EMPLOYMENT TRIBUNALS

Claimant: Mrs K Coupland

Respondents: Secretary of State for Justice

HELD AT: Leeds **ON:** 9,10th and 13 February 2017, 14 February 2017 (in Chambers)

BEFORE: Employment Judge Sharkett
Mrs C Bowman
Mr A J Gill

REPRESENTATION:

Claimant: In person
Respondent: Mr Scott of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant did not resign in circumstances which allowed her to resign by reason of the Respondent's conduct.

2. The Claimant's claim of constructive unfair dismissal is not well founded and his dismissed

3. The Claimant's claim that she was subjected to unlawful discrimination under s15 of the Equality Act 2010, is not well founded and is dismissed.

4. The Claimant's claim that the Respondent failed in its duty under the Equality Act to make reasonable adjustments is not well founded and is dismissed.

REASONS

1. The Claimant brings claims of constructive unfair dismissal. She relies on the act of her dismissal on 18 February 2016 and the implied allegation of dishonesty as being the final straw that resulted in the Respondent's fundamental breach of the mutual duty of trust and confidence.

2. The Claimant claims unlawful discrimination under s15 of the Equality Act 2010 (EqAct 2010), in that, the decision of the Respondent to take the Claimant through the disciplinary process following her conviction for driving with excess alcohol, resulted in her being subjected to a detriment that arose because of her disability and the Respondent was unable to show objective justification for doing so.

3. The Claimant also claims that the act of dismissal on 18 February 2016, was a detriment that arose because of her disability and the Respondent is unable to show objective justification for taking the decision to dismiss her.

4. The Claimant further claims that the Respondent failed in its duty to make reasonable adjustments in dealing with the disciplinary process.

The Hearing

5. The Claimant was not legally represented at the Tribunal but was accompanied by her union representative, Mr Brown who came to give evidence on behalf of the Claimant. It was established that as Mr Brown was not attending in an official capacity, communication between the parties throughout the course of this Hearing should be through the Respondent's representative and the Appellant and not through Mr Brown.

6. Mr Scott of Counsel appeared for the Respondents and called the following witnesses:

- Ms M Quickfall Claimant's line manager
- Mr D Wright Ms Quickfalls's manager and investigating officer
- Ms J Yoxall Dismissing Officer
- Mr D Keane Appeal Officer

7. All witness gave evidence in chief by way of written statements, which had been exchanged. Both the claimant and Mr Scott had the opportunity to cross-examine and re-examine witnesses and all members of the Tribunal asked questions for the purpose of clarification.

8. The Tribunal was provided with a bundle of documents which was in accordance with the index. Further documents were added during the Hearing and added to

the back of the bundle. The Tribunal has had regard to each document within the bundle even if not specifically referred to in this Judgment

9. The background to this case is that the Claimant was dismissed by reason of gross misconduct on 18 February 2016. The Claimant exercised her right of appeal under the Respondent disciplinary policy and was reinstated to her position on 22 April 2016. The Appellant did not return to work and resigned her position by letter of 3 May 2016. Her claim to have been dismissed is one that falls to be determined under s95(1)(c) Employment Rights Act because successful appeal and reinstatement had the effect of negating the dismissal of 18 February 2016.

10. The issues to be determined by the Tribunal were discussed and identified at the Preliminary Hearing in private with Employment Judge Rostant on 31 August 2016. In respect of the Claimant's claim of constructive unfair dismissal the issues are:

    a. Was the Respondent in breach of an express or implied term of the Claimant's contract of employment, whether oral or, in writing, express or implied.

    b. If so was the breach a fundamental breach going to the root of the contract

    c. Was there a series of breaches and if so what was the final straw and was this a fundamental breach or an innocuous act on the part of the Respondent

    d. Did the Claimant resign in response to the breach of did she waive the breach by her conduct or by waiting too long to resign

    e. If the breaches complained gave rise to a dismissal under s95(1)(c) ERA 1996, can the Respondent show a potentially fair reason for the dismissal and can the Respondent satisfy the provisions of s98(4) ERA 1996.

11. In support of her claim of constructive unfair dismissal, in light of the fact that the Claimant is not legally represented the Claimant was allowed to raise additional breaches to those identified by EJ Rostant. The breaches relied on are;

    a. Commencing an investigation into the Claimant's misconduct without giving her time to get over her criminal conviction

    b. Failure to make reasonable adjustments in the disciplinary process

c. Failing to deal with the Claimant's misconduct under the Drug and Alcohol Misuse Policy and instead dealing with it under the Disciplinary Policy

d. The Respondent's original decision to dismiss her without taking into account her disability

e. The implied allegation of dishonesty by Ms Yoxall when deciding to dismiss the Claimant

12. The Respondent concedes that the Claimant's generalised anxiety amounts to a disability for the purposes of the Equality Act 2010, therefore the issues to be addressed in relation to the Claimant's claims of unlawful discrimination are:

Discrimination arising from disability under s15 EqAct

13. The issues are

a. What is the unfavourable treatment complained of? In this respect the Claimant identified her dismissal as the treatment that had arisen as a consequence of her disability together with being pressurised into engaging with a disciplinary investigation when she was not well enough to do so.

b. How does it arise in consequence of the Claimant's depression – the Claimant asserts that her requirement to engage with the disciplinary process and dismissal were both in consequence of her conviction for driving with excess alcohol which was caused by her disability,

c. What is the legitimate aim that the respondent is seeking to achieve – the Respondent claims that it is imperative that pubic trust in the organisation is maintained and that the claimant's actions had the potential to bring the organisation into disrepute and was in breach of the civil service code

d. Is the treatment a proportionate means of achieving that aim or could it have been achieved in a non-discriminatory way

Failure to make reasonable adjustments s21 EqAct

14. The issues are:

a. Can the claimant identify a provision criteria or practice ("PCP") or physical feature of the respondent that was applied to her? The Respondent accepted at the Preliminary Hearing that it had applied a

provision in that it had dismissed the Claimant for gross misconduct because of a conviction for driving with excess alcohol

b. If so, did the PCP or physical feature in question put the claimant at a substantial disadvantage in relation to employment by the respondent in comparison with persons who do not have the claimant's disability?

c. If so what was the disadvantage that the claimant was put at?

d. In the case of each PCP or physical feature, did the respondent know that the PCP or physical feature in question put the claimant at a substantial disadvantage in comparison with persons who are not disabled in relation to employment by the respondent?

e. If not, could the respondent reasonably have been expected to know that the PCP in question put the claimant at a substantial disadvantage in comparison with persons who are not disabled in relation to employment with the respondent?

f. In the case of each PCP, did the respondent take such steps as was reasonable to have to take to avoid the disadvantage caused by the PCP?

g. What were the steps that it is said that the respondent should have taken in relation to each PCP or physical feature?

h. Would the steps have avoided the disadvantage caused by the PCP?

Findings of Fact

15. Having considered all the evidence both oral and documentary the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given and it is not the Tribunal's role to do so. However, for the avoidance of doubt the Tribunal has considered each piece of evidence submitted. These findings are a summary of the principal findings from which the Tribunal drew its conclusions. All references in this Judgment to page numbers are references to pages in the bundle provided for the Tribunal, unless otherwise stated.

16. The Claimant was employed by the Respondent from 18 August 2003. She worked as a Band E Court Administration Assistant based at the court centre offices in Scunthorpe.

17. In April 2014, the Claimant was diagnosed with generalised anxiety disorder which was managed by her General Practitioner (GP), with medication and counselling. The Claimant did not take any sick leave from work but did advise her line manager of her condition and the fact that she may need to request

flexibility with her working hours in order to accommodate appointments with her GP. The Respondent does not dispute that the Claimant is disabled for the purpose of the Equality Act 2010.

18. In September 2015, the Claimant reports that she saw a deterioration in her mental health and commenced a period of sick leave from work. She explained her situation to the Tribunal that, despite a change in her medication she reached a stage where she became extremely withdrawn and did not want to speak to anyone. The Claimant has explained the events that led up to her being required to respond to disciplinary allegations at work as follows:

19. The Claimant had been on sick leave for a number of weeks and was very withdrawn. At about 6pm on the evening of 1st November 2015, the Claimant's neighbour called round to see her, and while they were discussing social arrangements for their children, they drank some wine with the encouragement of the Claimant's husband. The neighbour left and while the Claimant's husband took the children upstairs to bathe them before bedtime the Claimant consumed more alcohol and decided that her life was worthless. She left a note for her husband and drove away from the house in her car with the intention of killing herself. She had not driven very far when she reflected on her actions and decided to go back home. She stopped her vehicle just around the corner from her home and was subsequently approached by a police officer who knocked at the window of her vehicle to enquire about her well-being. The Claimant admitted what she had done and was taken to the local police station where a breathalyser reading recorded her breath as being four times over the legal limit of alcohol allowed when driving a motor vehicle. The Claimant was charged with drinking with excess alcohol, and detained overnight at the police station. Whilst at the police station the Claimant suffered an anxiety attack and was seen by a nurse.

20. It is the Claimant's case that she was so severely ill at that time of this incident that her mental illness caused her to act in the manner that she did and such was the deterioration of her mental health that the police would not allow her to go home the next morning without being accompanied by her husband.

21. Whilst the Tribunal accept that the Claimant has been professionally diagnosed and treated for anxiety, we note that the Claimant has not provided any medical evidence in support of her claim that her illness was what caused her to act in the manner in which she did on 1 November 2016. We further note, that whilst the Claimant's husband has accompanied the Claimant each day at the Tribunal, he has not given evidence in support of the Claimant's contention that her condition had become so acute at the time of the incident that she had written a note to him indicating that she was contemplating suicide either on that date or at all. We further note that a copy of the note the Claimant is said to have written has not been produced to the Tribunal, nor to our knowledge has it been produced elsewhere.

22. The Tribunal remind itself that we are not medically qualified to assess the Claimant's mental health and can only be guided by the evidence we have before us. We have no doubt that the Claimant would have been extremely distressed to find herself arrested and charged with driving with excess alcohol, and that in turn would have been likely to trigger an anxiety attack, especially in someone who was already being treated for mental health issues. However, in the absence of medical evidence to support her claim that it would have been her illness that caused her to act in the way in which she did on the evening of 1st November 2015, we find on the balance of probabilities that it did not.

23. We make this finding for a number of reasons and not only because of the absence of the medical evidence which we would have expected to see. We note that when the Claimant was arrested neither the police officers nor the attending nurse thought it necessary to transfer the Claimant to hospital or, ask that she be seen by a doctor to assess her risk of suicide. Instead, she was clearly assessed as being fit to be detained overnight in a police cell, and released the following morning when she had sobered up. Similarly, her own GP did not consider it necessary to refer her for assessment by a psychiatrist when she attended the surgery following her release. We find on the balance of probabilities, that if the Claimant's mental state was such that she had become a risk to herself or to others she would have been referred for urgent assessment. Although the Claimant refers to the fact, that the police did not let her go the following morning until someone came to accompany her, we do not find that this is indicative of a high level of concern about her mental health and nor in our collective experience do we find it unusual. The Claimant had told the police who it was that she worked for and where, and they would have been alert to the fact that she was an otherwise respectable woman who would have been acutely distressed by the position she was in.

24. The following day (2nd November 2015), the Claimant was contacted by her line manager Ms Quickfall by text. The Claimant's sick note was about to expire and Ms Quickfall wanted to get an update on how the Claimant was and whether she would be submitting a further sick note. Ms Quickfall had maintained contact with the Claimant throughout her absence in accordance with the Respondent sickness absence policy and was fully supportive of facilitating the Claimant's return to good health and work. The Claimant responded to Ms Quickfalls's enquiry about the Claimant's health by telling her of the offence with which she had been charged. She later sent another text asking whether her actions would affect her job (p247). Ms Quickfall advised the Claimant that she would take advice on the matter and let her know. The Claimant then text again after she had returned from the doctors to say *"I know I need to concentrate on getting better but I can't stop worrying about if my job is in jeopardy"* (p51).

25. No later than 5 November 2015, Ms Quickfall had advised the Claimant that in relation to her conduct a full investigation would need to take place, that a formal meeting would follow and that all sanctions including dismissal would be available. She also reassured her that her health at the time of the offence, and the

fact that she did not drive for her job would also be taken into account (p154). The Tribunal note that in oral evidence the Claimant asserted that it was she who had sent the first text to inform Ms Quickfall about the charge, however it is clear from the copies of the text messages in the bundle that it was Ms Quickfall who first made the contact with the Claimant on that day (p245)

26. The Claimant had been due to attend Grimsby Magistrate's Court on 18 November 2015, but for operational reasons to protect both the Claimant and the Respondent, the Claimant's court case was ultimately changed to be heard at Sheffield Magistrates Court on 22 November 2015. Unfortunately, due to the change in venue there was a breakdown in communication and the court was not expecting the Claimant and her solicitor. The Claimant was anxious to get the court hearing over and done with and was understandably distressed that the court was not expecting to hear her case when she had prepared herself for it. Fortunately, the prosecutor with charge of the case recognised the Claimant's distress and agreed to proceed. The Claimant pleaded guilty to the offence and was duly sentenced.

27. The following day (23rd November 2015), the Claimant received notification that the Respondent intended to undertake a disciplinary investigation as a result of the Claimant's actions (p172). It is the Claimant's evidence that she was '*astounded'* when she received the letter (p21). However given the fact that Ms Quickfall, had clearly communicated to the Claimant that a full investigation would follow as outlined above, it is disingenuous of her to say that the letter came out of the blue. The Respondent had always intended to commence an investigation into the Claimant's conduct and in accordance with usual practice, in circumstances where there are criminal proceedings pending, it was reasonable for the Respondent to await the outcome of those proceedings before commencing its own investigation.

28. In oral evidence the Claimant has said that she expected to just get a slap on the wrist or a talking to and that in her mind she did not see that it was a disciplinary offence. We do not accept this evidence because it is clear from her text message asking whether her job would be in jeopardy that, on the balance of probabilities, she knew the situation would be viewed far more seriously than she now suggests she did.

29. It was clear from her oral evidence that the Claimant was distressed by what she perceived to be the lack of sympathy shown by her employer in writing to her at that time; she felt management should have recognised the fact that she was mentally unwell and at least deferred starting the disciplinary process to give her some breathing space.

30. The Claimant contacted her union representative who agreed with her view that the manner in which she was being treated was unfair especially as her offence did not take place at work and she was not required to drive for her job. The union representative referred her to the Respondent Drugs and Alcohol policy

which states: "*Issues that will be subject to disciplinary action, including the possibility of dismissal includes being disqualified from driving as a result of alcohol or drug related offences (where employees are required under their contract of employment to drive a vehicle"*

31. Ms Collins, the Cluster Manager for the area, appointed Mr Wright to carry out an investigation. Mr Wright was Ms Quickfall's manager and was known to the Claimant. By letter of 27 November 2015, the Claimant was invited to attend a disciplinary investigation meeting on 7 December 2015. The letter advised the Claimant of her right to be accompanied and offered her the opportunity to have the meeting held at a different venue if desired (p173). Mr Brown the Claimant's union representative responded on 30 November and asked for the meeting be postponed because he was of the opinion, having spoken to the Claimant and her husband that due to the Claimant's fragile mental health any meeting would badly set her back.

32. It appeared to the Tribunal that Mr Wright either had very little experience in carrying out investigations or was unable to make decisions on the matter without consulting with Ms Collins or the HR caseworker that had been assigned, both of whom he referred back to regularly for advice. It is clear from the documentary evidence, that Ms Collins was keen to proceed without waiting for the occupational health report that the Claimant had agreed to when she met with Ms Quickfall on 11 November 2015 (p158). Ms Quickfall did not play any further part in the disciplinary process but she did continue to maintain contact with the Claimant in relation to her sickness absence, and, when she had last met with the Claimant she had agreed to an occupational health assessment (p161). The referral to occupational health had been drafted and sent to the Claimant but by the time the Claimant received the letter asking her to attend the investigatory meeting she had not yet returned the form as approved by her.

33. Following consultation with Ms Collins and HR, Mr Wright agreed to postpone the meeting of 7 December and instead agreed to prepare a list of written questions that Mr Brown, her union representative would ask the Claimant to answer prior to Occupational Health giving approval for the Claimant to attend a formal meeting (p192 &253). Mr Brown confirmed that the Claimant was happy to respond to the written questions and she did so within the required time-frame. Mr Brown when submitting the answers on the Claimant's behalf indicated that she had found confronting the situation very challenging.

34. The Claimant ultimately had her occupational health assessment by telephone on 24 December 2015. Whilst we accept that Ms Quickfall genuinely wanted to help the Claimant, the Tribunal find that the instruction provided by the Respondent to the occupational health assessor fell below what the Tribunal would expect from an organisation the size of the Respondent, especially as there was HR input at each stage of the process. For example in response to the question *'are you aware of any work related issues that may impact on the employee's condition?* the response was, '*none that I am aware of'*. It is quite clear that a pending disciplinary

investigation is a work related issue that may impact on the employee's condition and therefore the response was at best misguided and did little to assist the assessor in preparing their report. In addition, whilst it was agreed in the absence case conference of 11 November 2015, that a face to face meeting would be preferable, the instruction gives a contrary impression by clearly making references to difficulty with transport. That said it is clear from the oral evidence of both Mr Brown and Ms Quickfall that it is for the occupational health provider to establish whether a telephone or face to face assessment is carried out. We also not that whilst the Claimant was given the opportunity, she did not tell the occupational health assessor what was happening with work either and the report that followed indicated that she did not report any work stresses that had contributed to her current symptoms and that whilst not fit for work, confirmed that she was fit to attend a formal meeting (p212).

35. In oral evidence, the Claimant said that although she approved the content of the occupational health referral she just glided over most of it and sent it back. In considering this evidence we find that throughout this process the Claimant had the constant support and advice of Mr Brown, whose advice the Claimant had said she followed every step of the way. We find on the balance of probabilities, that the Claimant and Mr Brown were aware of the content of the occupational health referral but did not seek to change or add anything to it that would have been relevant to the assessment.

36. On 30 December 2015, Mr Wright asked the Claimant to provide written answers to further questions which had arisen from the answers she had previously provided. Mr Wright was aware of the difficulties the Claimant had reported experiencing when providing the initial answers but again having consulted Ms Collins, considered that expedition of the disciplinary process was likely to benefit the Claimant in the long term as it was no doubt a source of worry to her. Neither the Claimant nor Mr Brown raised any objection to the additional questions that were asked and the Claimant answered them, as requested, by 8 January 2016. It was only when she submitted her answers that she informed Mr Wright that she found that being questioned was making her relive the nightmare she had experienced and was consequently the main barrier to her getting well enough to return to work.

37. Ms Quickfall continued as the point of contact with the Claimant in relation to her long term sickness absence and on 21 January 2016 held another long term absence case conference with her. The Claimant reported a significant improvement since the last meeting especially since the Christmas period (p332). Her doctor had suggested a phased return to work at the end of her most recent sick note and indicated that he did not need to see her again for a further six months unless she became unwell again. She had also completed her counselling sessions although had not attended all of them. The Claimant and her union representative suggestion a proposed return to work over four weeks, starting on 2 February 2015; Ms Quickfall was fully supportive of the same. At the meeting Mr Brown expressed his satisfaction at the way the Claimant's return to work

was being handled and confirmed he had nothing further to request at the meeting as did the Claimant. Ms Quickfall notified HR and Mr Wright of the outcome of the meeting and he passed this information on to Ms Collins.

38. On 18 January 2016, Mr Wright sent the findings of his investigation to the HR case worker and Ms Collins (p224-231). Ms Collins as the commissioning manager of the disciplinary process recommended that a disciplinary hearing should follow and appointed Ms Yoxall the operations manager from the same cluster to hear the same.

39. By letter of 28 January 2016, the Claimant was invited to attend a disciplinary hearing on 18 February 2016. The letter, which was also copied to Mr Brown, advised the Claimant that the purpose of the hearing was to consider a charge of gross misconduct, which could result in her dismissal. The letter had enclosed a copy of the investigatory report prepared by Mr Wright together with a copy of the discipline policy.

40. The following day Mr Brown contacted Ms Yoxall to advise her of his involvement in the matter and asked that by way of a reasonable adjustment, given the Claimant's disability, Ms Yoxall would provide a list of the questions she intended to ask the Claimant at the disciplinary hearing as least seven days beforehand. Ms Yoxall agreed to this request and by email of 4 February 2016, provided a list of questions she intended to put to the Claimant at the hearing of 18 February 2016. The email made it clear that the list was not exhaustive and that further questions may arise from the answers the Claimant gave. In oral evidence Mr Brown explained that he had not suggested that the Claimant should get medical evidence to show that she was not well enough to engage in the disciplinary process because he did not consider that it was his place to do so. If the Claimant had thought she needed to do that she would have done. It was his view that sometimes fear of something is often worse than the event itself and that sooner or later the Claimant was going to have to attend the meeting.

41. The disciplinary hearing took place as planned on 18 February 2016. Prior to the hearing HR had provided Ms Yoxall with a case summary, together with advice on the potential sanctions available. The HR advisor expressed the opinion that only a sanction of dismissal would ordinarily be appropriate unless there were significant mitigating circumstances that would lead to a finding that her actions were a direct result of her disability and would not occur again; in which case a 36 month final written warning would be appropriate (p380).

42. At the disciplinary hearing the Claimant was accompanied by Mr Brown. It is noted that Ms Yoxall appeared reluctant to accept that the Claimant was disabled relying solely on the occupational health report that her condition 'could be a disability'; however the HR advisor present confirmed that the Respondent did accept that the Claimant's mental health condition amounted to a disability. The Claimant then proceeded to answer the pre-planned questions, whilst Mr Brown indicated that he wished to add to her answers later. Ms Yoxall asked a number

of additional questions some of which we find did arise out of the Claimant's answer to the last question, but some had no relevance and the Claimant would not have been in a position answer one of the questions in any event. For example, Ms Yoxall asked the Claimant to explain why she had been charged with drink driving instead of being in charge of a motor vehicle. Given the fact that the Claimant had admitted the charge against her, and on Ms Yoxall's own evidence she had no legal knowledge, it is not clear how this question would have assisted Ms Yoxall in reaching the decision before her, which was not the decision that was before the court or the police when they charged her.

43. At the end of the questions Mr Brown made his submissions on behalf of the Claimant and presented substantial mitigation which he asked to be considered. His submissions resulted in one further question being addressed to the Claimant by Ms Yoxall.

44. The Claimant has complained that despite being distressed during the hearing she was asked additional questions which did not arise from the original six pre-planned questions that had been notified to her. Subject to our comment above, we do not agree that they did not arise from those questions and as one of the further questions arose from the submissions of her union representative it would have been wrong of Ms Yoxall to make a decision on the evidence submitted without seeking clarification of the information put to her. We further do not accept that Ms Yoxall had intended to put the Claimant on the spot, it is quite usual for a disciplinary officer to prepare notes for such important meetings and we accept that this is what Ms Yoxall had done on this occasion.

45. However, we prefer the evidence of the Claimant and her union representative in making a finding that Ms Yoxall was indifferent to the Claimant's distress during the hearing and did not offer to let her take a break. The Tribunal has had the benefit of hearing from Ms Yoxall, and we find the manner in which she handled the disciplinary meeting was not in any way dictated by a sense of malice, but was perhaps more indicative of her lack of experience and expertise in handling disciplinary matters, and a lack of empathy for people who may find themselves in the Claimant's position. In the circumstances of this particular case given the nature of the offence and Ms Yoxall's limited experience in dealing with disciplinary matters with a potential outcome of dismissal, it may perhaps have been more appropriate for the Respondent to appoint someone with more confidence and experience in dealing with complex disciplinary matters such as this. Ms Yoxall herself admitted to feeling anxious at carrying out the Hearing which may explain why she came across to the Claimant and Mr Brown as 'mechanical' in her approach.

46. That said it is our collective experience, that if an employee has been seriously distressed during a work place meeting, HR will usually make a note of the same, and if a union representative is in attendance, they will usually insist on a break. Neither occurred in this hearing and we accept Mr Brown's evidence that although the Claimant was upset during the hearing he decided he would

monitor the situation as he thought it would be better to carry on and thus bring an end to the ordeal. We find it is not unusual for an employee to become distressed in a disciplinary hearing especially when they know that there is a potential for the outcome to result in their dismissal.

47. The meeting lasted one hour. The notes extend over 8 pages. Save for one short question put to the Claimant on the fourth page, there were no questions put to the Claimant after page 3 of the notes.

48. Ms Yoxall delivered her decision orally approximately one and a half hours later. She confirmed a finding of gross misconduct. She indicated, that she had considered the mitigating circumstances before deciding to dismiss the Claimant, but concluded that, *"I am not wholly convinced that there is likely to be no reputational damage to the organisation and I am not wholly convinced that you[sic] rationale for committing the offence is plausible and brings into question the issue of trust in the employer/employee relationship that it would never happen again.*

49. The Claimant and Mr Brown immediately expressed their shock at Ms Yoxall's decision and the fact that her reasoning suggested that that Claimant had in fact been dishonest. The union representative indicated that they intended to raise a grievance because they felt that the disciplinary process and the outcome was discriminatory based on the Claimant's disability. The HR officer in attendance at the meeting asked the Claimant and Mr Brown not to rule out the appeal process which formed part of the disciplinary process (p393).

50. The Claimant received written notification of her dismissal by letter of 22 February 2016. The notes of the disciplinary meeting were sent to the Claimant's union representative for approval, these were subsequently returned to the Respondent with amendments on 25 February. The amendments were approved by Ms Yoxall 1 March 2016 (p401-403) and signed by the Claimant on 10 March 2016. We note that neither the Claimant or Mr Brown made amendments to these notes to note the Claimant's distress at the meeting.

51. On 7 March 2016, the Claimant accepted an offer of alternative employment with a new employer and started working with them 14 March 2016.

52. On 9 March, through her union representative, the Claimant submitted a grievance to Ms Collins (p415). The Claimant complained that:

"*the Respondent had failed to consider the impact of her disability before deciding to engage in a formal disciplinary process. In doing so the Respondent had subjected her to a detriment because of something arising from her disability and not shown objective justification for doing so*

Had failed to deliver on an agreed reasonable adjustment insomuch as it was agreed I would be provided with advance written notice of questions to be asked…….

That the department had treated her less favourably than it did or would treat others insomuch as an individual in the situation that I was in, but who was alcohol dependent and therefore not disabled, would have received consideration under the Drug and Alcohol Guidance.

The statement issued to justify my dismissal fails to adequately take account of my disability; simply dismissing it as implausible does not amount to objective justification for my dismissal. I consider this therefore amounts to discrimination arising from my disability.

The assertion that there was a lack of certainty 'it would never happen again' is a clear reference to my condition that would not have been made in the case of an individual who did not have my condition. I have therefore been treated less favourably than someone who did not have my condition"

The Claimant complained that her dismissal was discriminatory, unfair and wrongful and that such was the impact of her dismissal the she felt unable to return to work if such an offer was made to her.

53. On 11 March 2016, the Claimant on the advice of Mr Brown, submitted an appeal against the Respondent's decision to dismiss her. The Claimant explained in oral evidence that it was her understanding that the Respondent would not consider her grievance unless she submitted an appeal. We can find no evidence that it was the Respondent who insisted that the Claimant raise an appeal. Mr Brown told us that it was he who had told the Claimant that she had to appeal, and that before doing so he had taken advice from the union's legal advisors. The Tribunal cautioned Mr Brown that the advice he received from the legal team at the union was subject to legal privilege and that he was not required to disclose it. However he was determined that he wanted to tell the Tribunal what he had been advised; he understood the concept of privilege and that by telling the Tribunal of the advice he received he was waiving that privilege. Mr Brown confirmed to the Tribunal, that it was the union legal advisors who had told him to advise the Claimant to appeal the Respondent's decision to dismiss her.

54. Mr Keane was appointed to hear the Claimant's appeal. On the advice of HR he was also asked to consider the Claimant's grievance at the same time as the facts of both the grievance and the appeal arose from the same matters. Mr Brown disagreed with the Respondent's opinion of how the two matters should be handled especially as dealing with the Claimant's grievance as part of the appeal process would deny her the opportunity of an appeal if her grievance was not upheld. Ms Collins, having taken HR advice did not agree and Mr Brown felt he had no choice but to accept their decision.

55. There would appear to have been some conflict between the advice given to Ms Collins by the HR advisor who had been involved with the case throughout and the advice given to Mr Keane by the HR caseworker assigned to the appeal who expressed reservations about the approach. However we are satisfied that Mr

Keane was alert to the fact that he was also dealing with the Claimant's grievance and that if any matter arose that was not linked to the disciplinary this would have to be dealt with as a separate matter

56. Prior to hearing the appeal Mr Keane was provided with a full case analysis which had been prepared by the HR caseworker assigned to the appeal. The case analysis included the detail of the manner in which the Claimant considered the Respondent's treatment of her throughout the process amounted to unlawful discrimination related to, or arising from her disability. There was some delay in agreeing a date for the appeal hearing although this could not be attributed to fault on the part of either party, both parties putting forward legitimate requests for avoidance of dates.

57. The appeal was finally heard on 22 April 2016. During the course of the hearing Mr Brown raised a number of points with Mr Keane. About half an hour into the meeting it became clear to Mr Keane that the Claimant had raised some valid points about the decision to terminate her employment. He remained of the view that there had been good cause to commence the disciplinary process in the circumstances of this case, but was not convinced that the decision to dismiss was either appropriate or proportionate. He did however consider that the decision of Ms Yoxall had not been taken out of malice and Mr Brown agreed that *"it is a misunderstanding of obligations and the process and findings was not thought of as malicious just a misunderstanding"*.

58. Mr Keane requested a ten-minute break in the meeting before returning to inform the Claimant and her union representative that he considered that the penalty imposed on this occasion was too severe; he reduced the allegation from one of gross misconduct to serious misconduct. He imposed a final written warning which would remain active for 24 months. He confirmed that whilst he felt the sanction was too severe he did not consider that there had been any fault in the process leading up to the appeal and therefore there was no need for further action on the grievance.

59. He then informed the Claimant that she was reinstated with immediate effect. The Claimant expressed her relief and sense of justice at Mr Keane's decision and in oral evidence confirmed this was the case. Mr Brown commented in the meeting that had a different decision been reached at the time of the disciplinary hearing , the meeting between them would not have been necessary. He did however express concerns about the fact that the Claimant had been asked additional questions in the disciplinary hearing and the fact that the drug and alcohol policy had not been considered. At the end of the meeting the Claimant said that she could not face coming back to work, and was left to consider her position.

60. Mr Keane confirmed his decision in writing by letter of 27 April 2016 (p544). The letter confirmed that the Claimant's appeal had been upheld and that she was reinstated from the date of the appeal hearing. The Claimant did not return to

work as she felt that her trust and confidence in the Respondent had been destroyed when Ms Yoxall called into question her honesty. In oral evidence, she explained that had it not been for the last part of what Ms Yoxall said her confidence would not have been destroyed. By email of 3 May 2016 the Claimant submitted her letter of resignation to Ms Collins (p552). The Appellant asked for and was paid up to the date of her resignation including all monies owing from the date of her dismissal to re-instatement.

61. Prior to attending the disciplinary hearing, the Claimant commenced a phased return to on 2 February 2016. Soon after her return to work, all the staff were informed that there were plans to close the Scunthorpe court and that their jobs would be moved to Grimsby. The Claimant accepts in oral evidence that it would not have been possible for her to carry on working for the Respondent once the Scunthorpe court had closed because of the logistical problems she would have encountered without a driving licence and her child care commitments. She maintains however that given the distance involved in moving to Grimsby she would have been made redundant.

Submissions

62. Both parties had submitted skeleton arguments and we heard closing submissions from Mr Scott for the Respondent and the Claimant in person. A full note of all submissions made is in the record of proceedings. The tribunal confirms that although the full extent of the arguments submitted is not rehearsed below the panel have had regard to the same when reaching our decision.

63. Mr Scott submits that although there is no doubt that one cannot help but feel sympathetic towards the Claimant, the issue before the Tribunal is to determine the legal questions before us. Mr Scott referred us to the legal concept of the disappearing dismissal that had occurred in this case by reason of the Claimant's successful appeal and her subsequent acceptance of the monies owing for wages during the period between dismissal and re-instatement. Mr Scott submits that the real reason that the Claimant did not come back to work is because she knew that she would not be able to continue working for the Respondent once the Scunthorpe court closed because it would be too far for her to travel without a driving licence. He submits that she realised the difficulty she was in and sought compensation as a back door to gaining a redundancy payment without having to give up her new job.

64. Mr Scott submits that it was open to Ms Yoxall to dismiss the Claimant and the fact that Mr Keane decided to uphold the Claimant's appeal does not amount to a finding that Ms Yoxall's decision was wrong. The Claimant he says was

convicted of a serious offence which had to potential to impact of the public perception of the department and those working within the system. He submits that a fair procedure was followed throughout and if it had not been he says Mr Brown would have had something to say about it. Mr Keane on appeal was obviously impressed by the written submissions of Mr Brown and upheld the appeal, downgrading the allegation to one of serious misconduct and reducing the sanction to a final written warning. There was, he says no unfair dismissal and no constructive unfair dismissal.

65. In respect of the Claimant's s15 claim he further submits that the Claimant has failed to show any causal link between her disability and the conduct which resulted in her criminal conviction. In addition, the Respondent has clearly shown the objective justification for following its own disciplinary policy and dismissing the Claimant in the first instance. He submits that the where a PCP put the Claimant at a known disadvantage the Respondent has not failed in its duty to make reasonable adjustments.

66. The Claimant submits that the Respondent failed to take into account her disability before commencing the disciplinary process. They did not obtain a bespoke occupational health report to assess whether she was able to attend meetings under the disciplinary policy and failed to make reasonable adjustments to remove any disadvantage to her. The reasonable adjustments that were conceded to were not delivered and those that were, i.e. the written questions and answers, did not remove the disadvantage.

67. The Claimant rejects Mr Scott's submission that she would not have been able to continue to work once Scunthorpe was closed and argues that it was easier for the Respondent to dismiss her when it was clear that they would ultimately have to make her redundant and pay her redundancy pay. The fact that she secured alternative employment was because she had no choice as she had been dismissed.

68. The Claimant submits that it would have been impossible for her to return to work because the Respondent had brought into question her honesty and she believed that it would not be possible to have the same relationship with the Respondent as she did before her dismissal. She would have felt subjected to scrutiny and be faced with awkward questions from colleagues. The fact that she lodged an appeal was not because she wanted her job back, it was because she was told she had to and she was not aware of the implications of doing so.

The Law

69. We now turn to a consideration of the law as it applies to the claimant's claims before this Tribunal.

70. The law in relation to unlawful discrimination can be found in the Equality Act 2010 (the EqAct 2010). The claimant claims that she has been unlawfully discriminated against on the protected characteristic of disability. The disability that she relies on is that of anxiety and depression. The Respondent concedes that the Claimant's illness amounts to a disability for the purposes of the Act. The relevant sections of the Equality Act relied on by the Claimant are set out below

Discrimination arising from Disability s15 EqAct

71. This is defined as:
(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability

72. This provision prohibits treating a disabled person unfavourably not because of her disability but because of something that arises out of it, for example dismissing someone because they had disability related sickness absence. However it is possible for an employer to justify such treatment if they can show that the treatment was necessary to achieve a legitimate aim and that the treatment was a proportionate way of achieving that aim

Duty to make adjustments s20 EqAct

73. This duty if made up of three requirements
1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a 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.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format

74. It is clear when considering this duty it is necessary for the Tribunal to consider the nature and extent of the substantial disadvantage relied on and make positive findings as to the Respondent's knowledge of the nature and extent of that disadvantage. In **Newham Sixth Form College –v- Sanders 2004 EWCA Civ 734**, CA Lord Justice Laws observed that an employer cannot make an objective assessment of the reasonableness of proposed adjustments unless it appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP. Therefore, an adjustment can only be categorised as reasonable or unreasonable in light of a clear understanding as to the nature and extent of the disadvantage.

Unfair dismissal

75. The relevant legislation in relation to unfair dismissal is set out in Part X Employment Rights Act 1996 (ERA1996), which provides that subject to certain qualifying criteria every employee has the right not to be unfairly dismissed. If the qualifying criteria is met and the employer has been expressly dismissed the employee in accordance with section 95(1)(a) or (b) the burden of showing that the dismissal was fair for reason under section 98 ERA 1996 will fall on the employer. It is accepted by both parties that by reason of the employee's appeal of the original decision to dismiss on 18 February that dismissal in accordance with the principles in Roberts and West Coast Trains Limited [2005] ICR 354 the dismissal has disappeared and therefore there is no actual dismissal.

76. The burden is therefore on the Claimant to show that she was dismissed in accordance with s95(1)(c) ERA1996, to do this she must show that the Respondent's conduct was such that it entitled her to resign. Section 95(1)(c) ERA 1996 provides:

"For the purpose of this part an employee is dismissed by his employer if (and subject to section (2) only if) C the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct"

It follows therefore that unless the Claimant can show that she was entitled to resign in response to the Respondent's conduct she will not have been dismissed.

77. In deciding whether the Claimant was entitled to consider herself dismissed the Tribunal is assisted by a number of authorities which have set out the correct approach to take. In Western Excavating (ECC) Limited v Sharpe [1978] ICR 221 Lord Denning stated:

"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 say then he terminates the contract by reason of the employer's conduct. He is constructively dismissed"

In the same case it was established that the test for whether or not there has been a repudiatory breach is an objective one. Whether the breach is sufficiently serious to be classed as repudiatory is a question of fact and degree. Lord Justice Dyson in paragraph 14 of his Judgment in London Borough of Waltham Forest v Omilaju [2005] IRLR 35 stated some basic propositions of law which can be derived from a number of leading authorities including Western Excavating as follows: *"The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment.*

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 likely or calculated to destroy or seriously damage the relationship of confidence and trust between employer and employee. I shall refer to this as the implied term of trust and confidence."

"*Any breach of the implied term of trust and confidence will amount to a repudiation of the contract. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship*"

"The test as to whether there has been a breach of the implied term of trust and confidence is objective".

"*A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents*".

78. Lord Justice Dyson referring to earlier authority said that the final straw need not itself be a breach of contract (paragraph 15) and indeed viewed in isolation may not always be unreasonable still less blameworthy (paragraph 24). It must however "contribute however slightly to the breach of the implied term of trust and confidence" (paragraph 20). Although the final straw may be relatively insignificant it must not be utterly trivial (paragraph 16). Lord Justice Dyson added at paragraph 22:

"moreover an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective".

79. Where a claimant alleges that a number of actions by the employer over a period of time amount to a fundamental breach of contract it is not necessary for the Claimant to use the words "last straw" in order to bring the last straw doctrine into play. If the Respondent raises the defence that the Claimant has affirmed the contract of employment since the earlier breaches occurred it is relevant to consider whether the final act relied on by the Claimant is sufficient to revive those earlier breaches so that the whole course of conduct can be considered whether or not the Claimant has expressly used the term last straw.

80. In considering whether the actions or conduct of the employer is calculated or likely to destroy or seriously damage the relationship the focus must be on the employer's conduct and not the conduct of the employee. A principal supported by the case of Tolson v Governing Body of Mixenden Community School [2003] IRLR 84.

81. Whilst a breach of the implied term of trust and confidence is always a fundamental breach (Omilaju above) a breach of other express or implied terms will not necessarily amount to a repudiation of the contract. It is necessary for the Tribunal to firstly consider whether there was any breach of the term of the Claimant's contract and whether any of the breaches found are viewed separately or cumulatively fundamental which go to the root of the contract.

82. Although a repudiatory breach cannot be cured by the employer the Court of Appeal in **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121 draws a distinction between an anticipatory breach which has not yet occurred and if cured will never occur and a completed breach which has already happened.

83. It is also a well-established principal that in order to show that she has been constructively dismissed the employee need not show that the repudiatory breach of contract was the only reason for her resignation. It is sufficient to show that she resigned in response to the breach in the sense that it was a significant or important reason for the resignation. That done the definition of dismissal under section 95(1)(c) ERA 1996 is met and a constructive dismissal is established.

84. A constructive dismissal however is not necessarily an unfair dismissal. If the Tribunal finds that the Claimant was constructively dismissed then it must consider in accordance with section 98 ERA 1996 whether the Respondent can show a potentially fair reason for the dismissal.

85. Once a respondent has been able to show a potentially fair reason for dismissal it is then for the Tribunal to determine whether the provisions of s98 (4) ERA 1996 have been satisfied. S98 (4) provides: -

[Where] the employer has fulfilled the requirements of subsection (1) the determination of whether the dismissal is fair or unfair having regard to the reason shown by the employer –

(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer has acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with the equity and substantial merits of the case.

86. In addition a procedural failure may render a dismissal unfair under s98 (4) ERA 1996 even if the employee would have been dismissed if a fair procedure had been followed. In such circumstances a Tribunal will take these matters into account when determining the amount of compensation that may be awarded in a procedurally unfair dismissal.

87. In determining whether the decision of the respondent to dismiss the claimant was fair, it is not for the tribunal to substitute its own opinion of how the respondent should have behaved, rather the question for the tribunal is, taking into account the provisions of s98 (4) ERA 1996, what was the procedure followed and having followed that procedure was the decision of the respondent to dismiss (including the process that led to it) lay within the range of conduct which a reasonable employer could have adopted **[Williams –v- Compare Maxam Ltd [1982] IRLR 83]**

88. In considering the overall fairness of the procedure adopted the Court of Appeal in **Taylor v OSC Group Limited 2006 ICR 1602** stressed that the task of the tribunal is to look at the fairness of the disciplinary process as a whole. Where procedural deficiencies have occurred at an early stage the tribunal must examine the subsequent appeal hearing, particularly its procedural fairness, thoroughness and the open-mindedness of the decision maker.

89. In **UCATT –v- Brian (1981) IRLR 225** Sir John Donaldson stated: -

"Indeed, this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question 'would a reasonable employer in those circumstances dismiss' seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'well you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather

more difficult consideration that all reasonable employers would dismiss in those circumstances"

90. If the Tribunal find that the dismissal was unfair it is then required to decide whether the Claimant contributed to her own dismissal by culpable or blameworthy conduct.

Application and secondary findings of fact

91. The complaints raised by the Claimant relate on the whole both to her claim of constructive unfair dismissal and unlawful discrimination. For sake of clarity we deal first with those allegations in so far as they are said to amount to unlawful discrimination, before then considering whether they amount individually or collectively to breaches of the Claimant's contract and entitled her to resign in response to the Respondent's conduct. Although we deal with each allegation individually, we confirm that we have not reached our conclusion simply by considering each alleged act in isolation. We have looked at the evidence overall to establish if the facts are tainted by discrimination.

92. The Claimant complains that the Respondent pressurised her into engaging with a disciplinary investigation when she was not well enough to do so. This she says amounts to discrimination arising from her disability and that the Respondent cannot objectively justify a reason for doing so. In order to succeed with this claim the Claimant does not have to show that she has been subjected to a detriment because of her disability itself but rather because of something that has arisen as a consequence of her disability. The PCP is the disciplinary process and the detriment is the requirement that she attends a disciplinary investigation meeting. The something that has arisen as a consequence of her disability she asserts is her conviction for driving with excess alcohol, which is what has caused the Respondent to require the Claimant to engage in the disciplinary process.

93. As we have already indicated in our findings of fact above we find no causal link between the claimant's illness and her decision to drive a vehicle when she had been consuming alcohol. Similarly, we find no causal link between the Claimant's illness and her alcohol consumption. There is no evidence to suggest that the Claimant had become reliant on alcohol as a result of her illness and we have not been told of any other occasions when the Claimant has been drinking alcohol because of her illness. Similarly, there is no evidence to suggest that prior to the Claimant consuming two bottles of wine that she had contemplated suicide.

94. The Claimant has not provided any medical evidence which would support a finding that the Claimant's illness was what led to her drinking a large volume of alcohol on that occasion, or that at the time in question she had suicidal ideation.

It is well known that alcohol often acts as a depressant and in the absence of medical evidence to the contrary, we find on the balance of probabilities that it was the consumption of alcohol that led the Claimant to drive off in her car that night. For these reasons, we do not find that the conviction for driving with excess alcohol was a consequence of her disability and her claim under s15 EqAct 2010 cannot succeed.

95. However, even if we were wrong and the conviction for driving with excess alcohol did arise in consequence of her disability, we find that the Respondent is able to objectively justify the requirement for the Claimant to engage in the disciplinary process, because an employer is entitled to use such processes to ensure proper standards of conduct and behaviour are maintained and the reputation of the department upheld.

96. In respect of requiring her to do this when she was not well enough to do so. The Tribunal note that the Claimant had been fit to attend court and respond to the criminal charges against her only very shortly before. She did not provide any medical evidence to say that she was not fit to attend meetings with her employer even though at that time she was having regular appointments with her GP. Whilst we accept that the Claimant was clearly distressed by the situation she found herself in, which in turn would have increased her anxiety, we find no evidence that she was not well enough to go through a disciplinary process especially when she had been well enough to attend court. The Claimant was aware that she was going to be involved in a disciplinary investigation from the outset and it was always going to be a situation that caused her anxiety. We find that the requirement for the Claimant to engage in the disciplinary process was not unreasonable in the circumstances and the Respondent's requirement for her to do so did not amount to discrimination arising from her disability because we do not find that her conviction for driving with excess alcohol was as a consequence of her disability. Further, we find that even if the conviction for driving with excess alcohol was a consequence of her disability, the Respondent is able to objectively justify the requirement for the reasons stated above.

97. We find for the same reasons that the original decision to dismiss the Claimant was not discrimination arising out of her disability. The original dismissal was because of the Claimant's conviction for driving with excess alcohol, which did not arise as a consequence of the Claimant's disability. Even if it could be said that the driving with excess alcohol conviction arose as a consequence of the Claimant's disability the Respondent is able to justify the decision to dismiss because the claimant had admitted committing a serious criminal offence which had the potential to bring the Respondent into disrepute and was in breach of the civil service code. We find that dealing with the situation through the

disciplinary policy was a proportionate means of achieving the Respondent's objectives as outlined above.

Failure to make reasonable adjustments in the disciplinary process.

98. The Claimant struggled somewhat to identify which of the allegations raised were said to amount to a failure on the part of the Respondent to make reasonable adjustments when dealing with the Claimant. The Claimant maintains that the Respondent should have waited longer before commencing the disciplinary process as it was too soon after the court hearing and she was not well enough. The Tribunal notes that the Claimant did not provide any medical evidence in support of her claim that she was not well enough to take part in a disciplinary investigation. It was therefore not clear what disadvantage the Claimant was put at by commencing the investigation at this stage. She had known from the outset that a disciplinary investigation was going to follow. By her own evidence she had been keen to get the court case over and done with, so it is not clear why she did not want the same in relation to the disciplinary matter and she did not offer an explanation to the Tribunal.

99. The reasonable adjustment the Claimant says should have been made was to delay the disciplinary process to give her more time. She does not say for how long. However, an adjustment will only be reasonable if it will have the effect of avoiding the disadvantage. In January 2016, the Claimant told Mr Wright that requiring her to answer questions about the events that led up to her conviction was making her relive her nightmare and was hindering her recovery and return to work. On that basis, in the absence of any medical evidence, save for the submission of sick notes, delaying the disciplinary process would not have avoided the disadvantage to her but would just have prolonged the process and, on the basis of her evidence, have had a detrimental effect on her mental health when the process was ultimately commenced.

100. The Respondent however, did have regard to the Claimant's objections to attending a disciplinary investigation and the fact of her anxiety and depression. The Respondent suggested by way of an adjustment that instead of attending a face to face meeting she would be asked provide written answers to questions raised by Mr Wright instead. Mr Wright took this step because Ms Collins had been keen to move the matter forward and it was felt to be an appropriate means of doing so pending receipt of the occupational health report which would inform the Respondent whether the Claimant was fit to attend a meeting or not, and what if any reasonable adjustments could be suggested. Mr Brown confirmed on behalf of the Claimant that she "*is happy to respond to the questions that we discussed yesterday"* (p189). There was no suggestion at all from the

Claimant or her union representative that requiring her to provide answers to the questions was putting her at a substantial disadvantage compared to others who did not have her disability. She returned her answers by the date asked and Mr Brown advised that she had found confronting the subject matter of the questions, challenging.

101. Following receipt of the answers, Mr Wright asked the Claimant to provide further information to clarify some of the answers she had given. Neither the Claimant nor Mr Brown raised any objection to this request, but when the Claimant responded with her answers, she indicated that being asked to provide more information was making her relive what happened and was hindering her recovery.

102. The Tribunal find that the Respondent took such steps as were reasonable in these circumstances. The Tribunal find that it was reasonable for the Respondent to pursue an investigation into the conviction of the Claimant through the internal disciplinary process. It was accepted that the Claimant would be placed at a disadvantage in having to attend a meeting and the Respondnet agreed an adjustment to the policy which would require the Claimant to provide written responses. The Claimant did not object to the adjustment or suggest that the requirement to do so would place her at a substantial disadvantage as compared to others who did not have her disability. On the contrary Mr Brown reported that she was happy to do this. Once she had completed them she reported that she found answering the questions challenging, and later reported that the questions were having the effect of her having to relive the nightmare.

103. It appears to the Tribunal that the only adjustment that the Claimant would have really been content with would be for the Respondent not to have addressed the conviction at all, which would clearly not have been reasonable. In respect of delaying the process, we do not find that a delay would have avoided the disadvantage and, on the balance of probabilities, a delay would have had a deleterious effect on the Claimant, because instead of having the matter dealt with and allowing the Claimant to move on with her recovery, the effect of a delay would just have been to postpone the process which would result in her having to *"relive her nightmare"* once again and potentially causing increased anxiety levels. For this reason we find that it would not have been a reasonable adjustment to delay the disciplinary process and the Respondent did not fail in its duty under the EqAct by failing to do so.

104. The Claimant has argued that a bespoke occupational health report should have been obtained before embarking on the disciplinary process, with specific questions asked in relation to attending a disciplinary hearing. Whilst this might

have been a preferred option, and we acknowledge that the drafting of the referral to occupational health provider was lacking in detail, we also note that the referral was sent to the Claimant for approval before it was sent and that she had it in her possession for some time before she returned it as approved. We also note that before she returned the referral form she had received the invitation to the disciplinary investigation meeting and she was receiving support and advice from Mr Brown, who by his own evidence had spent considerable time both with the Claimant and her husband. Whilst we accept that it is not the responsibility of the Claimant to draft the referral, she was given the opportunity to add further to the referral or correct omissions or inaccuracies but she did not. Nor did she do so when she had the telephone assessment and reported that there were no work stresses that had contributed to her current symptoms. That said we are not of the opinion that commissioning a bespoke occupational assessment would have resulted in any different decision or obligation on the part of the Respondent for the reasons we have outlined above.

105. We now turn to the individual breaches that the Claimant relies upon in claiming that the reason for her resignation was the irretrievable breakdown of the employment relationship caused by the Respondent's treatment of her. In order to show that she has been dismissed under s95(1)(c)ERA 1996 the Claimant must show, that by treating the Claimant in the manner in which it did, the Respondent was in breach of an express or implied term of the contract of employment. Whilst it does not need to have been the last breach relied on that was a fundamental breach going to the root of the contract, there must have been a breach or series of breaches that were serious enough to allow the Claimant to treat the final breach or act as 'the last straw' resulting in her resignation. If the Claimant is able to show that she has been dismissed under s95(1)(c) as above, the burden will then shift to the Respondent to show a potentially fair reason for the dismissal before the Tribunal then considers the fairness of the dismissal overall and whether the Claimant contributed to her own dismissal by culpable or blameworthy conduct.

106. The Claimant complains that by commencing an investigation into her conviction for driving with excess alcohol without giving her time to get over her criminal conviction, the Respondent was in breach of an implied term of her contract of employment. We have already discussed the rationale of the Respondent in deciding to commence the disciplinary investigation above. The Respondent had a contractual right to commence a disciplinary investigation into allegations of misconduct against the Claimant. The Claimant had been aware that this was the intended action of the Respondent and the Claimant did not provide medical evidence to say that she was not fit to attend or take part in a

disciplinary investigation. We observe that in circumstances such as these it would have been best practice to await the outcome of the occupational health report and that the referral could have given a clearer picture to the Occupation Health assessor. However, the Claimant had been deemed fit to answer to charges of driving with excess alcohol and had attended the court for sentencing only very shortly before. It is reasonable to assume that attending a disciplinary investigation would not be as stressful as attending a court hearing and in the absence of medical evidence indicating that the Claimant was not fit to attend at that time, it was not unreasonable for the Respondent to progress the matter immediately once the criminal proceedings had been disposed of.

107. The Respondent did acknowledge that the process would be of distress to the Claimant and that was one of the reasons why the Respondent thought that it would be better to get matters dealt with and allow the Claimant to move on. We note that when it came to the disciplinary hearing that sentiment was also expressed by Mr Brown when he acknowledged that the meeting was going to have to happen sooner or later and that the fear of something happening is often more harmful that the event itself. In addition, the Respondent agreed that the Claimant would not have to face coming in to have a face to face meeting with Mr Wright and agreed that the investigation could be done by way of written answers. A suggestion that was accepted by the Claimant without complaint.

108. We accept that the Claimant wanted time before the Respondent started the investigation and that she was upset by what she perceived to be the lack of understanding and compassion. However, the Respondent had a contractual right to commence a disciplinary investigation into the Claimant's conduct and by choosing to do so at the time it did, having taken into account the particular circumstances of this Claimant and agreed to an adjustment to the disciplinary policy, the Respondent was not in breach of the implied duty of trust and confidence or any other express or implied term of the Claimant's contract.

109. The Claimant has also claimed of the Respondent's failure to deal with her misconduct under the Drug Alcohol Misuse Policy instead of the disciplinary policy. We have read this policy in detail and conclude that the Claimant's understanding that she would fall for consideration under this policy is misconceived. It is clear that the policy has been put in place as an acknowledgement that members of staff may from time to time suffer from addiction or dependency on drugs or alcohol. Whilst they may not be disabled for the purposes of the Equality Act 2010 the Respondent has put in place a provision to help and support those people to take steps to recover from the dependency or addiction. It cannot be the case that this policy is in place so that any member of staff who commits an act of misconduct whilst under the

influence of alcohol will be allowed to avoid disciplinary sanction. The Claimant did not produce any medical evidence that she was reliant or dependent on alcohol and nor is it her case that she is or was; therefore the fact that on this one occasion she deliberately consumed an excessive amount of alcohol which resulted in the criminal charges against her, does not bring her within the group of those people for whom this policy is intended. The Respondent did not breach the contract with the Claimant by dealing with the misconduct of the Claimant under the Disciplinary Policy instead of using the Drug and Alcohol Misuse policy

110. The Claimant complains that the Respondent's original decision to dismiss her without taking into account her disability and the implied allegation of dishonesty by Ms Yoxall when deciding to dismiss the Claimant breached the mutual duty of trust and confidence and resulted in the Claimant's dismissal.

111. In considering what happened at the disciplinary hearing, the Tribunal has regard to the role of the disciplining officer and the purpose of the disciplinary hearing itself. Firstly, the purpose of the disciplinary hearing is to give the Claimant the opportunity to provide an explanation in response to the allegations against her. Ms Yoxall had provided the Claimant with a list of questions she was going to ask but made it clear that the list was not exhaustive and that more questions may arise in response to the Claimant's answers. In reaching her decision Ms Yoxall would have had to be sure that she had a genuine belief that the Claimant had carried out the alleged misconduct and from there she would have needed to ensure that her decision was one that was within the band of reasonable responses taking into account all the circumstances of this particular case.

112. We accept that the Claimant became distressed during the disciplinary meeting, and we also accept that Ms Yoxall was mechanical in her approach. We can understand that the Claimant may well have been expecting a more sympathetic and understanding approach in the meeting, but the fact that such an approach is not Ms Yoxall's style does not amount to a breach of contract. Ms Yoxall was doing her job and she did not do it in a way that breached the duty of mutual trust and confidence.

113. We have carefully reviewed the notes of the meeting and had regard to the oral evidence of Mr Brown, who accepted that he did not feel it necessary to object to the conduct of the meeting or the questions asked, nor did he consider it was necessary to request that the Claimant be allowed a break. Whilst some small number of questions were, as we have already observed, irrelevant, they were not oppressive and nor was there much asked of the Claimant over and above

what she expected. We have already observed that most of the meeting was taken up with Mr Brown's submissions.

114. We do not accept that Ms Yoxall did not take into account the Claimant's disability before deciding to dismiss the Claimant because it is clear from her evidence that she did. What she decided was that whilst she accepted that the Claimant was disabled, she considered that the offence was so serious that despite all the mitigating factors that had been put before her she concluded that dismissal was the only option. The Tribunal observe that Ms Yoxall misdirected herself somewhat when making her decision that she was not satisfied that there would be no reoccurrence of the offence or that the Respondent would not be brought into disrepute, because she required 100% certainty which is clearly too high a burden to discharge in these circumstances. However, the decision to dismiss was one that was open to her and therefore in making the decision that she did she was not in breach of a term of the Claimant's contract.

115. Turing to what the Claimant has found to be the most offensive of the breaches claimed and Ms Yoxall's finding at the conclusion of the disciplinary hearing that:

"I am not wholly convinced that there is likely to be no reputational damage to the organisation and I am not wholly convinced that you[sic] rationale for committing the offence is plausible and brings into question the issue of trust in the employer/employee relationship that it would never happen again.

116. Once again it is necessary to consider the purpose of the disciplinary hearing and the role of Ms Yoxall as the disciplining officer. The Claimant had committed a serious criminal offence; that her remorse was genuine cannot be in doubt as can the fact that her behaviour was out of character on the basis of what was known of the by the Respondent. She had non the less committed the offence, which on the face of it, given the nature of the position of the Respondent and the higher standard of public behaviour that it expected of its employees, was an offence that would result in disciplinary action and may result in dismissal.

117. The role of Ms Yoxall was to determine whether the Claimant was able to provide an explanation for her actions (which were already admitted), which would convince her to impose the lowest sanction available. Ms Yoxall considered the content of the investigatory report, the evidence of the Claimant and the submissions of Mr Brown, and, on the basis of the evidence before her she concluded that she did not accept the Claimant's explanation for her actions. Whilst we understand that the Claimant was upset by the fact that Ms Yoxall did not accept her explanation it was a conclusion that she was entitled to reach.

118. We accept that the Claimant truly believed that the reason why she had consumed two bottles of wine and drove her car was because she was suffering from anxiety and depression, however her view of the situation was the only evidence in support of that explanation. Ms Yoxall was entitled to reject that explanation on the basis of the evidence before her. The reference to trust and confidence was not because Ms Yoxall was accusing the Claimant of being untruthful, it was a reference to a belief that whilst she accepted that the Claimant was suffering from anxiety and depression, she did not accept, on the basis of the evidence that was before her, that her illness was what caused her to drink two bottles of wine on that night and then decide to drive her vehicle resulting in the criminal conviction. Consequently, she was not convinced that there might not be a reoccurrence of the misconduct and it was on that basis that the duty of trust and confidence was referred to. There is a distinct difference between someone not accepting someone's view of events and finding that someone is being untruthful.

119. The Claimant has raised no complaint about the manner in which her combined appeal / grievance hearing was handled save for the fact the meeting was brought to a premature end when Mr Keane indicated that he was able to reach a decision on the evidence he had up to that stage. In oral evidence Mr Keane explained that he had already read the submissions of Mr Brown before he came to the meeting and had made sure that he was fully appraised of the facts of the Claimant's case. We find no fault with Mr Keane's handling of the meeting and find that he had sufficient information before him to reach a conclusion on both the appeal and grievance.

120. Overall, we accept that the Claimant found herself in a situation that she would never had anticipated and which caused her great distress. However, having waited until the criminal proceedings had concluded, the Respondent was entitled to follow its own internal policies. The Respondent was alert to the fact that the Claimant was being treated for anxiety and depression and had regard to that fact when progressing the disciplinary process. Whilst going through this process was difficult for the Claimant, the criminal conviction was a matter that the Respondent was entitled to address given the nature of her employer. The Claimant did not provide any evidence of being not well enough to take part in the process and did not advise the Occupational Health assessor that there was anything at work that was affecting her condition. She and her union representative had the opportunity to raise this with the occupational health assessor but did not do so.

121. The Respondent took such steps as it thought reasonable to avoid any disadvantage caused to the Claimant as a result of her disability and followed a

fair procedure throughout. It is common for employees to be resistant to engaging in the disciplinary process especially if it is anticipated that the outcome may be their dismissal, however the Respondent and ultimately Mr Brown were of the view that delay would merely make matters worse and hinder the Claimant's recovery. A fact that is borne out by the Claimant's own reference to reliving the nightmare in January 2016.

122. For the reasons outlined in the paragraphs above we do not find that any of the allegations raised by the Claimant amount to a breach of the Claimant's contract such as would entitle her to resign in response. In addition, even if any of the breaches or the breaches combined would amount to a fundamental breach entitling the Claimant to resign in response, we find that the Claimant did not resign in response to any such breaches as she affirmed the breach by waiting from 22 April 2016 to 3 May 2016 before submitting her letter of resignation and accepted payment of backdated wages from the date of her dismissal in February to re-instatement on 22 April 2016.

Conclusion

123. For the reasons stated above, the Respondent has not failed in its duty to make reasonable adjustment under s20 EqAct 2010; Claimant has not been discriminated against by reason of a consequence arising from her disability under s15 EqAct 2010, and, the Claimant did not resign in circumstances in which she was entitled to resign by reason of the Respondent's conduct under s95(1)(c) ERA 1996

124. The Claimant's claims are not well founded and are dismissed

Employment Judge Sharkett

Date: 27 April 2017