respondent had supported the claimant with a phased return to work in line with the recommendations which had been made, and that the performance expectations were reasonable. The outcome referred to the earlier agreement by the respondent to reduce the claimant's hours to assist her commuting, with a delayed start at 9:30 am rather than 9 am. The claimant had also complained that effectively she was required to carry out the same amount of assessments of five to six cases a day even though she had less time to do it because the agreed later start. The claimant appealed the grievance decision.
25. The claimant has since complained that from August 2017 she was not put on medical suspension on full pay as she had been in 2016. The position is that in July 2016 the claimant was placed on medical suspension on full pay in circumstances where the respondent had not been able to put in place the recommended adjustment of the varidesk. The respondent felt it unfair that the claimant was eroding her contractual sick pay entitlement when this equipment was not in place. The position however was different in August 2017. We accept Mrs Jones's evidence that the respondent had been unable to complete the work station assessment with the claimant in circumstances where these had been arranged on numerous occasions, but cancelled because of the claimant's absence. The relevant dates are set out above. When the claimant was eventually able to attend a work station assessment, the equipment was ordered and installed without any significant delay. Mrs Jones felt the position was different in 2017, and there was no requirement to place the claimant on medical suspension.
26. The claimant submitted a fit note from her GP dated 4 September 2017 which signed the claimant off for a period of two months. That fit note included the comment that "with your employer's agreement you may benefit from workplace adaptations … Would only be able to manage with hydraulic desk". The claimant complains that this recommendation was effectively ignored. In fact this comment was noted by the respondent and in particular its HR Department, but they preferred to rely on the existing specialist occupational health assessment reports which they had obtained, rather than this one off comment from the GP. In any event the original spring-loaded varidesk (as recommended) had been in place since September 2016.
27. Mrs Pearce then referred the claimant to OH again which resulted in a report dated 2 October 2017. Dr Brown reported that the claimant's back pain seemed essentially stable although certain aspects of the work caused an exacerbation of acute pain. The report suggested that the claimant's back pain was a chronic condition and therefore any recommended workplace adjustments should be regarded as permanent. These were allowing adequate mobilisation breaks between cases of between 10 and 15 minutes; accepting a lower number of cases per day; and conducting a stress risk assessment to

identify and address areas of dissatisfaction and difficulty in the workplace. Mrs Pearce discussed these recommendations with her line manager but they declined to make a permanent decision with regard to a reduced number of daily assessments expected prior to the claimant's return to work because the respondent did not know how the new equipment and the agreed shorter hours would assist, and the matter was to be kept under review.

28. There was then a very detailed work station assessment on 30 October 2017 and a copy of the resulting report was provided to Mrs Pearce on 3 November 2017. This made a number of recommendations including the provision of an electronic variable height sit to stand desk, a foot rest, a movable document holder, a new ergonomic chair, and a telephone headset. Another employee had had use of an electronic variable height sit to stand desk and had just left the respondent's employment. Mrs Pearce knew that this desk together with the foot rest and document holder were already on site and she arranged for them to be transferred to the claimant's workstation. She also ordered a new chair and telephone headset. At that stage the claimant was still signed off certified as sick until the end of December 2017 and so Mrs Pearce ensured that all of the equipment would be in place and available ready for the claimant's return to work at the end of December 2017. The electronic variable sit to stand desk was in place by 6 December 2017, and all of the recommended equipment was in place by 22 December 2017.
29. Mrs Pearce tried to keep in touch with the claimant on a regular basis during this recent period of sickness absence from August to December 2017. She had a number of telephone calls with the claimant, although generally speaking the claimant did not answer these. Mrs Pearce confirmed to the claimant by email on 13 December 2017 that effectively all equipment would be in place by 22 December 2017 and she was keen to arrange the claimant's return to work.
30. One of the respondent's HR advisers namely Ms Danielle Gibbons then invited the claimant to attend a welfare meeting on 22 December 2017 so that she could familiarise herself with the new workstation equipment before her return. In the event there was a telephone conversation with the claimant on 22 December 2017 and Mrs Pearce wrote to her with a revised return to work plan. During that conversation Mrs Pearce confirmed to the claimant that all the necessary equipment was in place and that this included a fully electric variable desk; the new ergonomic chair; a headset, foot rest and document reader. The respondent was hopeful that the claimant would return to work and following a phased return would be able to complete five or six assessments a day, subject to progress to that end being kept under review. Mrs Pearce also suggested a telephone conference on 29 December 2017 with Ms Gibbons from HR.
31. The claimant had also raised an enquiry about the respondent's income protection plan. This was an insurance policy with Legal and General under which employees could apply for a proportion of their salary to be paid by the insurer following 28 weeks of sickness absence. This effectively provided for payment of benefits under the policy following the expiry of the employee's contractual sick pay. The terms of the policy suggested that any application should be made within 90 days of the 28 weeks absence, but any payment was subject to the terms of the policy and Legal and General's confirmation of eligibility. In addition, Legal General would not normally pay out under the policy if the absence was caused by any work related issues because to do so would effectively discourage resolution of those issues in the workplace. The policy also required the employee in question to remain as an employee of the respondent.
32. The claimant returned to work on 29 December 2017 and Mrs Pearce met with her to discuss a phased return to work and the implementation of the new equipment including the fully electric varidesk. There were some teething problems with the new headset which did not have the right connection, and the wires connecting to the IT equipment on the desk became too tight when the varidesk was fully elevated. The wires were able to be resolved without delay and Mrs Pearce agreed to sort out the problem with the headset immediately. Mrs Pearce also provided the claimant with a copy of her amended return to work plan which provided for an extended phased return to work with reduced output lasting until 19

March 2018 during which time the claimant would be provided with support to return to her normal duties.

33. The claimant asserts that she complained at this stage about an unreasonable expectation that she should undertake six assessments per day. Mrs Pearce's evidence is that there was no such immediate requirement, and they did not discuss any PIAP on either an informal or formal basis, and that she was keen to support the claimant back to work with a gradual phased return to work particularly as all aspects concerning the necessary equipment and adjustments had been made. Mrs Pearce felt that the claimant displayed a negative attitude towards her return to work. It is also the case that the claimant's RCN union representative had made representations to the respondent's HR Department about various aspects of the working relationship.
34. The claimant then exchanged emails with Ms Gibbons of the HR Department on 2 January 2018. Effectively the claimant raised two concerns. The first was her perceived expectation that she was required to complete six assessments a day with no breaks in between. Ms Gibbons replied: "The company expectations in respect of outputs and the supportive measures that have been put in place so as best enable you to succeed in meeting our expectations have already been relayed to you in your phased return to work action plan and discussed at length both between you and Cathy and with your RCN representative."
35. Secondly the claimant raised a query about her eligibility under the income protection scheme and asking whether she been entitled to claim this and whether the process had been initiated. Ms Gibbons explained the eligibility criteria in detail and confirmed that the claimant did appear to meet the eligibility criteria. She also confirmed that the application had been submitted to Legal and General that they would be in touch with the claimant shortly to discuss the claim. She made it clear that the decision was in the hands of Legal and General and if the claim were to be accepted then payments would be made inclusive of any backpay deemed to be appropriate. The claimant responded by thanking Ms Gibbons for this explanation but also asking whether she had been able to use annual leave to bridge any gap in sick pay on her phased return and whether any such application had been processed. Ms Gibbons does not appear to have responded to this second email, and the claimant sent a reminder on 15 January 2018. She received an acknowledgement and "out of office" reply, but no substantive reply.
36. The claimant's return to work was very short lived, and she commenced another period of sickness absence because of flu from 2 January 2018. She did not return to work and resigned her employment by letter sent by email on 29 January 2018 to Mrs Pearce. The resignation letter stated: "I am writing to inform you that I am resigning from my position of Health Care Professional with immediate effect. Please accept this as my formal letter of resignation and the termination of our contract. I feel that I am left with no choice but to resign in light of my recent experiences regarding the fundamental breach of contract. I consider this to be a fundamental breach of contract on your behalf."
37. Mrs Pearce responded to the effect that she was reluctant to accept the claimant's resignation without fully understanding why she believed was a fundamental breach of contract. She stated: "I would welcome the opportunity for you to share this detail in the hope that I can resolve your concerns and avoid you resigning from the business."
38. The claimant did not make further contact with Mrs Pearce despite numerous efforts on the part of Mrs Pearce, and on 20 February 2018 the respondent accepted the claimant's resignation without notice with effect from 30 January 2018.
39. Although the resignation letter did not give the reasons, in her evidence the claimant suggested that the matter of recommended adjustments to her case load and breaks remained unresolved, and that despite emails the matters of income protection and holiday pay remained unresolved. With the assistance of her RCN representative the claimant also raised a grievance, which notwithstanding the termination of her employment the respondent investigated and processed. The grievance was rejected and the outcome in April 2018 was to the effect that the was no informal or formal PIAP on her phased return. The claimant appealed that outcome but the appeal was ultimately rejected in September 2018.

40. As we now understand it much of the claimant's concern is based upon the premise that she would be required to undertake a minimum of six case assessments per day, despite the fact that she would be unable to do so because of the pain which she was experiencing, and/or because the was insufficient time within her adjusted working day. We find that there was a general expectation from the respondent that its Health Care Professionals would undertake on average six assessments and complete six reports each day. However, in this case the respondent was more concerned about the quality of the claimant's reports, rather than the quantity, and there were a succession of agreed phased returns to work, and informal PIAP's, with reduced output requirements, which were aimed at encouraging and supporting the claimant back to a position whereby she could submit reports of the required quality following assessments. The number of assessments was generally due to be gradually increased from one or two a day during a phased return to work process in the hope that the claimant could return to five or six reports a day. In the circumstances the claimant was never required to return from sick leave straight into the position of having to complete six assessments and reports each day failing which she might face capability proceedings.
41. In general terms, despite the initial delay in 2015 and 2016 in putting in place the necessary physical reasonable adjustments, we find that the respondent's approach to the claimant was supportive and constructive. They tried to arrange a repeated number of work station assessments, and when the claimant was eventually able to attend one, the respondent put in place all necessary equipment by way of reasonable adjustments ahead of the claimant's return to work. In addition, the approach adopted by Mrs Pearce in particular was aimed at supporting and encouraging the claimant to complete reports of the necessary quality on a phased return to work basis. This was without ever progressing to potential capability or disciplinary sanctions in the event the claimant failed to meet the average expectation of six reports per day which clearly other Health Care Professionals had no difficulty in attaining.
42. Having established the above facts, we now apply the law.
43. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
44. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
45. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, indirect disability discrimination, discrimination arising from a disability, and failure by the respondent to comply with its duty to make adjustments.
46. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person. In addition, paragraph 6(1) of Part 1 Schedule 1 EqA provides that Cancer, HIV infection and multiple sclerosis are each a disability.
47. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

48. As for the claim for indirect disability discrimination, under section 19(1) of the EqA a person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision criterion or practice is discriminatory in these circumstances if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put, B at that disadvantage; and A cannot show it to be a proportionate means of achieving a legitimate aim.
49. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
50. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the third (under subsection 20(5)) is relevant in this case, namely that where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison is with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
51. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
52. We have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR 833 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Environment Agency v Rowan [2008] IRLR 20 EAT; Archibald v Fife Council [2004] IRLR 651 HL; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; Pnaiser v NHS England [2016] IRLR 170 EAT; Matuszowicz v Kingston Upon Hull City Council [2009] IRLR 288; and Robertson v Bexley Community Service [2003] IRLR 434 CA.
53. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
54. The parties have agreed a list of issues to be determined by this tribunal, and this list of issues sets out the allegations and claims relied upon in some detail. This list of issues was amended slightly during the course of these proceedings. We deal first with the claimant's claims for disability discrimination.
55. At all material times the claimant has suffered from a complex and multilevel spinal condition. The claimant experiences chronic continual and restricting pain. She manages her condition with various medications taken throughout the day. The condition restricts her ability to walk, sit and carry out other normal day-to-day activities. The claimant suffers from a physical impairment which has had a long-standing adverse effect on her normal

day-to-day activities which has been substantial in the sense that it has not been minor or trivial. The respondent concedes that the claimant is a disabled person at all material times for the purposes of these proceedings. We agree with that concession and we so find.

56. The first disability discrimination claim to be addressed is that of direct disability discrimination under section 13 EqA. There are five remaining allegations of direct discrimination as follows: (a) failing to implement the adjustments recommended in the OH report dated 30 March 2017; (b) failing to engage with Access to Work following the claimant's self-referral on 21 April 2017; (c) failing to acknowledge the GP's fit note requesting reasonable adjustments dated 28 September 2017; (d) failing to act on the claimant's workstation assessment dated 3 November 2017; and (e) failing to action the claimant's request for income protection on 15 January 2018.
57. With regard to the specific allegations, in summary we find as follows: (a) the report recommended a phased return to work, a meeting to discuss difficulties, a stress risk assessment, a review of the workstation, and consideration of Access to Work. We find that there was substantial implementation of this report, particularly bearing in mind the further meeting on 20 April 2017 and subsequent action; (b) it is true that the respondent failed to engage with Access to Work, but decided that there was no need to do so because it already knew what adjustments were required, and was willing to pay for them itself with the assistance of the DWP; (c) the respondent's position on this was that it preferred to rely on a detailed three-page OH report rather than a brief one line recommendation in the GPs fit note; (d) this allegation is simply inaccurate- Mrs Pearce was able to source and install all of the equipment recommended which was in place before the claimant's return to work on 29 December 2018; and (e) this allegation is simply inaccurate - the claimant's application for income protection was processed by the respondent. In any event, we find that the claimant faces insuperable difficulties with regard to her direct discrimination claim, for the following reasons. The claimant does not rely on any named comparator, and relies on an hypothetical comparator.
58. With regard to any claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been treated in the same less favourable manner. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board.
59. In this case the claimant has not proven any facts upon which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that an act of discrimination has occurred. The claimant has proven no facts from which we could conclude that she has been treated less favourably because of her disability than an hypothetical comparator in the same circumstances would have been treated. Indeed, the allegation that the respondent acted in the way alleged because the claimant was disabled was not even put to the respondent's witnesses. In these circumstances the claimant's claims of direct discrimination fail, and are hereby dismissed.
60. We next address the claim of discrimination arising from disability under s15 EqA. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was

something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

61. The claimant's claim under section 15 is that she suffered chronic back pain and problems with mobility and that this had arisen in consequence of her disability. She was then treated unfavourably by the respondent by its requirement for her to complete six case assessments per day, and when she was unable to meet this requirement it commenced performance management procedures.
62. We find that there was no such unfavourable treatment which is relied upon by the claimant for the purposes of this claim. It was not the case that the claimant was required to complete six case assessments per day nor that any performance management procedures were implemented for failing to complete six case assessments per day. In the first place we accept that there was a general expectation amongst the respondent's workforce for employees to complete on average six case assessments per day. However it is clear from the return to work meetings and the informal PIAPs that the claimant was accommodated with phased return to work programmes with the general aim of gradually building up over six week periods from a limited number of case assessments to five or six case assessments per day. The only performance management procedures envisaged related to the quality of the case assessments, rather than the quantity, and no formal such procedures were actually implemented.
63. For these reasons we find that the unfavourable treatment relied upon for the purposes of this section 15 claim was not was a matter of fact suffered by the claimant. There was no less favourable treatment as asserted by the claimant arising in consequence of her disability. In the circumstances we also dismiss the section 15 claim.
64. Thirdly, we address the claim for indirect disability discrimination under section 19 EqA. The provision criterion or practice (the PCP) relied upon is the application of the performance management process. The claimant asserts that the application of this PCP put other people with disabilities at a particular disadvantage when compared with non-disabled persons. The claimant also asserts that the application the PCP put the claimant at that disadvantage because she was unable to meet the target number of assessments on a daily basis.
65. The respondent accepts that there was a performance management process in place and that it applied the first informal stage of this process to the claimant. However, the respondent asserts that it did not apply any performance management steps against the claimant because of any failure to meet a target number of assessments, but did so because of genuine concerns about the quality of the claimant's work. These concerns always related to the quality of the claimant's reports, and not the quantity.
66. We find that the was a PCP in place, namely the performance management process generally. For the vast majority of the time it was only ever applied at its first informal stage, without the involvement of HR, and did not result in any formal capability or disciplinary process. Nonetheless the more formal elements of the process were available to the respondent as potential sanctions, and therefore there was a PCP of a performance management process generally.
67. We accept that such a process is potentially likely to cause a substantial disadvantage to persons with a disability in that their performance and attendance is likely to be less satisfactory than able-bodied comparators, and they are arguably more likely to become involved in and affected by a performance review process.
68. However, we do not accept that on the facts of this case the claimant suffered any substantial disadvantage personally as a result of the application of this PCP. The respondent only ever applied the PIAP process in a supportive and collaborative manner

to address the quality of the claimant's reports, and not the quantity which the claimant complains of (namely six assessments per day). The aim of the process was to assist and encourage the claimant to improve the quality of her reports during phased returns to work with an eventual expectation that she would complete either five or six assessments per day. There is no medical evidence nor any OH reports which conclude that the claimant was unable to complete a report to the required quality because of her disability. For this reason we cannot conclude that the claimant was put in any substantial disadvantage personally by the PCP, and we therefore dismiss this claim for this reason.

69. However, even if we are not correct on this point, we would have found in any event that the actions of the respondent were justified. It is clearly a legitimate aim of the respondent to ensure that its reports are accurate. Its very existence as a business depends upon providing reports to the DWP on behalf of benefit applicants. Maintaining accuracy and high performance standards in these reports is clearly its main aim, and is clearly a legitimate aim. We also find that the respondent's actions in putting in place its informal PIAPs and phased return to work programmes with the claimant, coupled with support and review, was a proportionate means of achieving this legitimate aim.
70. For these reasons we dismiss the claimant's claim for indirect disability discrimination.
71. The fourth and final claim for disability discrimination relates to an alleged failure by the respondent to make a reasonable adjustment under sections 20 and 21 EqA. This claim is limited to the alleged failure by the respondent to provide an auxiliary aid, namely an electronic sit/stand desk, under section 20(5) EqA.
72. We find as a matter of fact that this auxiliary aid was provided. The parties agree that it was in place with effect from 6 December 2017. For this reason we dismiss the claim.
73. It has also been argued on behalf of the claimant at this hearing that the duty to provide this auxiliary aid had arisen earlier, either at the time in March/April 2016 when the workplace assessment and subsequent report recommended either the spring assisted varidesk, or the electronic sit/stand desk, should be provided. At that stage the respondent provided the spring assisted varidesk. That was one of two possibilities recommended and we therefore reject the assertion that failure to provide the other option (the electronic alternative) was in any way a failure to make a reasonable adjustment. It has also been argued on behalf of the claimant at this hearing that alternatively the duty arose when the claimant made it clear that the spring assisted varidesk was unsuitable for her. The claimant says that this was in November 2016 (although Mrs Pearce says she was not informed until March 2017 that the claimant found it painful to use the varidesk). Given that the respondent then tried to arrange a number of workstation assessments over a period of months to discuss and agree how to proceed, we cannot agree that a failure to provide the electronic desk at that stage was a failure to provide a reasonable adjustment.
74. In any event, to the extent that the reasonable adjustments claim arises at either of these two earlier times (April 2016 in the first place, or September 2016 or March 2017 in the second place), this claim has been presented substantially out of time. The claimant notified ACAS under the Early Conciliation provisions (Day A) on 29 March 2018 and the ACAS Early Conciliation certificate was issued on 13 May 2018 (Day B). These proceedings were issued on 10 June 2018. Allowing for the extension of time under the Early Conciliation provisions, any claim before 30 December 2017 was not brought within the relevant three month time limit.
75. In Matuszowicz the Court of Appeal held that a failure to make a reasonable adjustment is an omission, not an act, and that omission may be either deliberate or inadvertent, or may be due to a lack of diligence, competence or any reason other than conscious refusal. If an employer does an act which is inconsistent with making a reasonable adjustment, for instance refusing to make it, that sets time running. If there is no such act then there must be an enquiry by the tribunal as to when the employer might reasonably have been expected to make the necessary reasonable adjustment. That may be an artificial date and not one that is readily apparent to either the employer or employee, but that will be treated as the start date for bringing the claim. There is however no need for such an artificial date or "notional moment" if the employer has done an act including refusing a request.

76. In this case, given that the electronic desk was actually provided on 6 December 2017, the claim must fail unless (as now appears to be argued) the claimant chooses to rely on either of the two earlier dates explained above. The problem for the claimant is that the claim was issued out of time by reference to both of these dates. The claimant has not given any evidence as to why it would be just and equitable to extend time.
77. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".
78. For all these reasons we also dismiss the claimant's claim for failure to make a reasonable adjustment by way of the specified auxiliary aid.
79. Finally, we turn to the claimant's claims for unfair dismissal and wrongful dismissal arising from her resignation and alleged constructive dismissal.
80. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
81. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
82. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was

for a potentially fair reason; (iv) If he does so, it will the be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."

83. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
84. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.
85. The allegations which are now said to have amounted to a fundamental breach of contract, either individually or collectively, are as follows.
86. Allegation (a): Failure to provide a workstation assessment between 10 January 2015 and 21 May 2015.
87. The claimant's employment commenced with ATOS in January 2015 and was transferred to the respondent in March 2015. Her evidence is limited as to what happened at that time, other than to say that this respondent was aware of her disability from a pre-screening assessment, and that at some stage a workstation assessment was recommended. She continued to ask for it, and it took place in May 2015. Reasonable adjustments were then put in place. We do not find that there was any inordinate or unreasonable delay in assessing the claimant's disability and putting in place reasonable adjustments such as to amount to a fundamental breach of contract. The claimant did not write or raise any complaint or grievance at that time, nor reserve her rights generally. She continued to work on, and the matter was addressed. We do not find that there was any fundamental breach of contract, but even if there were, the claimant has clearly affirmed any such breach by working on for nearly three years before her resignation.
88. Allegation (b): Failure to provide the required sit/stand desk following the claimant's telephone workstation assessment with OH Assist on 21 May 2015.
89. Although the respondent suggests that there is no documentary evidence that some form of varidesk was recommended in May 2015, we accept the claimant's evidence that it was recommended, and that she continued to ask for it when it was not supplied. It seems that other potential adjustments were discussed in early 2016, particularly with regard to commuting time, but the recommended adjustment of the desk was not sourced and installed by the respondent. After Mrs Pearce became the claimant's line manager in 2016, she investigated the matter, and by June 2016 considered it appropriate to put the claimant on paid medical suspension (which avoided the claimant using up her allowable sick leave) while she investigated and tried to resolve the installation of the desk. It seems clear therefore that despite a recommendation that the installation of the desk would be a reasonable adjustment in May 2015, this had not been sensibly addressed by the respondent for at least a year. We find that such an omission could well amount to a fundamental breach of the implied term of trust and confidence between employer and employee. However, the same point applies as with the first allegation above, namely the claimant continued in her employment. She did not raise a formal grievance nor reserve her rights generally, and did not resign employment until some 18 months later. We therefore find to the extent that the was any breach of contract at this stage, the claimant affirmed that breach by continuing in employment.
90. Allegation (c) has been withdrawn.

91. Allegation (d): Failure to provide a further workstation assessment when requested by the claimant on 13 September 2016.
92. There is a conflict in the evidence on this point. The claimant suggests that she requested a further workstation assessment because she found the requirement to make manual changes to the varidesk too painful. Mrs Pearce denies that the claimant made this request, and confirms that the varidesk was in place by 13 September 2016, that the claimant did not raise any complaint, and that Mrs Pearce in any event agreed to keep the matter under review. We prefer the respondent's version of events because Mrs Pearce's version is corroborated by a contemporaneous document, namely the notes of a return to work meeting at that time. Accordingly, we find that there was no breach of contract by the respondent in this respect.
93. Allegation (e): Subjecting the claimant to performance management process in November 2016 when the OH report from February 2016 confirmed that the claimant would be unable to meet performance targets due to her medical condition.
94. In dealing with this allegation, we first confirm our finding above that (despite the respondent's suggestion that the informal PIAP is not a formal review process) the informal PIAP is part of an overarching performance review process. At the informal stage there are discussions between the line manager and the relevant employee whereby the employee is informed of perceived shortcomings, and provided with support and encouragement by the line manager. There are no immediate disciplinary or capability performance connotations. However, if this process does not prove successful to the satisfaction of the line manager, the formal PIAP process might then be instigated, with the involvement of the HR department. The process does then become more formal with either capability or disciplinary procedural connotations.
95. On the facts of this case therefore the PIAP process which was commenced by Mrs Pearce in November 2016 was part of an overall performance review process, notwithstanding that it was clearly expressed to be informal and dealt with by the claimant and Mrs Pearce, without the involvement of the HR department. The allegation raised by the claimant is that it was a fundamental breach of contract to commence this process despite the recommendations of the OH report which was completed nine months previously.
96. It is clear to us that the informal PIAP process commenced by Mrs Pearce in November 2016 was aimed at supporting the claimant in a process to improve the quality of her reports. The respondent is required to seek to maintain high quality standards in the production of it its reports, both under contractual obligations to the DWP, and by way of a greater responsibility to applicants for benefits whom it interviews. It was entirely appropriate for the respondent to address any perceived shortcomings in the quality of the reports prepared by the claimant. We also find that Mrs Pearce did this in a manner which was constructive and supportive, and bore in mind all the prevailing circumstances relating to the claimant's health difficulties, including the comments made in the OH report completed some nine months previously. For these reasons we reject the assertion that the respondent acted in fundamental breach of contract when Mrs Pearce engaged the claimant in that informal PIAP process.
97. Allegation (f): Failure to utilise the Access to Work service when the claimant contacted them for assistance in getting back to work in January 2017.
98. With regard to this allegation we accept Mrs Pearce's evidence that the respondent had by this stage already made the necessary work station assessment and had decided to purchase the necessary equipment with the assistance of the DWP. In these circumstances there was simply no need to seek to resolve the same matter by way of an approach to Access to Work, which is merely an alternative route to obtaining workplace assessments and recommendations. We find that there was no breach of contract by the respondent in this respect.
99. Allegation (g): Continuation of the performance management process on the claimant's return to work on 16 June 2017.
100. The claimant had been absent from work with back pain in December 2016, and returned to work on 3 January 2017. Her performance was monitored under her informal PIAP, but by 20 January 2017 the respondent was sufficiently concerned about the quality

of the claimant's reports that she was placed on a formal PIAP. Unfortunately within three days the claimant was absent on certified sick leave with back pain and stress with effect from 23 January 2017. She was then absent from work until 16 June 2017, although she did attend two welfare meetings in March and April 2017. Upon her return to work on 16 June 2017 the claimant was informed that she was on an informal PIAP at a meeting with Mrs Pearce. It is clear from the minutes of this meeting that this was an informal support plan, with reduced requirements as to the number of reports which were required, but with support in place to assist the claimant in meeting the necessary quality of her reports. Given the respondent's responsibilities to both the DWP and benefit applicants, we find that it was entirely reasonable for the respondent to seek to monitor and improve the quality of the claimant's reports, and that it was appropriate for the respondent to commence this informal PIAP process to do so. We cannot find therefore that the respondent acted in breach of contract in this respect.

101. Allegation (h): Failure to provide a stress risk assessment until 10 July 2017 despite OH recommending such an assessment take place on the claimant's return to work.

102. With regard to this allegation, the previous advice from OH was that there should be a stress risk assessment upon the claimant's return to work, and the return to work was on 16 June 2017. Mrs Pearce had time to conduct the return to work meeting at that time by way of the informal PIAP discussions, but because of imminent annual leave and other commitments, she was unable to arrange for the stress risk assessment to take place until 10 July 2017. Although there was a slight delay in arranging this, we do not consider that any such delay was inordinate or unreasonable. The assessment was arranged, and its recommendations were implemented. We cannot find that there was any fundamental breach of contract committed by the respondent in this respect.

103. (New) Allegation (hh): Failure to put the claimant on medical suspension on full pay in August 2017 (consistent with the earlier period of medical suspension in 2016).

104. Our understanding of the position is that in July 2016 the claimant was placed on medical suspension on full pay in circumstances where the respondent had not been able to put in place the recommended adjustment of the varidesk. The respondent felt it unfair that the claimant was eroding her contractual sick pay entitlement when this equipment was not in place. The position however was different in August 2017. We accept Mrs Jones's evidence that the respondent had been unable to complete the work station assessment with the claimant in circumstances where these had been arranged on numerous occasions, but cancelled because of the claimant's absence. The relevant dates are set out below. When the claimant was eventually able to attend a work station assessment, the equipment was ordered and installed without any significant delay. Mrs Jones felt the position was different in 2017, and there was no requirement to place the claimant on medical suspension. We agree with that conclusion. The circumstances were different in 2017, and in any event the fact that the respondent had acted in that way in 2016, does not necessarily make it a fundamental breach of contract to fail to do so in 2017. We cannot find that there was any fundamental breach of contract by the respondent in this respect.

105. Allegation (i): Continued failure to provide reasonable adjustments in the form of an electronic sit/stand desk.

106. Our understanding of the events relating to this allegation is as follows. The respondent supplied the original manual varidesk in accordance with the early OH recommendations and discussions with the claimant. In March 2017 the claimant reported to Mrs Pearce for the first time that she had difficulty operating the manual element of the varidesk which caused her further pain. Mrs Pearce arranged repeated workstation assessments to address this issue, which were cancelled because of the claimant's absence through illness. For the record the appointments which were arranged and cancelled were: 13 March 2017, 23 March 2017, 7 July 2017, 31 July 2017, 9 August 2017, 19 September 2017, 29 September 2017, and 11 October 2017. The workstation assessment with the claimant eventually took place on 30 October 2017. This resulted in a detailed report which Mrs Pearce received on 3 November 2017. It recommended for the

first time that a full electric sit/stand desk should be installed to assist the claimant. Mrs Pearce knew that there was one on-site, and arranged for this to be moved, and also arranged for all the other equipment recommended by way of reasonable adjustments to be installed. The claimant was absent on certified sickness absence at that stage, and the electronic desk was installed on 6 December 2017 in her absence. Mrs Pearce confirmed to the claimant in a telephone conversation on 22 December 2017 that all of the equipment was in place to await her return from sickness absence. For these reasons we cannot find that there was a continued failure to provide a reasonable adjustment in the form of an electronic sit/stand desk as suggested. The respondent acted promptly in March 2017 in seeking to address the claimant's concerns, and as soon as a workstation assessment had taken place which for the first time recommended the electronic sit/stand desk, this was immediately sourced and implemented by the respondent. We cannot find that there was any breach of contract by the respondent in this respect.

107. Allegation (j): Failure to implement the claimant's entitlement to income protection despite repeated requests. Confirmation that the request for income protection had not been implemented was communicated to the claimant on 28 January 2018 by payroll when she queried her salary payment.

108. Our understanding of the circumstances relating to this allegation are as follows. The respondent has an income protection policy with Legal and General Insurance, which is a form of insurance policy under which the insurer might make payments to employees who have been absent for more than 28 weeks and who had exhausted their entitlement to contractual sick pay. The scheme requires an application to Legal and General, who may or may not make payments depending upon their eligibility criteria. The claimant made enquiries in late 2017, following which the respondent made an application in early January 2018. That application was acknowledged by Legal and General, who by mid-January 2018 had sent the relevant forms to the claimant to complete. Although we have not heard any evidence as to the terms of the insurance policy, they normally require employees to remain in employment to retain eligibility under the scheme. The claimant's resignation therefore cancelled her eligibility, and the claim was then rejected by Legal and General. We therefore find that the respondent did process an application on behalf of the claimant to Legal and General when the claimant requested them to do so, and at a time when she was still eligible for that benefit. The cancellation of the benefit did not occur as a result of any act or omission by the respondent. For these reasons we do not find that the respondent has therefore acted in breach of contract in any way in respect of this potential benefit.

109. Allegation (k): Failure to respond to emails throughout January 2018.

110. There was an exchange of emails between the claimant and Ms Danielle Gibbons from the respondent's HR advisers on 2 January 2018, which included a detailed email from Ms Gibbons to the claimant concerning the income protection application. This was followed up shortly thereafter on 2 January 2018 by another email from the claimant asking for confirmation whether the income protection application had been processed. There was no reply to that subsequent enquiry, presumably because Ms Gibbons felt that she had already explained the position earlier that day. Nonetheless the claimant sent a further email on 15 January 2018 to Ms Gibbons asking her to confirm whether she had heard anything back from Legal and General. That was met with an automatic out of office reply. This allegation is effectively therefore that Ms Gibbons had failed to respond to the original enquiry on 2 January 2018, and a chasing email on 15 January 2018. No further emails were exchanged between the parties until the claimant resigned her employment by email on 29 January 2018.

111. Ms Gibbons had explained the position with regard to the income protection application in detail in her first email, and at that time the claimant was also being supported by her RCN trade union representative, who subsequently raised a formal complaint on behalf of the claimant immediately after her resignation. In that letter of complaint it was acknowledged that the income protection application had been processed and that the claimant had received the relevant forms. In the circumstances we cannot find that the

failure by Ms Gibbons of the respondent's HR advisers to respond to the claimant's one email enquiry amounted to a fundamental breach of contract by the respondent.

112. We have found that allegation (b) above could have amounted to a fundamental breach of contract, but in any event the contract was affirmed by the claimant who remained in employment and did not accept that alleged breach and resign at the relevant time. In conclusion therefore we do not find that any of the alleged breaches of contract relied upon amount (either individually or cumulatively) to a fundamental breach of the implied contractual term that an employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. In the absence of any fundamental breach of contract, the claimant's resignation cannot be construed to be her dismissal, and we find that the claimant resigned her employment and was not dismissed.

113. In circumstances in which the claimant resigned and was not dismissed, we therefore dismiss her unfair dismissal claim.

114. Having found that the claimant resigned her employment and was not dismissed, we also dismiss the claimant's wrongful dismissal claim in respect of her notice period, because she resigned her employment without notice and was not dismissed.

115. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 41; a concise identification of the relevant law is at paragraphs 42 to 53; how that law has been applied to those findings in order to decide the issues is at paragraphs 54 to 114.

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Employment Judge N J Roper
Dated 21 February 2019