# EMPLOYMENT TRIBUNALS

**Claimant:** Ms M Sweeney

**Respondent:** Merseyside Community Rehabilitation Company Limited

**Judgment** having been sent to the parties on 3 March 2017 and the claimant having requested written reasons on 20 February 2017:

## REASONS

### Complaints and issues

Procedural history

1. By a claim form presented on 5 August 2015 the claimant raised complaints of:
   1.1. unfair constructive dismissal, contrary to sections 95(1)(a) and 98 of the Employment Rights Act 1996 (ERA);
   1.2. detriment on the ground of protected disclosures, contrary to section 47B of ERA;
   1.3. failure to make adjustments, contrary to sections 20, 21 and 39 of the Equality Act 2010 ("EqA");
   1.4. discrimination arising from disability, contrary to sections 15 and 39 of EqA;
   1.5. direct discrimination because of disability, contrary to sections 13 and 39 of EqA;
   1.6. indirect discrimination, contrary to sections 19 and 39 of EqA;
   1.7. victimisation, contrary to sections 27 and 39 of EqA; and
   1.8. harassment, contrary to sections 26 and 40 of EqA.
2. The complaint of indirect discrimination was withdrawn on 18 April 2016.
3. It was unclear from claim form how the claimant was putting her case. Employment Judge Shotter attempted to clarify the basis of the claim over the course of two preliminary hearings. A case management order following the hearing on 1 February 2016 set out a chronological list of allegations at paragraphs 13 to 51. In these reasons, when we refer to an allegation by number, we mean the corresponding paragraph of the case management order. (For example, Allegation 31 appears at paragraph 31). Following a further hearing on 18 April 2016, a written case management order listed 12 complaints

of direct discrimination. These lists were very helpful in making sense of the claim, but still left some important matters to be clarified.

4. The case was then listed for a further preliminary hearing before Employment Judge Whittaker to determine statutory time limit issues. In a judgment ("the PH Judgment") sent to the parties with reasons ("the PH Reasons"), Employment Judge Whittaker dismissed various parts of the claim on the ground that they had been presented too late. The remainder of the claim was permitted to go forward to a final hearing.

5. There was some debate about the impact of the PH Judgment.

   5.1. The claimant wished us to place on record her dissatisfaction with the decision. She recognised, however, that there was nothing that this tribunal could do about it at the final hearing.

   5.2. The tribunal was initially under the impression that the PH Judgment had dealt definitively with time limit issues. That is to say that, in respect of those parts of the claim that had been ordered to proceed to the final hearing, the PH Judgment had found that that the claim was presented in time, or that the time limit had been extended. That would mean that there were no time limit issues for us to consider. Prior to final submissions, counsel for the respondent sought to set us straight. Although the PH Judgment and the PH Reasons did not explicitly say so, they had, in the respondent's view, left open the question of time limits in relation to the surviving parts of the claim.

6. We dealt with the respondent's argument separately in relation to the whistleblowing detriment complaint and the complaints under EqA.

   6.1. As regards the EqA complaints, we agreed with the respondent. On a proper reading of paragraph 5 of the PH Judgment, together with paragraphs 14 to 16 of the PH Reasons, all Employment Judge Whittaker decided was that it was reasonably arguable that the surviving EqA allegations were in time. He made express reference to *Aziz,* from which the "reasonably arguable" test derives. He did not find that the allegations were presented in time; nor did he make a decision as to whether the time limit should be extended.

   6.2. The position under section 47B ERA (whistleblowing detriment) was harder to decipher. Paragraph 10 of the PH Reasons outline the allegation of detriment which we have reproduced elsewhere in our reasons. The paragraph continued (with our emphasis):

      > "The claimant therefore alleges that she continued to suffer that detriment up to and including the date her employment ended. On that basis **the Tribunal concluded that the claim** of the claimant under section 48 relating to protected disclosures … on the basis that the claimant suffered a detriment of "her allegations of risk were ignored" **was in time** and should proceed to be heard…"

   6.3. What we had to decide was whether the phrase, "the Tribunal concluded that the claim…was in time" was capable of being interpreted as leaving open the question of time limits to the final hearing. Counsel for the respondent argued that, in its context, the phrase could bear that interpretation. There is no such thing in section 48 of ERA as a detriment "extending over a period". The time limit runs from the date of the "act or deliberate failure to act". Where there is a "series of similar acts", the time limit runs from the last of

them. There was no analysis of the detriment complaint in these terms. Nowhere did the PH Reasons identify the occasions on which the claimant's concerns were deliberately ignored, or the people who deliberately ignored them, or examine any similarities. In the light of that omission, the tribunal could not have found that the claim in respect of the surviving allegations had been presented within the time limit. Forceful though that argument is, we do not see how it gets around the plain meaning of Employment Judge Whittaker's words. Rightly or wrongly, he found that the claim had been presented in time. If the respondent believed that finding to have been based on an error of law, it should have appealed against the PH Judgment. We therefore believe ourselves constrained to ignore any jurisdictional question relating to time limits in the whistleblowing detriment claim.

<u>Our approach to the issues</u>

7. At the start of the hearing, the parties agreed that the remaining ambiguities in the claimant's case could be explored with the claimant during the course of her evidence. As the evidence drew to a close, we drafted a list of what we believed to be the issues for us to determine. We delivered that draft to the parties on the afternoon of Day 7 of the hearing. During the afternoon of Day 8, once the evidence had concluded, we invited the parties' representations as to whether the list properly reflected their understanding of the issues that we would have to consider. As part of the process of seeking the claimant's views, the employment judge spent 55 minutes explaining the issues in as non-technical language as possible.

8. Subject to the argument about whether we should consider time limits (dealt with above) and the claimant's application to amend the claim (dealt with below), the parties agreed that our draft had completely listed the issues we would have to decide.

<u>Amendment</u>

9. During our discussion of the draft list, the claimant indicated that she wished to amend the claim in the following respects:

    9.1. Alleging that her disclosures qualified for protection because they tended to show deliberate concealment;

    9.2. In the context of the adjustments claim, expanding the list of meetings at which the claimant should have been permitted to audio-record the meeting and/or bring a family member as her companion;

    9.3. Introducing a further allegation of victimisation marked in *italics* in the list below.

    9.4. Introducing one complaint of discrimination arising from disability, marked in *italics* below.

10. The respondent consented to the first of these amendments. In other respects, the parties agreed that we should make our decision on whether to allow such an amendment at the same time as we determined the issues on their merits.

<u>The finalised list of issues</u>

11. It is drawn from the case management orders, the preliminary hearing judgment and the discussions that took place during the course of the hearing. Issues

marked in *italics* indicate those issues that were added to the list following the discussion that took place on Day 8 of the hearing.

Disability

12. It was common ground that the claimant was disabled as a result of her visual impairment. The respondent required the claimant to prove that she was disabled as a result of her colitis at the time that is relevant to this claim.

Direct discrimination

13. Eleven allegations of direct discrimination were allowed by Employment Judge Whittaker to proceed to the final hearing. As the hearing progressed, however, it became clear that the claimant did not intend to pursue a complaint of direct discrimination at all. We took this to be the case because:

    13.1. In respect of some of the allegations in particular, and all of the allegations in general, the claimant was asked if it was her case that she was treated as she was because she was disabled. Her answer was no. She contended that the reason for her treatment was because she had "raised concerns about risk" and was "a whistleblower".

    13.2. At one point she alleged, in general terms, that the respondent had "used discrimination as a weapon against me". When asked to clarify this allegation, she told the tribunal that the respondent had "used my difficulties in accessing risk information to prevent me from doing my work". In a follow-up question, she was asked how, on her case, the respondent would have treated a person who had made the same disclosures, who had a similar difficulty in accessing the information, but who was not disabled. In answer, the claimant confirmed that such a person would have been treated exactly the same as she was treated.

    13.3. At no point did the claimant put it to any witness that they treated her in any particular way because she was disabled. The employment judge had reminded the claimant at various points during the hearing of the need to put her case to the witnesses.

14. We were conscious that the claimant was representing herself and had obviously struggled to put her clear sense of injustice into legal language. We looked at the 11 allegations of direct discrimination to see if they obviously fell into one of the other categories of prohibited conduct. It appeared to us, and ought to have appeared to the respondent, that direct discrimination allegations (6) and (7) were really complaints of victimisation. We therefore considered them under that heading. The remainder of the direct discrimination allegations were bound to fail because of the way in which the claimant put her case.

Victimisation

15. In order to succeed in her complaint of victimisation, the claimant must show that she did one or more protected acts. These were originally stated in the 1 February 2016 case management order to be "her grievances and protected disclosures". We take this phrase to be a reference to only two protected acts, namely the claimant's grievance dated 9 October 2013 and her grievance appeal statement dated 16 May 2014. As will be seen below, the claimant was permitted to rely on these two grievances as her only protected disclosures. It was conceded by the respondent that these grievances were both protected acts for the purpose of section 27 of EqA.

16. The detrimental acts of which the claimant complained were:

    16.1. Delaying until January 2015 to inform the claimant of the outcome of her grievance (Allegation 46);

    *16.2. Delaying sending the minutes of the grievance meeting for 3 months – Direct discrimination allegation (7);*

    16.3. Providing the claimant with inadequate minutes (Allegation 46);

    16.4. The grievance investigation report itself (Direct discrimination allegation (7), recorded as "victimisation");

    16.5. Engineering the claimant's removal from the National Probation Service (Allegation 47);

    16.6. Lying to the claimant during the meeting on 25 February 2015 (Allegation 49);

    16.7. *(If permitted to amend her claim)* Sending information about Transforming Rehabilitation to the claimant at a time when she did not have the assistive technology to read it;

17. The questions for the tribunal to decide were:

    *17.1. Was the alleged treatment part of an act extending over a period ending at a time in respect of which the claim was presented within the time limit?*

    *17.2. If not, would it be just and equitable to extend the time limit?*

    17.3. Did one or both grievances contain an express or implied allegation of discrimination?

    17.4. In respect of each alleged detriment, did the respondent treat the claimant in the manner alleged?

    17.5. Could the claimant reasonably understand it to be to her detriment?

    17.6. What was the reason why the claimant was treated as she was? Was it because she had raised one or more of the grievances?

<u>Harassment</u>

18. Here is a complete list of the unwanted conduct that, on the claimant's case, amounted to harassment:

    18.1. Aggressive and bullying behaviour from Ms Kuyateh on 1 May 2013 (Allegations 32 and 33);

    18.2. Leaving the claimant in the same building as Ms Kuyateh after the incident on 1 May 2013 (Allegation 39);

    18.3. Ms Kuyateh "excessively" giving the claimant more and more cases to work on following the incident on 1 May 2013 (Allegation 39);

    18.4. Constantly "bombarding" the claimant with contact during her sickness absence up to January 2014 (Allegation 34);

    18.5. Issuing the attendance notice on 19 September 2013 (Allegation 35);

    18.6. Allocating the claimant more than 60 cases during the first 11 weeks of her return to work (Allegation 40); and

18.7. Mrs Evans using an agency worker as the claimant's support worker in a deliberate attempt to undermine her (Allegation 42) when two internal candidates had expressed an interest in the role.

19. The issues for the tribunal to determine, in respect of each item of unwanted conduct, were:

*19.1. Was the alleged conduct part of an act extending over a period ending at a time in respect of which the claim was presented within the time limit?*

*19.2. If not, would it be just and equitable to extend the time limit?*

19.3. Did the various employees of the respondent subject the claimant to the alleged unwanted conduct?

19.4. Was that conduct related to the claimant's visual impairment and/or her colitis?

19.5. Did it have the prohibited purpose or effect?

<u>Failure to make adjustments</u>

20. The adjustments claim had a number of different components. *Before listing the issues in relation to each component, we record two generic issues:*

*20.1. Was the alleged treatment part of an act extending over a period ending at a time in respect of which the claim was presented within the time limit?*

*20.2. If not, would it be just and equitable to extend the time limit?*

21. The first (Allegations 31 and 33) is based on the respondent's admitted practice (PCP1) of introducing a new computerised risk management tool called OaSys-R which was different to its predecessor in layout and method of operation. This practice put the claimant at a substantial disadvantage compared to persons who were not visually impaired in the following ways:

21.1. The claimant used a form of assistive technology called ZoomTech. It was alleged by the claimant that OaSys-R was incompatible with ZoomTech, meaning that she could not use the system.

21.2. The claimant's visual impairment meant that she could not navigate the new system easily. She did not know where on the screen to look. As a result, it took her much longer than her sighted colleagues to do her work.

22. By way of adjustment, the claimant contends that the respondent should have taken the following steps:

22.1. Delaying the implementation of OaSys-R until the compatibility issues were resolved;

22.2. Training the claimant in the use of OaSys-R; and

22.3. Reducing the claimant's workload until she was able to use the new system (Allegation 37);

23. The respondent did not, in relation to PCP1, rely on any defence based on knowledge of the claimant's visual impairment or knowledge of the disadvantages caused by the PCP.

24. The issues for the tribunal to determine in relation to PCP1 were:

24.1. Did PCP1 put the claimant to the alleged disadvantage in a way that was more than minor or trivial?

24.2. Was it reasonable for the respondent to have to make the adjustments?

25. The second component (Allegations 34 to 36) was based on a practice (PCP2) of maintaining management contact with an employee who was absent from work on sick leave at the rate of once or twice per week. It is to be noted that, unlike the harassment allegation, the period of time covered by PCP2 was alleged to have extended into the claimant's second period of absence (from 2014 to 2015). This practice put the claimant at a substantial disadvantage compared to persons who did not have colitis. The claimant's condition was aggravated by stress. She found that the frequency of contact aggravated her condition. The claimant's case is that the respondent should have made the adjustment of contacting her less frequently.

26. The issues for determination were:

26.1. Whether the claimant had a disability by reason of her colitis;

26.2. Whether PCP2 put the claimant at the alleged disadvantage in a way that was more than minor or trivial;

26.3. Whether the respondent could prove that it neither knew nor could reasonably be expected to know that the claimant was placed at that disadvantage; and

26.4. Whether it was reasonable for the respondent to have to contact the claimant less frequently.

27. The third component (Allegations 35 and 38) is based on the practice (PCP3) of regarding defined patterns of sickness absence as grounds for issuing a formal attendance notice under its sickness absence policy. This practice was alleged to have put the claimant at a disadvantage compared to people without colitis, because the stress of receiving the notice aggravated her condition. As an adjustment, the respondent should not have issued the notice.

28. In relation to PCP3, the tribunal had to decide:

28.1. Whether the claimant had a disability by reason of her colitis;

28.2. Whether PCP3 put the claimant at the alleged disadvantage in a way that was more than minor or trivial;

28.3. Whether the respondent could prove that it neither knew nor could reasonably be expected to know that the claimant was placed at that disadvantage; and

28.4. Whether it was reasonable for the respondent to delay issuing the notice.

29. The fourth component of the adjustments claim relates to the provision of a support worker. Her claim appeared to be that, without the auxiliary aid of a support worker, the claimant would be at a substantial disadvantage compared to sighted colleagues. The question for the tribunal was whether it was reasonable for the tribunal to have to provide a support worker for the period between 20 January 2014 and 5 March 2014.

30. The fifth and sixth components concern the grievance meeting on 2 July 2014 (Allegation 44). It is alleged that the respondent had a criterion (PCP4) that the claimant's companion at the meeting was required to be either a work colleague or a trade union representative. The claimant's case is that this put her at two disadvantages:

    30.1. One disadvantage was in comparison to people without visual impairments. She needed a companion more than they did. Her case is that a work colleague would not do, because she was raising concerns that were uncomfortable for her employer to hear. The claimant was worried that a work colleague might face reprisals if he or she were drawn into the discussion. She did not believe that the National Association of Probation Officers were acting in her interests.

    30.2. The second disadvantage was, the clamant contends, compared to people without colitis. In particular, in order to explain her grievance, she needed to describe the effects of her colitis, including rectal bleeding. She found it embarrassing to mention such details and did not wish to share them with a work colleague.

    30.3. *During final submissions, we allowed the claimant to allege a third disadvantage, namely that she needed a companion more than people without colitis. Having a condition aggravated by stress meant that she needed to make the experience of the meeting as stress-free as possible, whereas a person without colitis did not have that need.*

31. As an adjustment, she should have been allowed to bring a family member to the meeting.

32. The tribunal had to determine the following issues:

    32.1. Whether the claimant had a disability by reason of her colitis;

    32.2. Whether PCP4 put the claimant at either of the alleged disadvantages in a way that was more than minor or trivial;

    32.3. Whether the respondent could prove that it neither knew nor could reasonably be expected to know that the claimant was placed at that disadvantage; and

    32.4. Whether it was reasonable for the respondent to have to permit a family member to attend.

33. The claimant also alleges that Ms McKevitt had a practice (PCP5) of making typed minutes based on notes taken at the time of the meeting. As an adjustment, she should, the claimant says, have been given "the facility to record the grievance hearing".

34. The tribunal had to decide, first, whether PCP5 put the claimant at substantial disadvantage in comparison with persons who were not disabled. It was not clear what the alleged disadvantage was.

35. The remaining issues for the tribunal were:

    35.1. Whether the respondent could prove that it neither knew nor could reasonably be expected to know that the claimant was placed at that disadvantage; and

35.2. Whether it was reasonable for the respondent to have to permit the claimant to audio-record the meeting; and

35.3. Whether the respondent in fact did permit the claimant to audio-record the meeting subject to the requirement that all parties received a copy of the transcript.

*36. On Day 7 of the hearing, the claimant made an application to amend the adjustments claim based on PCP4 and PCP5 to refer to meetings on 15 May 2014, 19 May 2014, 5 June 2014 and 20 June 2014. We accordingly had to determine, in relation to that part of the claim:*

*36.1. Whether to allow the amendment; and*

*36.2. If the amendment were to be allowed, the same issues as for the 2 July 2014 meeting.*

*37. The seventh component of the adjustments claim was based on a practice (PCP6) of allocating in excess of 60 new cases to the claimant over an 11-week period. This practice put the claimant to a substantial disadvantage compared to colleagues who were not disabled, in that:*

*37.1. The claimant needed a support worker for her visual impairment. She was not yet in place at the time the claimant's caseload was re-introduced and thereafter needed a period of training to become fully effective; and*

*37.2. The claimant was less able than her colleagues without colitis to cope with stress.*

*38. As an adjustment, the claimant should have been allocated fewer new cases.*

*39. The issues for the tribunal to determine were:*

*39.1. Whether the alleged failure to make this adjustment was part of an act extending over a period;*

*39.2. If not, whether it would be just and equitable to extend the time limit;*

*39.3. Whether the claimant was disabled by reason of her colitis;*

*39.4. Whether PCP6 put the claimant to the alleged disadvantages;*

*39.5. Whether the respondent knew or could reasonably have been expected to know about the alleged disadvantages; and*

*39.6. Whether it was reasonable for the respondent to have to reduce the number of new cases allocated to the claimant.*

<u>Discrimination arising from disability</u>

40. The 1 February 2016 case management order records that the claimant had not mentioned in any detail the complaint of discrimination arising from disability. On 18 April 2016 the claimant was given "one last opportunity to clarify her claims", which were then set out as direct discrimination. At no point did the claimant seek to formulate her claim in terms of discrimination arising from disability. At the time of our discussion on Day 8, there did not appear to be any intelligible complaint upon which we could adjudicate.

*41. The discussion prompted the claimant to seek to amend her claim to introduce one complaint under this heading. It is formulated as follows. In late 2013 the respondent sent the claimant written information to her home address about the*

*Transforming Rehabilitation programme. In December 2014 they sent her written information to her private e-mail address about the preferred bidder for the CRC. The reason why the respondent chose this format and method of communication was to exploit the claimant's difficulties in accessing written information to stop her making an informed choice about joining the National Probation Service. This reason arose at least partly in consequence of her visual impairment.*

42. *The issues were stark:*

    42.1. *Should the amendment be allowed?*

    42.2. *Was the treatment part of an act extending over a period?*

    42.3. *Would it be just and equitable to extend time?*

    42.4. *Did the respondent send the written information for that reason?*

    42.5. *Did the claimant in fact have difficulty in processing written information?*

43. *The respondent did not seek to argue that exploiting the claimant's difficulties in this way would be a proportionate means of achieving a legitimate aim.*

<u>Protected disclosure detriment</u>

44. As a result of paragraph 2 of the judgment of Employment Judge Whittaker, the claimant is permitted to rely on only two protected disclosures. These were referred to as the claimant's "grievances" submitted in October 2013 and May 2014. This must be a reference to the claimant's grievance dated 9 October 2013 and her grievance appeal statement dated 16 May 2014.

45. It was common ground that in the 9 October 2014 grievance the claimant disclosed information about the difficulty she experienced in using assistive technology in handling cases following the introduction of OaSys-R.

46. During the course of the evidence, it became clear that the relevant alleged information in the 16 May 2014 document was:

    46.1. that Ms Kuyateh had bullied her making it more difficult for the claimant to assess risk;

    46.2. that Ms Kuyateh had mismanaged cases resulting in cases not being properly escalated through MAPPA;

    46.3. that Mr Metherell had taken inadequate action to prevent Ms Kuyateh behaving in that way;

    46.4. that the claimant had been allocated too many cases with incorrect or incomplete risk assessments.

47. The claimant was given permission to proceed with one allegation of detriment. That detriment was that, as a result of her protected disclosures, "her allegations of risk were ignored".

48. During the course of the hearing, the claimant was asked for the names of the individuals who, on her case, had deliberately ignored her concerns. She gave a complete list of these individuals as follows:

    48.1. Kerry McKevitt;

    48.2. Carla Beigan;

48.3. Rosie Goodwin;

48.4. Paul Gotts;

48.5. David Metherell; and

48.6. Ann Pakula

49. We noted the period of time during which Mr Metherell and Ms Pakula allegedly ignored the claimant's risk concerns. This period predated the first of the protected disclosures on which the claimant was permitted to rely.

50. The issues were:

50.1. Did the claimant disclose the alleged information?

50.2. Did the claimant believe that that information tended to show that a criminal offence was likely to be committed or that the health and safety of the claimant, colleagues and members of the public was likely to be put in danger *or that any of these matters had been deliberately concealed*?

50.3. Was it reasonable for the claimant to hold that belief?

50.4. Did the claimant believe that she was making the disclosures in the public interest?

50.5. Was that belief reasonable?

50.6. If the disclosures were protected, did any of the named individuals deliberately ignore the risk?

50.7. If so, was that decision influenced materially by the fact that the claimant had brought one or other of those grievances?

<u>Unfair constructive dismissal</u>

51. The essential issue here was whether the claimant had been constructively dismissed. There was no doubt that she had resigned. The claimant needed, first, to prove a fundamental breach of her contract. She relied on the implied term of trust and confidence. The conduct that was alleged to have undermined the trust and confidence relationship was set out in Allegations 47 to 51. We summarise it as:

51.1. The conduct listed above;

51.2. Engineering the claimant's removal from the National Probation Service by misleading her about Purple Futures being the preferred bidder for the CRC;

51.3. The murder of a teenager in January 2015;

51.4. The grievance failing to address matters other than the bullying;

51.5. The prospect of returning to work in an organisation that had Ms Goodwin as its Assistant Chief Executive; and

51.6. A "last straw incident" on 25 February 2015, at which Ms Goodwin allegedly made a disparaging remark.

52. We had to decide:

52.1. Whether the respondent conducted itself as alleged;

52.2. Whether that conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence;

52.3. Whether the respondent had reasonable and proper cause;

52.4. Whether the claimant resigned in response to the breach; and

52.5. Whether, in the meantime, the claimant affirmed the contract. These last two questions would become relevant, in particular, if the tribunal found that the "last straw" incident on 25 February 2015 was incapable of adding cumulatively to the breakdown of trust and confidence.

**Evidence**

53. We considered documents in an agreed bundle running to 6 volumes (excluding witness statements). In keeping with the warning we gave the parties on the first day of the hearing, we did not read every document in the bundle. Rather, we concentrated on the documents to which the parties drew our attention in witness statements and orally during the course of the hearing. Where the witness statements referred to a document and we chose not to read it in full, we informed the parties of that fact and gave them the opportunity to take us to the most relevant parts of that document.

54. The claimant gave oral evidence on her own behalf. The respondent called Mr Gotts, Mrs Churchill, Miss Monteith, Miss Watkin, Mr Quick, Mrs Evans, Mrs Stott, Mrs McKevitt and Ms Goodwin. All witnesses confirmed the truth of their written statements and answered questions.

55. Our impression was that all of the witnesses, including the claimant, were doing their best to answer questions honestly and truthfully. That did not, however, mean that we accepted all that each witness said. Where, for example, there was a dispute as to what was said in any particular meeting, we found the evidence of the respondent's witnesses to be more reliable than that of the claimant. We did not for a moment doubt the claimant's honesty, but the reliability of her evidence was dented by a number of factors. One was her assertion that she had disclosures of information in her document dated 16 May 2014. Try as we might, we could not find any such disclosures in that document. A second problem was that she alleged that things had been said during meetings that were openly audio-recorded and transcribed; the alleged remarks were not in the transcript. She alleged that the transcript had been selectively edited, but the way in which she contended that this had been carried out did not, in our view, fit very easily with the undisputed parts of the conversation. A third was that the claimant made what was, in our view, a rather far-fetched allegation against Mr Gotts, namely that he was wearing an ear-piece during a meeting and receiving instructions remotely from Human Resources managers outside the room.

56. There were some factual issues that were hard to resolve because the evidence in relation to them was vague. One example relates to the events of March and April 2014. We had a vivid picture of cases passing between the respondent and the National Probation Service in batches and that it was a difficult time for everybody. What we found much more difficult was to find at what point in time, if any, the claimant was overworked, or when, if at all, Ms Monteith knew about that state of affairs. It was hard to find whether Ms Monteith should have done more to secure additional resource to take the claimant's cases from her and, if so, at what point. Another, linked, area of factual dispute was whether Ms Kuyateh

compounded the problem by allocating work unfairly. Evidential difficulties included the following:

56.1. The respondent relied on a computerised workload management tool which appeared to indicate that the claimant was handling only 40% of her expected workload. This did not fit with anybody's impression of the amount of work that the claimant was being required to do. It appeared to be based on the number of cases that the claimant had at a particular time, rather than the work that was involved in handling them. In particular, it did not appear to take account of the substantial additional work caused by a high turnover of cases.

56.2. The claimant asked for permission – at a very late stage of the hearing – to rely on documentary evidence that was not in the bundle. This might have indicated the number of cases that the claimant had at a particular time, but would not have shown how much work was required to be done on them. In any event, because of the disadvantage to the respondent, we refused permission for the claimant to rely on them.

56.3. The claimant's evidence in relation to these matters appeared inconsistent to us: each time she referred to a sequence of new cases allocated to her and being taken away, the numbers were different.

56.4. Miss Monteith's evidence was vague and lacking in detail. This was not surprising. Not only were the events nearly 3 years ago, but, in the meantime, Ms Monteith had gone on maternity leave and was still on maternity leave at the time of giving her evidence.

56.5. The responsibility for allocating additional resources lay with Ms Goodwin, but the claimant did not ask her any questions about it.

57. Another evidential question for us was what to make of the absence of Ms Kuyateh. Her alleged conduct was at the heart of many of the allegations of harassment, yet the respondent had not called her as a witness. Having heard all the evidence, we decided it would not be appropriate to draw any inference adverse to the respondent from Ms Kuyateh's absence. Ms Kuyateh does not work for the respondent and it appeared to us that she would be unlikely to have attended voluntarily.

58. A closely related issue related to the absence of any statement or interview record of any kind setting out Ms Kuyateh's version of events. The respondent made substantial efforts to secure Ms Kuyateh's cooperation at the time of the claimant's grievance investigation. By that time, Ms Kuyateh already worked for a different employer, namely the National Probation Service. She could not be required to cooperate with the respondent and did not do so. We thought that the position would have been markedly different if the claimant had raised her grievance, or presented her tribunal claim, at an earlier stage. Ms Kuyateh would still have been employed by the Trust which, at that time, also employed the claimant. We would have been much more likely to have Ms Kuyateh's side of the story.

**Facts**

59. The respondent is a community rehabilitation company ("CRC"). It owes its existence to what, in essence, was the part-privatisation of the Probation Service in 2014. It provides services in the sector of justice, probation and rehabilitation

of offenders. It is owned by Purple Futures Limited, a joint venture company, of which the biggest shareholder is commercial company with a stake in numerous CRCs around the country.

60. As is well known, Probation Officers work with offenders. Amongst many other things, they assess the risk of reoffending and write reports for courts within the criminal justice system. Some reports, known as Short Delivery Reports, require tight turnaround times imposed by the court. Reports are also required to be prepared quickly when an offender is in custody.

61. The Probation Service recognises different categories of risk. For our purposes, the critical distinction was between Tier 4 cases, on the one hand, and Tiers 1 to 3 on the other.

62. The respondent operates under a contract with the National Offender Management Service ("NOMS"), an agency of the Ministry of Justice. Broadly speaking, under the terms of the contract, the respondent manages "low risk" offenders within Tiers 1 to 3. The higher-risk (Tier 4) offenders are managed by the National Probation Service.

63. Prior to 2014, management of both low-risk and high-risk offenders was the responsibility of Merseyside Probation Trust ("the Trust"). That organisation, founded in April 2008, replaced the Merseyside Area of the National Probation Service.

64. The claimant began employment with the National Probation Service from 24 August 2001. She became a fully-qualified Probation Officer in 2003, from which time she was based in the St Helens Probation Office. This remained her base until she left. Her employment transferred to the Trust in 2008 and then to the respondent on 1 June 2014. It terminated on 2 April 2015 on expiry of notice given by her on 3 March 2015.

65. The claimant is registered blind. Throughout her employment, she had a long-term visual impairment affecting, in particular, her central vision. A number of adjustments were in place to enable her to carry out her work. These included a support worker for 30 hours per week, funded by Access to Work and provided by an employment agency. In 2013 her support worker was a woman called Georgia and her agency was Adecco. They also included a large computer screen, coloured keyboard and assistive technology ("AT"). At the time that matters for this claim, the claimant's main AT software was called ZoomText. It enabled the claimant to magnify and navigate the image on her computer screen. Another adjustment was a reduction of 2% from her expected workload.

66. The claimant was good at her job. During her career she was invited to the BQF Awards in London as a recognition of her achievement.

67. In December 2010 the Trust implemented a written Grievance Procedure, which was updated from time to time and continued by the respondent. Amongst its rubric was the following:

> "1.5 Matters appropriately dealt with under this procedure include any complaints relating to employee work….Matters which will not be dealt with under this procedure are…whistle blowing, for which separate procedures apply.

6.1 The employee may bring a companion to any meetings held under this procedure. The companion must be either a Trade Union Representative or a work colleague…

9.1 The Company operates a separate whistle blowing procedure to enable employees to report illegal activities, wrongdoing or malpractice within the organisation. Employees should seek advice from the Human Resources Department if they are unsure of which procedure to refer to."

68. On 1 August 2013, the Trust introduced an Attendance Management Policy. It was implemented following consultation with the National Association of Probation Officers (NAPO) and the Trust's Disability Advisory Group (DAG). It included the following provisions:

"3.3 For the avoidance of doubt both normal sickness absence and disability related absence will be considered together when the Company is assessing absence against the triggers in this procedure.

4.7 Contact during sickness absence is a two way process. Individuals should expect to be contacted regularly during their absence by their line manager who will want to enquire after their health and be advised, if possible, as to the expected return date. It is also the individual's responsibility to ensure that they make contact with their line manager on a regular basis during their absence.

8.1 If an individual is absent on sick leave they should expect to be contacted by their line manager in order to discuss their wellbeing, expected length of continued absence from work and…. Such contact is intended to provide reassurance and will be kept to a reasonable minimum…

12.2 Whilst each case of sickness absence should be considered individually, the following triggers will normally lead to a Stage 1 First Attendance Review Meeting: (a) Sickness absence of 9 or more working days in any rolling 12 month period;…

16.2 The purpose of a first attendance review meeting may include…(h) All cases will be reviewed on their own merit, however a Stage One Attendance Advisory Notice … will normally be issued…

69. With the coming into force of the Criminal Justice Act 2003, the Probation Service worked in partnership with other agencies such as the police to manage offenders who were considered as presenting a particular danger to the public. These arrangements were known as Multi-Agency Public Protection Arrangements, or "MAPPA" for short.

70. Over the years, the claimant had a number of line managers. From November 2009 to December 2012, her line manager was Ms Jeanette Kuyateh, Senior Probation Officer. Ms Karen Rooney took over as line manager from December 2012 to March 2013, when that responsibility passed to Mrs Gail Churchill (then a Senior Probation Officer). From January 2014 to March 2014, Ms Gail Andow was the claimant's line manager, followed by Miss Tracey Monteith in March and

April 2014. From April 2014 onwards the claimant was absent on sick leave until her employment terminated.

71. In 2008 the claimant raised a grievance about staff shortages, excessive case load and disproportionate allocation of work to her. It was heard by Ms Anne Pakula who at that time was Head of Operations. The grievance was not upheld.

72. In 2011, the claimant was concerned about 4 cases which, in her view, should have been escalated through MAPPA. Ms Kuyateh did not consider MAPPA to be necessary. The claimant approached Mr David Metherell, then Assistant Chief Officer, twice requesting a meeting to review these and other cases. Mr Metherell subsequently confirmed that the claimant's risk management decisions were correct. The claimant again raised concerns to Mr Metherell about Ms Kuyateh by e-mail on 10 July 2012. At or around this time, the claimant noticed that e-mails sent by her were missing from her e-mail account. These e-mails had highlighted issues of risk. The claimant believed that they had been deleted by someone else. She made enquiries with the IT department and discovered that only Mr Metherell had authority to delete e-mails from the server.

73. A mediation meeting took place between the claimant and Ms Kuyateh, facilitated by Mr Metherell. From December 2012, it was decided that the claimant would no longer be line managed by Ms Kuyateh, but by Ms Rooney instead. Ms Kuyateh still had a degree of operational management responsibility for the St Helens Probation Officers, including the claimant. In particular, Ms Kuyateh would decide on the allocation of new cases. With Ms Rooney in place, relations between the claimant and Ms Kuyateh improved.

74. The Trust used two main computer systems, both supplied and supported centrally by NOMS. One was called N-Delius, which is not the subject of this claim. The other, which features prominently, was a risk management tool called OASys.

75. The claimant was familiar with OASys and managed to operate it effectively using ZoomText. She did, however, frequently telephone the Trust's IT helpdesk to report IT problems. Many of these (such as password changes, or being locked out of the system) did not relate at all to the use of AT at all. Others were indirectly linked: her laptop did not have enough memory capacity to support ZoomText fully.

76. In about 2011, NOMS began the process of replacing OASys with a new system called OASys-R. It was completely different from OASys, both in its visual layout and in its method of operation. The new system was to be delivered by Steria, an IT contracting company. An AT consultancy company known as Astec was also engaged with a view to ensuring that OASys-R was compatible with AT products including ZoomText. It was envisaged that there would be a brief pilot followed by a "Go Live" date in April 2013. The pilot would be somewhat artificial, since it would not be handling "live" cases.

77. Mrs Watkin was the Trust's Project and ICT Support Lead. She took a keen interest in AT and the impact of OASys-R.

78. In readiness for the change, the Trust's ICT Change Management Board held a series of meetings in 2012 and 2013. At a meeting on 9 August 2012, the Board noted that a 3-week pilot had been planned to start in January 2013. The meeting minutes recorded the "need to consider access for AT users". A further meeting took place on 15 October 2012. There was a further discussion of

compatibility between OASys-R and, in particular, the concern that Steria could not test the combination of software use.

79. On 26 October 2012, Mr Geoff Harris of NOMS sent out a nationwide appeal by e-mail for volunteers to participate in OASys-R testing for AT users. The venue was to be in Hemel Hempstead. Mrs Watkin forwarded the e-mail to the Trust's AT users including the claimant. She did not reply.

80. On 11 December 2012, NOMS sent an "OASys-R Implementation Workstream" document to each Probation Trust. The document advised, in bold type:

    **"NB. You need to note that the OASys deployment date is national. The new application will go live everywhere on the same day and the current version will vanish from your screens. This will happen from central approval and will not be delayed if the local work we are asking you to now do is incomplete."**

81. On 30 January 2013, NOMS gave a presentation in anticipation of the Go Live date. It included feedback from AT users. One ZoomText user was particularly enthusiastic and reported no compatibility problems.

82. A visually-impaired probation officer based at Knowsley participated in the pilot. She used a different form of AT from the claimant. Her feedback was reported at a meeting on 25 February 2013. Subject to a "couple of problems", this officer reported that OASys-R was "much more compliant".

83. At a Trust meeting on 18 March 2013, it was noted that there had "been a request for training for some users now". A representative from the Trust's IT provider, Laurus, suggested that she "could provide these users with the why and how it looks now in terms of the assessment and this would be followed up with new user training following OASys-R implementation."

84. The reason why such limited training could be offered by the Trust prior to Go Live was that NOMS did not provide funding for local training and Steria did not make the system available for the Probation Trusts to use. Steria did offer training at Hemel Hempstead from time to time, usually at short notice. Such offers were cascaded by the Trust to its employees. The claimant, amongst others, would have liked to attend training, but she found travel to Hemel Hempstead at short notice to be incompatible with her case load. At no point did anybody at the Trust offer to reduce the claimant's case load so that she could attend training prior to the Go Live date. Few, if any, other Trust employees attended for training.

85. Some online generic e-learning about OASys-R was made available to the Trust. Staff were notified. We were unable to make a finding as to whether the claimant tried to get access to the e-learning or not prior to Go Live. It is academic: when, later, the claimant attempted to gain access to the e-learning on her laptop, the e-learning would not load.

86. From March 2013, Mrs Churchill took over as the claimant's line manager. Ms Kuyateh continued to allocate new cases and Mrs Churchill was responsible for transfers of cases between Probation Officers.

87. OASys-R was implemented on or around 3 April 2013. The Trust set up a help desk and had "floor walkers" available to help members of staff. Initially, they could only provide limited assistance because the help desk operators had not been trained themselves. Everybody was "learning on the hoof".

88. From 15 to 21 April 2013, the claimant was unwell and did not attend work. As her reason, she gave "Nausea/vomiting/stomach upset/diarrhoea".

89. Owing to her ill-health absence, the claimant first started using OASys-R on 22 April 2013. Mrs Watkin set up a large monitor for the claimant in a quiet room so that she could "take herself away and practice and familiarise herself" for a week after the initial rollout. The claimant found it difficult to take advantage of these facilities, because of her case load. There was no attempt to reduce the number of cases allocated to her to alleviate this problem. She found the new system very difficult to use. On or about 23 April 2013, she e-mailed Mrs Watkin in the following terms:

    "I have now worked on OASys-R for 2 days, and I am absolutely devastated at the impact of this software [I] have left work for the last 2 days with a blinding headache…possibly linked to the resolution on the document. The navigation is making me feel physically ill, and it took me over 7 hours to complete a document that would have taken me 2 hours previously."

90. Also on 23 April 2013, at a 1:1 meeting, the claimant told Mrs Churchill about the problems she was experiencing with the new software, including "Significant concerns re issue of navigation and increased time taken to complete OASys". She reported her workload to be "manageable at present".

91. On 1 May 2013 a Development Day was held at the St Helen's office. It was supposed to be a team-building event, but unfortunately it did not turn out that way. During one session, the claimant suggested that Ms Kuyateh should "scribe" (take notes) for the group. Ms Kuyateh took umbrage and refused. It is the claimant's case that Ms Kuyateh said to the claimant, "I fucking won't scribe, you can fucking scribe". According to the claimant these words shocked her, not just because of the strength of the language, but also because Ms Kuyateh should have known that it would be difficult for the claimant to take notes because of her visual impairment. The claimant contends that, as she was leaving, Ms Kuyateh came up behind her and physically intimidated her, making her think Ms Kuyateh was going to hit her.

92. We found the claimant's evidence about this incident to be honestly given and capable of belief. The altercation may well have happened as she described it. We did not, however, find it easy to make any positive finding of fact about what happened. Where a confrontation of this kind happens in the workplace, there is very rarely just one side of the story. A subsequent investigation drew different accounts from different witnesses present in the room (from whom we have not heard). One witness recalled essentially an "argument" with the claimant leaning down over Ms Kuyateh. Another described "raised voices on both sides". Ms Kuyateh's version may be completely different. We do not know because we have not heard it.

93. Immediately following the Development Day incident, the claimant went to see Mr Nick Kayani, who at that time was an Assistant Chief Officer and line manager to both Ms Kuyateh and Mrs Churchill. She complained about Ms Kuyateh's behaviour. It is not entirely clear what Mr Kayani said in response. Broadly speaking, he advised the claimant to go home and encouraged the others to remain and continue with the Development Day.

94. The following day, 2 May 2013, Mrs Churchill and the claimant discussed the previous day's events. The claimant told Mrs Churchill that she had "consulted

with the union and her GP" and was thinking of submitting a grievance. Mrs Churchill offered referral to Occupational Health and to the Employee Assistance Programme, but the claimant declined, stating that she would continue her conversations with her NAPO representative.

95. Following this incident, both the claimant and Ms Kuyateh continued to be based at the St Helen's office. Ms Kuyateh was not suspended or transferred. In our view, the fact that this did not happen had nothing to do with the claimant's disability. It would be unreasonable to expect the respondent to move Ms Kuyateh without an investigation. As to whether an investigation should take place or not, the respondent reasonably left it to the claimant to decide whether to bring a complaint. At no time in 2013 did the claimant raise a grievance about Ms Kuyateh or ask for Ms Kuyateh to be transferred out of St Helen's.

96. From May to July 2013, the claimant felt overworked. A contributing factor was her difficulty in operating OASys-R. We have looked for any evidence that it was also caused by Ms Kuyateh unfairly allocating cases. We could not find such evidence. The respondent's workload management tool, which only serves as a guide, suggests that the claimant was working to 100% of her expected case load, once the 2% reduction was taken into account. We do not have corresponding figures for the remainder of the St Helen's team. Mr Kayani's comment to the subsequent grievance investigation was that the claimant was given the same case load as her colleagues. It was hard to test that assertion because Mr Kayani was not a witness and now works for a different organisation from the respondent. We also find that the absence of Ms Kuyateh as a witness has made it harder for us to find how she allocated work.

97. Whilst the claimant continued to report difficulties in using OASys-R in May 2013, she did not specifically complain of having too much work until July 2013.

98. On 9 May 2013, Mrs Watkin e-mailed Mrs Churchill. Referring to claimant's difficulties in using OASys-R and ZoomText, Mrs Watkin commented (with original capitals), "These issues are having an impact on [the claimant's] work, health and wellbeing." Later that day, Mrs Watkin e-mailed again, stating that she was "seriously concerned for [the claimant's] welfare". The main cause of the problem was, as described by Mrs Watkin, that the claimant had "gone from a system which she has learned to 'feel her way around' … to a system where she has NO CONCEPT of HOW IT LOOKS and where things are on the screen. This, for someone who at any one time only gets to see a fraction of what we can see … on the screen is a complete nightmare. I would liken it to being caught in a 'snowdrift without a compass'".

99. Pausing there, we accept Mrs Watkin's analysis, both in this e-mail and in her oral evidence. The problem for the claimant was not that OASys-R was incompatible with ZoomText. The contemporaneous suggests that there were no compatibility problems. What caused the claimant such difficulty was the process of familiarising herself with a completely new system without prior training and where she could not see the whole of the screen.

100. On 12 May 2013, Mr Mike Clews from Astec met with the claimant on site to discuss ZoomText and OASys-R. He reported that the claimant would benefit from training. This recommendation was not followed up until Mrs Churchill met with Ms Goodwin (then Assistant Chief Officer) on 15 June 2015.

101. Mrs Watkin arranged for the claimant and other AT users attend a meeting on 16 May 2013 with representatives from the Ministry of Justice and Steria to describe the difficulties she was experiencing. She explained her problems but was unable to demonstrate because, ironically, there was a technical error and the claimant's OASys-R session could not be opened at all. Another problem that the claimant shared with AT users was delay in logging on and starting work. Though no less frustrating to the individual, this problem was in fact unrelated to OASys-R, and was a symptom of the Trust's laptops having insufficient memory to support AT software. As a result of the meeting, Mr Harris was asked by the NOMS Senior Management Team to undertake a review of AT.

102. By 3 July 2013 the claimant was still struggling to operate OASys-R. She found Short Delivery Reports (SDRs) a particular problem because of the tight timescales and perceived that Ms Kuyateh was unfairly allocating a disproportionate number to her. She had had to cancel annual leave simply to get her reports written. On 3 July 2013, Mrs Churchill met with the claimant, who updated her. They discussed adjustments. Following the meeting, Mrs Churchill e-mailed Mr Kayani, proposing the following measures to be tried over the next 4 weeks:

102.1. an increase in the workload reduction from 2% to 4%;

102.2. restriction of SDRs to one at a time;

102.3. no new case allocations for 4 weeks;

102.4. consideration that the claimant use the quiet room when using OASys-R;

102.5. clarification of the role of the support worker;

102.6. referral to Occupational Health;

103. On 4 July 2013 Mrs Churchill e-mailed Katherine Lea, Occupational Health Advisor, enquiring about support that could be offered in connection with the transition to OASys-R.

104. On or about 12 July 2013, Mrs Watkin e-mailed Mr Clews of Astec, asking whether the claimant would benefit from further sessions with Astec or whether she needed further assistance from someone within the Trust. Mr Clews replied that the claimant "uses ZoomText as well as anyone I've seen" and that the problem was "more of an OASys training issue than AT". Mrs Watkin forwarded the thread to Mrs Churchill asking for advice on how the claimant's needs could be met. The e-mail was circulated to Ms Anne-Marie Crowley, PQF & Training Co-ordinator, who arranged for someone from Laurus to contact the claimant.

105. Unfortunately, the training did not take place. The claimant began a period of sickness absence from 16 July 2013 to 18 August 2013. Her computerised medical certificate stated "Gastro-intestinal nausea/vomiting/stomach upset/diarrhoea". She supplied a GP fit note which stated, "vomiting under investigation".

106. On 17 July 2013, Mrs Churchill telephoned the claimant. They discussed her health. The clamant said that she "was experiencing breathing difficulties", she "felt that her throat was tightening" and she "required investigation in relation to vomiting". Her earliest return to work date was 18 August 2013. She stated that her symptoms were unrelated to her AT difficulties.

107. Mrs Churchill telephoned the claimant again on 22 July 2013. The claimant reported that she had vomited "only" three times over the weekend and was feeling better.

108. By letter dated 23 July 2013 the claimant was invited to an Attendance Review Meeting ("ARM") to take place on 15 August 2013. The next day, Mrs Churchill telephoned the claimant to check on her condition. The claimant said that she had been to hospital for a biopsy and was still in pain. The claimant then obtained a fit note with a return to work date of 5 August 2013. She agreed to take annual leave between 5 and 16 August 2013. She did not attend the ARM on 15 August 2013. When telephoned, she said that she had not received the letter.

109. The claimant returned to work on 19 August 2013. By this time, her Tier 4 cases had been re-allocated. At a return to work meeting that day, she stated that she was fit to return to work, although she was still awaiting test results in relation to her vomiting. She did not, at that time, need any further support over and above her usual adjustments.

110. Her return to work was short-lived. On 21 August 2013, she began a long period of absence, from which she did not return until 19 January 2014.

111. The claimant telephoned Mrs Churchill on 21 August 2013 saying that she had been admitted to hospital with stomach pain and vomiting. Mrs Churchill telephoned the claimant the following day. The claimant told her that she was scheduled to return to hospital for an "investigative stomach procedure" and that she was on anti-sickness medication and pain relief.

112. Early during her absence, the claimant provided a GP fit note stating "lower abdominal pain, likely colitis".

113. Mrs Churchill telephoned again on 29 August 2013. By this time the claimant had had further biopsies taken and was again waiting for results.

114. An ARM took place on 4 September 2013. The claimant did not attend, citing ill health. It was agreed that Ms Lea would make contact with the claimant and that Mrs Churchill would maintain contact.

115. The claimant telephoned Mrs Churchill on 5 September 2013 essentially to advise that there had been no change. Mrs Churchill telephoned the claimant on 12 September 2013 and was told that a deeper biopsy was required. In a further telephone conversation on 16 September 2013, the claimant indicated that she would send a medical certificate declaring her unfit for work until the end of the month. They agreed on further telephone contact at the end of the week.

116. Some time between 16 and 23 September 2013, the claimant spoke with Ms Lea. They discussed the potential benefit of a longer term medical certificate in assisting with forward planning.

117. A further ARM was held on 23 September 2013. Present were Mrs Churchill, Mr Kayani and Ms Lea. The claimant did not attend, but was represented by Mr Barry O'Doherty of NAPO. (The claimant denies that Mr O'Doherty was "representing" her, but we took this to be a criticism of the quality of his representation and her suspicion that he did not have her interests at heart. So far as the respondent was concerned, Mr O'Doherty appeared to be the claimant's representative). Ms Lea reported that further investigation was required under general anaesthetic and "severity of symptoms would indicate that

surgery is likely". Mr O'Doherty added that a longer term medical certificate would be "likely to assist [the claimant] and reduce the required frequency of contact from team manager". By this time the claimant had been absent for 20 consecutive days and had well exceeded the trigger point of 9 days' absence over a 12-month period. At the conclusion of the meeting, Mr Kayani decided to issue a Stage One Attendance Advisory Notice. This was sent to the claimant by letter dated 30 September 2013.

118. Following the issue of the Stage One Notice, the claimant obtained longer-duration fit notes and Mrs Churchill reduced the frequency of her contact to monthly.

119. The claimant was distressed when she received the notice. It caused her a further flare-up of abdominal pain and diarrhoea. She appealed by letter dated 5 October 2013, chiefly on the grounds that she was still undergoing investigation and treatment and that the notice just added to the pressure she had been experiencing.

120. During the period August to December 2013, she suffered a number of flare-ups when her symptoms were particularly acute. During these times, she could only take liquid food, she felt unable to leave the house, even to walk the dog, and she felt tired during the day because she could not sleep at night.

121. On 9 October 2013, the claimant e-mailed Human Resources with a formal grievance. Her headline complaints were:

121.1. the Trust had discriminated against her on the grounds of her disability; and

121.2. "Health and Safety was breached in that the Trust failed in their duty of care towards me".

122. The factual basis of the grievance was the introduction of IT systems (OASys-R) that prevented her from undertaking her duties to her previous ability, without "preparation, training or adjustment made to accommodate the impact". Her concerns had gone unaddressed and, as a result, she had "started to become physically unwell in the workplace".

123. The grievance did not mention the impact of what had occurred on anybody else but herself and did not refer to anybody's interests but her own.

124. Pausing there, we are satisfied that the claimant reasonably believed that this e-mail tended to show that the Trust had breached its legal obligations towards her and had put her health and safety in danger. She did not think that this e-mail tended to show that a criminal offence had been committed or would be committed, or that any wrongdoing had been, was being, or was likely to be concealed. We do not think the claimant believed at the time that she was raising her grievance in the public interest. Our finding to this effect is not based on the claimant's choice of procedure. We believe the claimant when she says that she did not, at this time, realise that there was a separate Whistleblowing Policy. Rather, we have made our finding based on the content of the e-mail itself and on a comment the claimant made during her subsequent grievance meeting. She said that the "catalyst" for initiating the grievance was the issuing of the Stage One Notice. The Notice affected her and her alone.

125. The grievance was acknowledged by letter dated 21 October 2013. The letter offered the claimant the choice of a face-to-face meeting or a series of written

questions. The claimant expressed her preference for written questions. Mr Metherell decided to appoint Ms Lorraine Morris, an independent consultant, to investigate the grievance.

126. On 15 November 2013, Mr Rajaganeshan, the claimant's consultant colorectal surgeon, wrote a referral letter to Dr Mark Fox, consultant gastroenterologist. The letter described how the claimant had "been having severe problems with abdominal bloating, nausea and alternating diarrhoea and constipation. The symptoms were not settling despite a change in her diet.

127. Whilst the claimant was absent on sick leave, probation services were going through a process of radical change, dictated by central government. The programme, called "Transforming Rehabilitation", involved abolishing local Probation Trusts. In their place, a CRC for each local area would be created to work alongside the National Probation Service. Probation Officers would transfer to either the CRC or the National Probation Service.

128. Mrs Churchill telephoned the claimant on 20 November 2013 to discuss both her health and the Transforming Rehabilitation programme. The claimant reported that she was feeling "much improved" but that she had been advised that she would need life-long medication. Shortly afterwards, she submitted another month-long fit note stating "medical symptoms under investigation".

129. In the meantime, Ms Morris began her grievance investigation. On 21 November 2013, she interviewed Mrs Watkin and Ms Lea. She also introduced herself to the claimant and enquired if she would be able to attend a meeting. This was later arranged for 16 December 2013. On 26 November 2013 she interviewed Mrs Churchill and Mr Kayani. She later sent a questionnaire to Mr Bob Steele. His reply included a statement that there had been no training before the introduction of OASys-R apart from general online e-learning. Had the Trust had control over the introduction of the new system, they would have phased it in. They would have targeted training appropriately. Ms Morris also sent an e-mailed query to Ms Rooney, to which she received a reply on 4 February 2014.

130. On 27 November 2013, Mrs Paula Evans, Human Resources Officer, wrote to the claimant to inform her that Georgia, the support worker, no longer worked for the Trust. The letter encouraged the claimant to contact Access to Work directly to arrange a replacement ready for her return to work.

131. On 3 December 2013, Dr Chandy, consultant gastroenterologist, wrote to the claimant's general practitioner. The letter described the claimant as having "quite a severe irritable bowel syndrome characterised by recurrent vomiting, abdominal bloating and diarrhoea. The clear trigger to her symtoms is stress, usually at work." The letter recorded that the claimant was taking painkillers and Sertraline, and recommended anti-emetics to be taken in future.

132. The same day, Annette Hennessy, the Trust's Chief Executive, wrote to all staff, including the claimant, who were affected by the forthcoming split in the service. The letter invited staff to express a preference as to which organisation to which they would like to transfer. Although the letter was expressed neutrally, it was common knowledge that the majority of staff wanted to work for the National Probation Service and did not wish to transfer to the CRC. The letter made clear that, if staff expressed a preference for the "under-subscribed organisation" (the CRC), they would be assigned to that organisation in

accordance with her stated preference. Sifting criteria would be used to assign "the remaining staff." It added, "If you do not express your interest by the specified date, your preferences cannot be taken into account and you will be assigned in to an under-subscribed post once the sifting criteria is complete." This last sentence was regrettably ambiguous as to the consequences of failing to express a preference. It could have meant that the defaulting staff member would automatically be assigned to the CRC regardless of their score against the sifting criteria. Or, consistently with the earlier part of the letter, it could have meant that they would be assigned in accordance with the sifting criteria, regardless of their preference, with the result that they might be assigned to the National Probation Service.

133. Enclosed with the letter was the expression of interest form. Under a bold-type heading, the form stated, "If you require any reasonable adjustments to support you during this staff transfer including the process of assignment please detail these below.

134. Mrs Churchill telephoned the claimant on 6 December 2013. The claimant confirmed that she was feeling better. She was informed of forthcoming staff briefings on Transforming Rehabilitation. On 11 December 2013 the claimant telephoned Mrs Churchill to say that she spoken with NAPO and had all the information she needed to complete her expressions of interest form. The claimant did not return the form.

135. Unknown to the Trust at this time, the claimant had her own reasons for not attending any briefing meetings and not returning her expression of interest form. On 10 December 2013, the claimant had been assaulted by a member of her family. Her attacker was prosecuted in the criminal courts.

136. The grievance meeting went ahead on 16 December 2013. Beside making the "catalyst" comment we have referred to above, the claimant went into detail about the introduction of OASys-R. She said "it shouldn't have been rolled out without the training" and "managers should have sat down with AT users to see what support could be offered and acknowledged the impact of this before the implementation."

137. On 19 December 2013, the claimant submitted a further fit note stating that she had "abdominal pains under investigation", but may be fit for a phased return to work.

138. By letter dated 19 December 2013, the claimant was informed that she had been assigned to the CRC. It is not entirely clear to us how the Trust came to this decision. The letter indicated that the reason was that she had not returned her expression of interest form. If that was the reason, it was regrettable. The 3 December 2013 letter did not make clear that this would be the inevitable consequence. It is possible that the claimant may have been unfairly deprived of the opportunity to be pooled for selection. As it turned out, however, criteria-based selection would have had exactly the same result. We accept the unchallenged evidence of Mr Quick that the claimant's scores, based on her pre-absence case load, placed her in the group of employees aligned to the CRC.

139. The 19 December letter informed the claimant of her right to appeal against the assignment. She did not appeal.

140. Mrs Churchill telephone the claimant on 23 December 2013 to discuss arrangements for the claimant's return to work. It was agreed that she would

return from 6 January 2014 on 2 days per week for a 4 week period, to be reviewed. Mrs Churchill agreed to re-arrange the OASys-R training.

141. On 30 December 2013 Mrs Evans reminded the claimant in a large-print letter to make contact with Access to Work to arrange funding for a replacement support worker.

142. The claimant did not return to work on 6 January 2014. Mrs Churchill telephoned her that day and they agreed to have a meeting on 8 January 2014 to discuss reasonable adjustments. That meeting went ahead and the following adjustments were agreed:

142.1. Access to Work assessment

142.2. Recruitment of a support worker

142.3. N-Delius training

142.4. OASys-R training

142.5. Provision of electronic copy Astec training disks

142.6. Phased return over 6 weeks with the claimant increasing her days every two weeks and

142.7. Adjustment of work duties to include training, system navigation, support worker recruitment, updates on policies and procedures.

143. On 9 January 2014 it was agreed that the claimant's first day of work would be 20 January 2014. This was in any event the first opportunity for OASys-R training to take place.

144. The claimant attended an ARM meeting on 15 January 2014. At that time she was taking medication and following a specialist diet. It was agreed that no formal action was necessary. The following day, she obtained a GP fit note confirming her readiness to begin a phased return. Her condition was stated to be "colitis, IBS". Then, on 21 January 2014, the claimant returned to work.

145. Mrs Evans e-mailed the claimant on 22 January 2014 with details (such as job description and person specification) that she would need to give to Adecco to recruit a support worker. She reminded the claimant that "once the number of hours has been confirmed" in Access to Work's funding decision, was for the claimant to "start the ball rolling".

146. On 4 February 2014, Miss Monteith returned to work from maternity leave.

147. Now that the claimant was back at work, the Trust decided to make progress with the claimant's Stage One Notice appeal. Mr Metherell wrote to the claimant on 5 February 2014 asking for an appointment with an occupational health physician before arranging an appeal hearing.

148. Being back at work brought the claimant back into contact with Ms Kuyateh. Though not amongst the allegations of harassment in this claim, we find that, in January 2014, Ms Kuyateh made two comments to which the claimant took offence. One was "Skinny Ninny", a passing reference to the claimant's weight. The claimant had lost weight because of her illness. We do not know enough about the context to know whether the comment was meant to be hurtful. The second comment was one of support for the claimant being the victim of the assault in December 2013. The claimant was shocked by the fact that Ms Kuyateh had learned of it in the first place. By this time a pre-sentence report

had been prepared in respect of the assailant for use in the criminal courts. Because a member of staff was involved, the report was kept in a sealed envelope. Ms Kuyateh was not amongst those members of staff authorised to view it.

149. Some time between 22 January 2014 and 12 February 2014, Access to Work confirmed the funding arrangements. The funded hours were reduced from 30 to 28 hours per week. On 12 and 13 February 2014, in an exchange of e-mails, Mrs Evans agreed with the claimant that she would get in contact with Adecco to confirm pay details for the agency post.

150. At around this time, the claimant discovered that two colleagues, currently employed by the Trust, were interested in the support worker role. It is not clear to us whether those colleagues properly understood what the implications would be. They had no prospect of being employed as a support worker directly by the Trust. Access to Work only provided funding for an agency worker. If a serving employee of the Trust wanted to take on that role, he or she would have had to resign and become an agency worker. On balance, we think it unlikely that either colleague would have wanted to take this step had it been properly explained to them.

151. Mrs Churchill was due to begin a secondment to another organisation in February 2014. Ms Gail Aindow was appointed as the claimant's interim line manager. The evidence as to when, precisely, line management responsibility transferred is a little vague. Of one thing, however, we are satisfied. On 13 February 2014, whatever the formal reporting structure was at that time, Mrs Churchill met with the claimant to discuss adjustments. The claimant said that she would use 14 days' annual leave to complete her phased return, which would finish on 24 February 2014. They agreed that the claimant would "liaise" with the employment agency and "progress recruitment" of a support worker. By that time, the claimant had completed her OASys-R and N-Delius training. She reported that she was "able to navigate both systems with little difficulty". Up to that point, the claimant had been undertaking non-operational activities. They agreed that they would "commence the allocation of cases and reports on a phased basis".

152. The claimant did not object to being given any new cases or ask for the start of the phasing-in period to be delayed until after her support worker had started work.

153. The claimant's support worker, Ms Adele Barlow, started work on 5 March 2014. Prior to her arrival, Ms Barlow was unfamiliar with the probation services and with the Trust's computer systems. At some point – we are not sure when – Ms Barlow received training in the Trust's IT systems. To a large extent, Ms Barlow learned on the job.

154. We do not know when, precisely, the claimant first started to take on new cases. It is likely to have been, at the latest, a few days before 5 March 2014.

155. In early March 2014, Miss Monteith took over from Ms Aindow as the claimant's line manager. Ms Monteith had been back at work from maternity leave for about a month and was herself trying to cope with the changes to the service. Nobody briefed her about the claimant's individual circumstances. In particular, nobody told her that the claimant had a medical condition that was aggravated by stress, or that she had just completed a phased return to work.

156. As we have already discussed, the evidence about the extent of the claimant's workload is unreliable. We know about the number of cases at given points in time, but not how much work they required. The only thing we can be sure of is that the Trust was in a state of flux. The allocation of cases bordered on the chaotic. This was because cases were being passed back and forth between the National Probation Service and the Trust in anticipation of the forthcoming split in the service. Allocation was based on level of risk, which was dynamic, changeable over time, and about which Probation Officers could, and did, reasonably disagree. As the assessment of risk changed in relation to a particular case, so did the organisation that was supposed to be dealing with it.

157. We have no specific evidence about how Ms Kuyateh allocated new cases and to whom. Generally, cases would be passed between organisations and allocated to Probation Officers in batches. This was the same for all Probation Officers including the claimant. We cannot find any evidence of a deliberate attempt to give the claimant an increased workload compared to her colleagues. In coming to this view we have looked at Ms Kuyateh's behaviour generally, including the two comments in January 2014 that offended the claimant. Our opinion is that we could not conclude from those comments that Ms Kuyateh was unfairly distributing work. We also took into account Mr Kayani's evidence to Mrs McKevitt that the claimant's case load was the same as that of her colleagues. For the same reasons as with the 2013 distribution of work, we found it difficult to make findings without hearing from Mr Kayani and Ms Kuyateh. Had the claimant brought her claim before June 2014, it is much more likely that the respondent would have been able to secure their attendance.

158. The ebb and flow of cases involved additional work for everybody. Ms Monteith vividly described how team members – not just the claimant - were "crying under the pressure". But it affected the claimant particularly. This was not because of her visual impairment. One factor was the claimant's cautious approach to risk. She would not take a colleague's risk assessment at face value, but would familiarise herself with the details sufficiently in order to carry out her own assessment.

159. On 27 March 2014 Ms Morris delivered her report into the claimant's grievance. The headline conclusion was that the grievance would not be upheld. In summary, Ms Morris concluded that the Trust had had no choice but to introduce OASys-R and had no funding for training; when the claimant reported problems, Mrs Churchill had taken appropriate steps to deal with them. There had been no opportunity to deliver training because the claimant had gone on sick leave.

160. We agree with many of Ms Morris' findings. We do, however, part company from her conclusions in a number of respects:

160.1. There was an opportunity to send staff for training in Hemel Hempstead prior to Go Live so that they would be better equipped to coach the claimant as soon as she began using OASys-R.

160.2. There was an opportunity to send the claimant for training in Hemel Hempstead prior to Go Live, provided that her case load was adjusted.

160.3. In our view, it took an unacceptably long time to arrange 1:1 training once the claimant started to report her difficulties.

160.4. It must have been apparent from April 2013 that the claimant would need a reduced case load to enable her to spend time navigating the new system.

161. On 4 April 2014, Miss Monteith e-mailed Ms Goodwin appealing for additional resources. She outlined the case loads of various officers in her team and stated that some of the claimant's current work would need to be reallocated, otherwise her case load would reach 79 cases. Other team members' cases were roughly around the 50 mark. Ms Goodwin replied that staff would have to get used to a higher case load, with less work to do on each case, and that if additional resources were required, Ms Monteith would have to write a business case for Mr Quick. A further e-mail from Miss Monteith on 10 April 2014 put the claimant's case load at 50 cases. This was in step with her colleagues.

162. On 15 April 2014 the claimant appealed against the grievance outcome. Other than stating that she refuted Ms Morris's findings, and stating that the problems had continued since her return, the claimant did not at that stage put forward any grounds of appeal. The following day, she requested a work based health and safety assessment. Miss Monteith replied, informing the claimant that her clients for that day had been reallocated to the duty Probation Officer, but that she would have to expect to be given more cases.

163. Mrs Evans acknowledged the claimant's appeal and made arrangements for a meeting.

164. On 22 April 2014, Miss Monteith and the claimant met to discuss the claimant's ongoing cases. The meeting did not go according to plan. The claimant told Miss Monteith that she was no longer in a position to work with her caseload comfortably, that she did not know the offenders or the risks involved in managing them. Some cases had had little or no risk assessment done on them and she had a high number of cases with domestic violence or child protection issues. She did not want any more cases over the next few weeks and was considering handing in her notice. It is the claimant's case that she was told to "do no more work with children at risk". What is more likely in our view is that she was told that would not be allocated new cases.

165. Following the meeting, Miss Monteith summarised the meeting to Ms Lea. She also gave an update to Ms Goodwin. The claimant had 40 cases and, in Miss Monteith's opinion, could not be allocated any more. In terms of simple numbers of cases, the claimant had fewer than many of her colleagues. The claimant e-mailed Mr O'Doherty (her NAPO representative) the same day, indicating that she would be "resigning from the trust today" as her position had become "untenable" and that her practice was currently "unsafe". Mrs Evans e-mailed the claimant, also that day, to suggest a meeting to discuss her reasonable adjustments.

166. On 23 April 2014, the claimant suffered an anxiety attack at work, with symptoms of colitis. On 24 April 2014 the claimant went back on sick leave and never returned to work. Her first fit note, dated 24 April 2014, stated "work related stress".

167. Shortly after commencing her sick leave, the claimant spoke to her Member of Parliament about her concerns at work.

168. By letter dated 6 May 2014, the claimant was invited to a meeting with Ms Goodwin to discuss her appeal. She was advised that a digital recording of the

hearing would be taken. The letter stated, “To ensure that the hearing officer has as much information as possible, you are required to supply in writing the full grounds of your appeal and detail the redress you are seeking in advance of the meeting.”

169. Miss Monteith e-mailed Mrs Evans on 13 May 2014, stating that the claimant’s case load had been “always around the 50 mark” and had not been “unrealistically high”.

170. An occupational health assessment was arranged for the claimant with Ms Lea on 23 April 2014. In a report dated 14 May 2014, Ms Lea expressed the view that the claimant was “fit for her usual duties”, but “there are active health concerns at present”. She recommended a risk assessment in relation to the changed working environment and workload.

171. The claimant attended an ARM meeting on 15 May 2014 with Miss Monteith, Mrs Churchill and Mrs Alison Lavin of Human Resources. At this meeting the claimant became very upset. She reiterated that she was feeling “unsafe in the workplace” due to factors including:

171.1. The transfer of cases to her and away from her, some of which had no up-to-date risk assessments;

171.2. The fact that her support worker’s training on IT systems was not immediate.

171.3. Unreasonable behaviour from Ms Kuyateh which, the claimant said, would be included in her grievance appeal;

172. At the meeting, the claimant reported being physically sick with the worry and that she had lost 3 stones in weight.

173. The claimant contends that, in advance of the ARM, she asked Ms Lavin for permission to be accompanied by a family member who was neither a trade union representative or work colleague. This contention was advanced at a very late stage of the tribunal hearing. Ms Lavin was not called as a witness at all and the claimant did not give detailed evidence about the conversation. We thought it would be unfair to try and make findings of fact with so little evidence to go on.

174. On 16 May 2014, the claimant submitted a document for use at her grievance appeal. It ran to 12 pages of dense typescript. Most of its contents were not about the new IT system at all. The claimant outlined a history of Ms Kuyateh’s “unpredictable” and “verbally aggressive” behaviour and “personalised mistreatment and mismanagement” towards her. She also accused Ms Kuyateh of “complete mismanagement and misjudgement” in relation to cases, citing, in particular, the 4 cases from 2011 that should have gone through MAPPA. She mentioned the effect of Ms Kuyateh’s behaviour on her health.

175. The sequence of events described in the narrative was hard to follow. One of the few incident she mentioned in particular was the 1 May 2013 development day. She referred to the e-mails she had sent to Mr Metherell.

176. At various points in her 12-page document, the claimant mentioned the public interest. Dealing with historical concerns that she had raised in relation to her cases, she stated that Ms Kuyateh had “refused to register these concerns, leaving me for substantial periods to manage cases that needed significant intervention from a range of serices to reduce risk to victims, including children.”

She alleged that the effect of “inadequate management, bullying and ill treatment” was that people would “not develop and sustain effective relationships and will not reduce risk to the public”. She had, she alleged, “watched Managers and staff …being allowed to remain in positions that increased risk to the public”. She referred to a more recent conversation with Ms Kuyateh in which she had queried “why basic work hadn’t been done by [an agency worker] leaving unassessed risk.” She complained of being “given a large amount of cases whose risk status was questionable”. Her final paragraph brought the focus back to herself: “I want an acknowledgment of the victimisation, discrimination and mismanagement I have faced in the years of my service.”

177. The claimant believed that the information in her 12-page document tended to show an increased risk that an offence would be committed by offenders under probation supervision. She did not believe that her document was saying it was likely that any particular offence would be committed. She did believe that the information tended to show that her own health and safety had been put in danger, that colleagues’ health and safety had been put in danger and that public health and safety had been put in danger, in particular by the increased risk of re-offending.

178. Was it reasonable for the claimant to hold that belief? Here we are not dealing with whether it is reasonable for the claimant to believe that the information was correct, so we do not have to decide whether there really was an increased risk to the public. What we have to decide is whether it is reasonable for the claimant to believe that that is what her 12 page document tended to show. We do think that this was a belief that was reasonable for her to hold. That does not, however, mean that every person reading the document would be bound to interpret the document in that way. It was not an easy piece of text to follow.

179. We must also ask ourselves whether the claimant believed she was submitting this document in the public interest. We find that she did. She thought it was mainly about the way that she herself had been treated but she also thought it was about the risk to the public. In our view it was just about reasonable for her to hold this belief.

180. On 19 May 2014, the claimant attended her grievance appeal meeting. Ms Goodwin chaired the meeting with support from Mrs Evans. The meeting was fully audio-recorded and properly transcribed. The claimant attended unaccompanied. In advance of the meeting the claimant asked Mrs Evans if she could bring a family member. Following the Grievance Procedure, Mrs Evans refused on the ground that the family member was neither a trade union representative nor a work colleague. The claimant did not explain why she could not bring a companion falling into one of those two categories.

181. During the meeting the claimant made numerous references to “protecting the public” and “the public interest”. Mrs Evans assured the claimant that her concerns would be investigated. Both Ms Goodwin and Mrs Evans agreed, however, that the grievance appeal was not the appropriate mechanism for conducting such an investigation. They told the claimant that the meeting would be adjourned so they could decide how best to proceed. The claimant said, “At this moment in time I am only thinking of an employment tribunal.”

182. Following the meeting, Ms Goodwin asked Mrs Evans to take advice on how the claimant’s new concerns should be investigated. A decision was made – we

are not sure precisely by whom – that an external consultant should be appointed. The investigator ultimately chosen was Mrs Kerry McKevitt, who had formerly been employed by a different Probation Trust. Carla Beigan, the respondent's Employee Relations and Workforce Design Manager, appointed Mrs Stott of Human Resources to support Mrs McKevitt. (At the time of these events, Mrs Stott's surname was Pimblett, but we use the same surname throughout for consistency.)

183. On 1 June 2014, the Trust was formally abolished and the claimant's employment transferred to the respondent.

184. The appeal meeting reconvened on 5 June 2014. Like the previous meeting, it was fully audio-recorded. This time, as well as the respondent's own recording facilities, the meeting was separately recorded by the claimant. The meeting focused on the subject of the original grievance, namely the IT issues. She made clear that if any further adjustments were required, they could be made.

185. The claimant's sickness absence continued. Periodically she submitted GP fit notes citing "work related stress". We are satisfied, however, that the claimant continued to experience flare-ups of colitis for which the stress was an aggravating factor. At some point between April and July 2014, the claimant started to experience rectal bleeding. She found this symptom extremely embarrassing.

186. Ms Monteith telephoned the claimant from time to time during 2014. The frequency of contact was roughly monthly.

187. On 20 June 2014, the claimant attended her appeal meeting in respect of the Stage One Notice. The meeting was chaired by Mr Quick, supported by Ms Lavin. The claimant attended unaccompanied. The entire meeting was audio recorded. At the start of the meeting she confirmed that she was happy to proceed without representation. For the same reasons as we have given in relation to the 15 May 2014 meeting, it would be unfair for us to try to find facts about any conversations between the claimant and Ms Lavin about the claimant's choice of companion.

188. The transcript of the meeting shows that the claimant was finding it increasingly difficult to concentrate on one train of thought. She often referred to historic treatment at the hands of Ms Kuyateh. One point she did get across, though, was that the Stage One Notice should not have been issued because the claimant was still undergoing tests and keeping the Trust regularly informed. Following an adjournment, Mr Quick told the claimant that her appeal against the notice was unsuccessful. They were in the middle of discussing his reasons when the claimant walked out of the meeting.

189. By letter dated 24 June 2014, the claimant was invited to a meeting with Mrs McKevitt to discuss her 16 May 2014 grievance. The venue for the meeting was in Old Swan, Liverpool.

190. The meeting proceeded on 2 July 2014. Mrs McKevitt was supported by Mrs Stott. The claimant, once more, attended unaccompanied. In advance of the meeting, the claimant asked Mrs Stott if her sister could accompany her in the meeting. Mrs Stott replied that she could wait outside the meeting room and the claimant could confer with her during breaks, but she would not be allowed into the meeting itself. There is a clash of evidence as to whether Mrs Stott made a further suggestion. Mrs Stott told us that she suggested to the claimant that she

could bring a colleague who was a member of the Disability Advisory Group. The claimant denied that this had happened. In the end, we decided that we did not need to resolve that particular dispute.

191. This is a convenient opportunity to record the claimant's reasons for wanting her sister to accompany her. Our finding is that the claimant believed, wrongly, that a work companion would be persecuted if he or she accompanied her. The claimant's wish to insulate her companions from perceived persecution, in her mind, was more important than the need to compensate for any disadvantage that she might suffer compared to a non-disabled person by attending the meeting herself.

192. Unlike the St Helen's office, the Old Swan venue did not have audio-recording facilities. At the start of the meeting, the claimant asked to record the meeting on her iPhone. Mrs McKevitt agreed, subject to the proviso that, if the claimant recorded the meeting, both parties would require a copy. Here there was a probably a misunderstanding. The claimant thought she would be required to produce a transcript. All Mrs McKevitt actually wanted was the sound file. At any rate, the claimant backed down. She agreed that the meeting would be minuted by Mrs McKevitt typing the claimant's answers into her laptop as she spoke, then reading the answers out loud and giving the claimant the opportunity to agree or disagree.

193. Nobody present at the meeting read from documents or asked anyone else to read documents. It was a process of asking and answering questions out loud.

194. Mrs McKevitt asked the claimant if she was able to provide copies of the e-mails to Mr Metherell she had referred to in her 12-page statement. Rather unhelpfully, the claimant replied that it was for the respondent "to evidence that they hadn't done this and not for her to evidence that they have." She stated that the respondent had the authority to access the e-mails.

195. Altogether, Mrs McKevitt asked the claimant 39 pre-prepared questions and noted the answers. The questions were appropriate and designed to elicit more specific information in relation to the claimant's allegations. Her primary focus was on the behaviour of Ms Kuyateh. This was not surprising. The 12-page document was levelled at Ms Kuyateh almost from start to finish.

196. Mrs McKevitt asked a series of questions about why the claimant had not followed the Whistleblowing Policy. The claimant replied that she had raised concerns with Mr Metherell and had been to see her Member of Parliament.

197. The final question from McKevitt was, "What outcome are you looking for to resolve this grievance?" In reply, the claimant told Mrs McKevitt that she did not see that there was "a way through this that does not result in [me] taking a constructive dismissal claim against the organisation". She stated that she was engaging a barrister the following day.

198. We are satisfied that the minutes of this meeting were accurate in the sense of they were the best attempt by Mrs McKevitt to record what she believed to have been the claimant's responses to her questions.

199. There was an unfortunate delay in the claimant receiving the minutes of her meeting with Mrs McKevitt. This was because Mrs McKevitt sent the notes to the claimant's work e-mail address. The claimant, of course, was absent from work

at the time. This meant that she could not pick up her work e-mails. Mrs Stott ought to have known of that fact, but we accept Mrs McKevitt's evidence that she had not been informed. It was a genuine misunderstanding. The mix-up over the e-mail addresses had nothing to do with the inclusion of a complaint of discrimination in the claimant's grievance.

200. Mrs McKevitt then set about interviewing witnesses. Mrs Stott tried to make the arrangements. The process was not straightforward, as many of the individuals named by the claimant had transferred to the National Probation Service and were no longer managed by the respondent. On 8 July 2014, Mrs Stott e-mailed Mr Kelsall of the National Probation Service to seek his consent.

201. On 16 July 2014, Ms Goodwin wrote a detailed letter to the claimant to inform her that her appeal against the original grievance had been unsuccessful. The letter engaged with the points the claimant had made during the 5 June 2014 meeting and gave reasoned conclusions.

202. As with Ms Morris' report, we agree with many of Ms Goodwin's findings. Where we disagree is in relation to the period up to July 2013. Our view is that it was clear that the claimant was struggling and action was not taken promptly to enable the claimant to manage.

203. On 18 July 2014, Mrs Stott reported back to Mrs McKevitt that there had been a lack of progress in securing cooperation from witnesses at the National Probation Service. By this time she had consulted NAPO in relation to the issue. She suggested a change of tack, namely approaching the individuals directly. Ms Lavin e-mailed Mr Metherell and Ms Kuyateh on 15 August 2014 asking for them to participate in the investigation. Mr Metherell agreed; Ms Kuyateh did not. Mrs Stott sent Ms Kuyateh a chasing e-mail on 29 August 2014, to no avail.

204. From July 2014, Mrs Churchill resumed the management of the claimant's sickness absence. She telephoned at appropriate intervals to enquire of the claimant's health. The claimant told her she was suffering from stomach pain and vomiting as well as bleeding.

205. On 20 August 2014, Mrs McKevitt interviewed Mr Metherell. She asked him 28 pre-written questions, many of them searching and rooted in documents that had been provided to her. Amongst Mr Metherell's replies was a comment that the claimant had "a slightly inflated view of her own …importance" and that Ms Kuyateh was a "feisty character and putting two characters like that together there was always likely to be friction". In general terms, he agreed with Ms Kuyateh's professional judgments and occasionally disagreed with those of the claimant.

206. Ms Lea provided a further occupational health report on 21 August 2014. She identified barriers to the consideration of returning to work as being chiefly the claimant's perception that the respondent was "failing to address her needs". Ms Lea recommended an "open dialogue", preferably in a neutral venue, with a "supportive other person".

207. On 17 September 2014, at a further ARM meeting, Ms Goodwin decided to issue the claimant with a Stage Two Attendance Advisory Notice. The claimant did not attend the meeting. She had made clear that, without a family member to support her, she would be unable to attend. The claimant appealed against the notice on the ground that the respondent had failed to protect her against bullying and harassment "for a sustained period of years".

208. On 29 September 2014, the claimant telephoned Mrs Stott. She informed her that she was "applying to a tribunal as a whistleblower".

209. Over the following week, Mrs McKevitt conducted a series of interviews with Mr Tony Perkins (Probation Officer), Miss Monteith, Louise Ingram (Probation Service Officer), and Ms Rooney (who by now was Assistant Chief Executive). Mrs McKevitt's questioning technique was the same. The witnesses' evidence did not paint a single, clear picture. In relation to the 1 May 2013 Development Day, Ms Ingram's account suggested that the claimant might have been just as aggressive as Ms Kuyateh. More than one witness described a personality clash between the two. There were also a number of witnesses describing Ms Kuyateh behaving aggressively towards the claimant. Ms Rooney recalled the claimant as having a tendency to "go deeper into cases" than her colleagues. Others describe her as having an "exaggerated" (we would say "cautious") approach to risk.

210. Mrs Stott made a further attempt on 3 October 2014 to open up a channel of communication with four National Probation Service witnesses. This led to interviews taking place on 9 October 2014 with Ms Scott-Harley and on 13 October 2013 with Mr Kayani, Mrs Churchill and Mr Clayton Knowle. Amongst Mr Kayani's answers was a description of the claimant's case load. According to Mr Kayani, "she had a mixed caseload which was no different to any other offender manager." It was not particularly high-risk.

211. On 14 October 2014 Mrs Stott made further attempts to secure interviews with National Probation Service witnesses. Anna Curzon, a Probation Officer, e-mailed some answers to detailed written questions the following day. A further interview took place on 23 October 2014 with Ms Cath Aubry.

212. On 24 October 2014, Mrs Stott gave the claimant a general update and reminded the claimant that she had not responded to the draft notes of the grievance meeting. At this point, Mrs McKevitt was clearly under the impression that the claimant had received the notes, otherwise she would not have asked Mrs Stott to chase them. The claimant replied that she had not received the minutes. Mrs Stott then realised the mistake and a fresh copy was sent to her in November 2014.

213. On receipt of the minutes, the claimant disputed their accuracy. In particular, she challenged the reference to her having purportedly agreed to the meeting taking place without audio recording.

214. On 25 November 2014, Mrs McKevitt e-mailed her report to Ms Beigan. This was some 4½ months since her interview with the claimant. We have asked ourselves why it took her so long. The main reason was the difficulty in arranging interviews with witnesses, particularly those employed by the National Probation Service. The final witness had not been interviewed until 23 October 2014. The mistake over sending the minutes to the claimant added to the delay. Having completed her investigation, we would have expected Mrs McKevitt to take several days to write her report. We are satisfied that these factors fully explain the delay. There was nothing about the fact that the grievance contained an allegation of discrimination that caused Mrs McKevitt, wittingly or unwittingly, to draw out the process.

215. Once the draft report was in the respondents' hands, it took a long time to proof-read it and correct spelling and grammatical errors. This process was still

ongoing as at 5 January 2015 when the claimant chased the outcome. This delay was unfortunate. Some of it, no doubt, was due to the holiday period. We also bear in mind that that the organisation was still in a state of relative flux, having only existed for 6 months. Having considered all the evidence, we are satisfied that Mrs Stott did not deliberately delay sending the grievance report to the claimant. We are also satisfied that the fact that the grievance contained an allegation of discrimination had no influence, conscious or subconscious, on the timing of the release of the report to the claimant.

216. On 9 December 2014, Mrs Churchill tried to conduct an ARM meeting with the claimant by telephone, but it did not proceed, because the claimant wanted to discuss the detail of her grievance.

217. By this time, the CRCs were established and NOMS was in the process of awarding contracts for probation services. The preferred bidders would acquire a shareholding in the CRC. During December 2014, the respondent circulated to its staff, including the claimant, written information about the bidding process. The written information made clear that the preferred bidder for the respondent was Purple Futures Limited. In this respect, the claimant was treated no differently than her colleagues. There was no attempt by the respondent to "use the claimant's disability to attack her", or to make information inaccessible to her. That is not to say that the claimant would have found it easy to absorb all the information being circulated to her. Her visual impairment meant that it was harder for her than for her colleagues to read written material. But there was nothing about the fact that she had complained of discrimination that affected the way in which information about the bidding process was disseminated to staff.

218. At some point in December 2014, the claimant and Mrs Stott spoke on the telephone. There is a dispute about what was said during this conversation. It is the claimant's evidence that she asked Mrs Stott who would be running the CRC and that Mrs Stott replied, "Positive People". We prefer Mrs Stott's evidence that the conversation did not happen like that. Positive People was an organisation that ran the Employee Assistance Programme. Mrs Stott could not have believed that it would be running the CRC. She would have no reason to lie to the claimant about that organisation and could not have hoped to get away with it bearing in mind it was common knowledge, already documented, that the preferred bidder was Purple Futures. It is possible that the claimant has remembered a conversation about the Employee Assistance Programme. This topic was often brought up in conversation with Human Resources managers as a supportive measure.

219. On 7 January 2015, a teenager, C, was murdered on Merseyside. The killer was an offender, H, who had been involved with the probation services. At the time of the murder, H was no longer subject to probation. When the claimant learned of the murder on the news, she was upset. She thought, incorrectly, that H's reoffending had been due to just the sort of inadequate risk assessment that she had been complaining about when she began her sick leave.

220. Eventually, on 9 January 2014, the claimant was provided with the report. Running to 21 pages, its main findings were as follows:

220.1. The claimant's allegations were reasonably divided into three:

220.1.1. Bullying by Ms Kuyateh over a number of years

220.1.2. Ms Kuyateh and the wider Trust creating a culture of poor practice and victimising the claimant for making a protected disclosure and

220.1.3. The Trust failing in its duty of care.

220.2. Ms Kuyateh had bullied the claimant within the meaning of the Trust's policies. In particular, she had behaved inappropriately on an occasion in 2011 and during the 1 May 2013 Development Day.

220.3. There was not sufficient evidence of inappropriate case allocation by Ms Kuyateh.

220.4. The claimant had not been victimised by the wider Trust, but Ms Kuyateh had treated her unpleasantly when she challenged her on issues of practice.

220.5. There was insufficient evidence of the culture that the claimant alleged. Mrs McKevitt noted the evidence of the claimant's perception of risk being out of step with that of some of her colleagues. "Put simply, just because [the claimant] thought there was poor practice does not mean, in actuality, that there was."

220.6. There had not been a general breach of the duty of care. Mrs McKevitt took account, particularly, of the mediation meeting and of the response to the Development Day incident.

221. The claimant was dissatisfied with the grievance outcome and indicated her wish to appeal.

222. Ms Goodwin, reading the report, wanted to explore options to see if they could find a way for the claimant to return to work. Ms Kuyateh was still physically working in the same building as the claimant, but was now employed by a different organisation. Ms Goodwin had no formal procedure in mind, but was concerned that the claimant appeared to be manoeuvring herself into a position where she could not return. By letter dated 13 February 2015, Ms Goodwin invited the claimant to a meeting which would be audio-recorded and transcribed. She made clear that the National Probation Service would be informed of Mrs McKevitt's findings about Ms Kuyateh. She assured the claimant that there would be no further line management or day-to-day business contact between Ms Kuyateh and the claimant. She also expressed her wish to discuss alternative working patterns or environments that might enable the claimant to return to the workplace. The letter also made clear that, should the claimant's appeal be successful, any agreed actions from the proposed meeting could be reviewed.

223. The meeting proceeded on 25 February 2013. At the meeting:

223.1. The claimant alleges that Ms Goodwin waited for the recording device to stop, then, during the gap in the recording, leaned over towards the claimant and said, dismissively, "I don't want you to think I'm oppressing you". We prefer Ms Goodwin's evidence that this did not happen. There was a short gap in the recording, but it was not long enough for the claimant's version of the missing part of the conversation to have happened. During a completely separate part of the meeting, Ms Goodwin did say, "if we told you what we wanted to do without asking you what you wanted, you'd accuse us of being oppressive". The claimant is probably confused her version with this part of the transcript.

223.2. Ms Goodwin mentioned Purple Futures as being the owner of the respondent. The claimant asked her to confirm this and she did.

223.3. The claimant said that she would not be returning to work in the same place as Ms Kuyateh. Ms Goodwin said that the respondent would do everything in its power to locate the claimant in a place where she felt safe.

223.4. The claimant said she wanted an acknowledgment that the respondent was attempting to "become corporate" and "to sell victims and crime…at the expense of all front line staff". She added, "You can't make a profit on people's suffering".

223.5. Ms Goodwin tried to bring the conversation round to practical measures, such as alternative working patterns. The claimant kept bringing the conversation round to the ownership and strategic direction of the respondent. It was agreed that the claimant would have some further time to consider whether she wanted to work for the respondent's organisation and to reflect on their offer of support to get her back to work.

224. On 3 March 2015 the claimant resigned. In a long e-mail to Mrs Stott, she set out her reasons. Amongst the reasons were:

224.1. Alleged failure to comply with her requests for information "evidencing criminality at a corporate level".

224.2. Conducting a "campaign" against her for raising issues.

224.3. Being "marginalised, victimised and discriminated against throughout my employment".

224.4. Forcing her to work for the CRC – "a company that I would ever choose to work for or with, based on the publicised misuse of public money, … I would have no confidence that these organisations would act in the interests of offenders and staff who work front line…"

224.5. The grievance investigation "attempted to place blame solely on one management issue when it was evidence that the manager was acting at the direction of the senior management team…"

224.6. Being refused the right to record the 2 July 2014 meeting;

225. We pause here to record our findings about the claimant's actual reasons for resigning. They were overwhelmingly reasons for which the respondent was entirely innocent:

225.1. The claimant did not want to work for a private company. She had no confidence that such an organisation would act in the interests of members of the public. She thought they were "making money on the backs of crimes and victims". That was not the respondent's fault: it was a consequence of central government policy.

225.2. She resigned in response to her perception that she was continuing to be bullied. That perception was unfounded because it was made clear to her on 25 February 2015 that she would no longer have any day-to-day contact with Ms Kuyateh.

225.3. She resigned in response to her mistaken perception that the organisation was "using her disability as a weapon to attack her". She may

genuinely have believed that this was the case, but the respondent did not do anything to substantiate that belief.

225.4. She resigned because of her health. It cannot in our view be said that the state claimant's health in March 2015 was caused by any act or omission of the respondent. She resigned in response to what occurred at the 25 February 2015 meeting and the way she mistakenly thought that Rosie Goodwin had treated her.

225.5. The claimant resigned partly in response to her surprise at being told that a private company, Purple Futures, was the preferred bidder for the CRC, and her unfounded belief that Mrs Stott had lied to her in December 2014 about their identity.

225.6. There was another very important reason for resigning. During the course of the hearing, the claimant indicated that she did not want to discuss it in public. With the parties' consent, we agreed to hear it in private. It related to the effect of her workplace concerns on her family life. It came to a head just before she resigned. It was not the claimant's fault, but nor was it the fault of the respondent.

225.7. A small part of her reason for resigning was the delay in receiving the grievance report. This may have been on her mind at the time of resigning, but it was not the thing that finally made her decide to leave. She had had the grievance outcome for nearly 2 months by the time she resigned.

226. Although the claimant was no longer an employee, she continued to pursue her appeal. In due course an appeal meeting took place on 25 March 2015. It was chaired by Mr Paul Gotts, Head of Corporate Operations. He had had no prior dealings with the claimant. Ms Beigan and Ms Rebecca Glassar provided Human Resources support. The claimant was unaccompanied. The meeting was audio-recorded and transcribed. Unfortunately it became apparent that the meeting would have to be adjourned. Mr Gotts had received Mrs McKevitt's report but had not received the supporting documents, including the interview records.

227. The meeting was reconvened on 9 April 2015. The same cast of attendees were present. The combined transcripts of the two meetings runs to 37 pages. During the meeting, the claimant spoke at length. From time to time, Mr Gotts asked questions that would bring the topic back to the claimant's grounds of appeal. His questions showed a genuine interest in the claimant's arguments.

228. At no point in either meeting did Mr Gotts wear an earpiece or receive instructions remotely from somebody outside the room.

229. Following the meeting, Mr Gotts wrote to the claimant on 20 April 2015 asking her for further information. The letter was highly focused and asked for examples of various types of behaviour. The claimant replied on 25 April 2014 with generalised assertions but very little detail.

230. On 5 May 2015, Mr Gotts wrote to inform the claimant that the original grievance decision would stand. Two pages of explanation engaged with the claimant's grounds of appeal.

**Relevant law**

Duty to make adjustments

231. By section 20 of EqA, the duty to make adjustments comprises three requirements.

232. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

233. The third requirement is found in section 20(5). Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to employment in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to provide the auxiliary aid.

234. By subsection (11), an auxiliary aid includes an auxiliary service.

235. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

236. Schedule 8 to EqA, paragraph 20, provides, relevantly:

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> …
>
> (b), that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first…requirement.

237. Paragraph 6.28 of the Equality and Human Rights Commission's *Code of Practice on Employment* lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

237.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

237.2. The practicability of the step;

237.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

237.4. The extent of the employer's financial and other resources;

237.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

237.6. The type and size of employer.

238. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

<u>Discrimination arising from disability</u>

239. Section 15(1) of EqA provides:

(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.

240. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

241. In Langstaff P's view, there was "considerable force" in the argument that the phrase, "because of…" in section 15 should carry the same meaning as the equivalent phrase in section 13. That is to say, the tribunal should focus on the conscious or subconscious thought processes of the alleged discriminator in order to establish the reason why the claimant was treated unfavourably (paras 32 and 33). That reason is "something" which must arise in consequence of the disability. The question of whether "because of…" imported the same test as for direct discrimination did not arise directly for decision in *Weerasinghe* and Langstaff P was careful not to express a concluded view. The *ratio decidendi* (reason for the decision that is binding in future cases) is simply that the tribunal must adopt the two-stage approach to causation. But we are of the view that Langstaff P's analysis is right.

242. As with direct discrimination, the focus must be on the conscious or subconscious motivation of the person or persons who decided on the unfavourable treatment: *IPC Media Ltd v Millar* [2013] IRLR 707

243. If another person influenced that decision by supplying information with improper motivation, the decision itself will not be held to be discriminatory if the actual decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

244. An employer can be reasonably expected to know of an employee's disability if he could have discovered it on making reasonable enquiries. Paragraph 5.15 of the *Code* illustrates the point:

5.15

An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability,

employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

> **Example:** A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.
>
> The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

245. Knowledge on behalf of one part of the employer's organisation cannot necessarily be imputed to a decision-maker in another part of the organisation: *Gallop v. Newport City Council* UKEAT 0118/15.

246. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565, applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

247. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

Harassment

248. Section 26 of EqA provides, so far as is relevant:

> (1) A person (A) harasses another (B) if—
>
> (*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (*b*) the conduct has the purpose or effect of—
>
> (*i*) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—
>
> (*a*) the perception of B;
>
> (*b*) the other circumstances of the case;
>
> (*c*) whether it is reasonable for the conduct to have that effect.

249. Disability is one of the relevant protected characteristics.

250. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

<u>Victimisation</u>

251. Section 27(1) of EqA defines victimisation, for present purposes, as follows:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act…

252. Subjecting a person to a detriment means putting them under a disadvantage: *Ministry of Defence v. Jeremiah* [1980] ICR 13, CA, per Brandon LJ. A person is subjected to a detriment if she could reasonably understand that that she has been detrimentally treated. A detriment can occur even if it has no physical or economic consequence. An unjustified sense of grievance, however, is not a detriment: *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

<u>Disability</u>

253. Section 6 of EqA provides:

> (1) A person (P) has a disability if- (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> …
>
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

254. According to section 212(1) EqA, "substantial" means "more than minor or trivial".

255. Schedule 1 to EqA supplements section 6. Relevant extracts are:

> 2. Long-term effects
>
> (1) The effect of an impairment is long-term if- (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or….
>
> …
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
>
> …
>
> PART 2 - GUIDANCE
>
> 10. Preliminary

This Part of this Schedule applies in relation to guidance referred to in section 6(5).

11. Examples

The guidance may give examples of- (a) effects which it would, or would not, be reasonable, in relation to particular activities, to regard as substantial adverse effects…

12. Adjudicating bodies

(1) In determining whether a person is a disabled person, [a tribunal] must take account of such guidance as it thinks is relevant.

256. The relevant guidance is to be found in the Secretary of State's *Guidance on Matters to be Taken Into Account in Determining Questions Relating to the Definition of Disability (2011).* The following passages appear to be helpful:

A3. …The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness…

B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, "likely" should be interpreted a meaning, "could well happen"…

C3. The meaning of "likely" is relevant when determining

- whether an impairment has a long-term effect …
- whether an impairment has a recurring effect…

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood…

…

APPENDIX

AN ILLUSTRATIVE AND NON-EXHAUSTIVE LIST OF FACTORS WHICH, IF THEY ARE EXPERIENCED BY A PERSON, IT WOULD BE REASONABLE TO REGARD AS HAVING A SUBSTANTIAL ADVERSE EFFECT ON NORMAL DAY-TO-DAY ACTIVITES.

…

- Difficulty eating; for example, because of an inability to co-ordinate the use of a knife and fork, a need for assistance, or the effect of an eating disorder;

- Difficulty going out of doors unaccompanied, for example, because the person has a phobia, a physical restriction, or a learning disability; …

257. The tribunal must focus on what the claimant cannot do, or can do only with difficulty, rather than the things that she can do: *Goodwin v. Patent Office* [1999] IRLR 4.

258. In assessing whether an impairment has an effect on a person's normal day-to-day activities, it is appropriate for a tribunal to consider the effect on the person's ability to cope in his or her job: *Paterson v. Commissioner of Police for the Metropolis* [2007] ICR 1522.

Burden of proof

259. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

260. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

261. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Protected disclosures

262. According to section 43A of ERA, a "protected disclosure" is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with, amongst other sections, sections 43C.

263. Section 43C provides that "a qualifying disclosure is made in accordance with this section if the worker makes the disclosure– (a) to his employer…"

264. Disclosures made after 25 June 2013 are to be judged according to the following provisions:

"

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, …

(d) that the health or safety of any individual has been, is being or is likely to be endangered…and

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

265. The ordinary meaning of "information" is conveying facts. Thus a disclosure of information requires something more than a mere allegation: *Cavendish Munro Risks Management Ltd v Geduld* [2010] ICR 325, EAT. The paradigm example of this distinction was given by Slade J at paragraph 24:

> 'Communicating "information" would be: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that: "You are not complying with health and safety requirements." In our view this would be an allegation not information.'

266. In *Kilraine v London Borough of Wandsworth* UKEAT 260/15, the EAT has warned that tribunals should take care when applying the principle in *Geduld*, to the effect that a mere allegation does not amount to a qualifying disclosure if it does not convey information. The statute does not itself make a distinction between 'allegation' and 'information' and tribunals should not focus on whether any putative disclosure is one or the other, given that 'information' and 'allegation' are often intertwined.

267. Where the worker relies on section 43B(1)(b), the information must identify, albeit not in strict legal language, the breach of legal obligation on which the worker relies: *Fincham v. HM Prison Service* [2003] All ER (D) 211 per Elias J at paragraph 33.

268. The question of reasonable belief involves two stages. The first is subjective: did the worker actually believe that the information tended to show one of the relevant categories of wrongdoing? The second stage is objective: was that belief reasonable? That second question is to be judged according to what a reasonable person in the worker's position would believe: *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4.

269. In *Chesterton Global Ltd v. Nurmohamed* UKEAT/0335/14, Supperstone J accepted that it was open to a tribunal to find that a worker reasonably believed that a disclosure about individual contractual entitlement was made in the public interest if it affected some 100 employees also working for the same employer. On the general point of principle, he said this:

> The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see *ALM Medical Services Ltd v Bladon* at paragraph 16 above). It is clear from the parliamentary materials to which reference can be made pursuant to *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 that the sole purpose of the amendment to section 43B(1) of the 1996 Act by section 17 of the 2013 Act was to reverse the effect of *Parkins v Sodexho Ltd*. The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the

> clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest".

Protection from detriment

270. By section 47B(1) of ERA, "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by his employer on the ground that the worker has made a protected disclosure."

271. In respect of disclosures made after 25 June 2013, section 47B(1A) of ERA also provides:

> "(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment….
>
> on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

272. Section 47B clearly envisages that the "other worker" will be personally liable. It is a defence against such liability for the worker to show that they relied upon a statement by the employer satisfying certain conditions (section 47B(1E).

273. Section 48(1A) of ERA allows a worker to present a complaint to an employment tribunal that she has been subjected to a detriment in contravention of section 47B. On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Where a complaint is well-founded the tribunal has power to award compensation against the employer. There is no express power to award compensation against any co-worker who has breached section 47B(1A).

274. We have had regard to the meaning of "detriment" by reminding ourselves of the interpretation of that word in the field of victimisation under EqA (set out above).

275. Whether or not the employer's act (or deliberate failure to act) was done "on the ground that" the worker had made a protected disclosure involves looking at the motivation of the employer. Was the employer influenced to any material extent by the fact that the worker had made a protected disclosure? "Material", in this context, means "more than trivial". The authority for formulating the test in this way is *NHS Manchester v. Fecitt* [2011] EWCA Civ 1190, [2012] IRLR 64.

276. In our view, before examining the motivation of the employer under section 47B(1), or the colleague under section 47B(1A), the tribunal should identify the decision-maker in respect of each act or deliberate failure. Knowledge of a disclosure, or improper motivation, on the part of another person is, in our view, irrelevant except in so far as it plays on the mind of the decision-maker. Where a claimant believes that another colleague has influenced the decision-maker with improper motivation, his remedy is to allege a breach of section 47B(1A) against

the colleague for their part in influencing the decision. The employer will be vicariously liable for that breach under section 47B1B). Likewise, in a claim under section 47B(1A) against a colleague, the focus should be on *that colleague's* motivation; if the colleague was influenced by others, the worker should raise a separate complaint against those others.

277. There is no authority directly on this point. Some commentators suggest that a different approach is necessitated in the light of *Royal Mail Group Ltd v. Jhuti* UKEAT 0020/16. That case concerned automatically unfair dismissal. Mitting J held that, the tribunal should not, for unfair dismissal purposes, always be constrained to limit its focus on the reasoning of the decision-taker. Where the decision has been manipulated by a third party, as had occurred on the facts of that case, the motivation of the manipulator ought to be considered when looking at the reason for dismissal.

277.1. The reasoning in *Jhuti* only applies to dismissals of employees. It does not directly concern detriment short of dismissal. Mitting J's main reason for allowing tribunals to consider the reasoning of the manipulator was the exclusion, in detriment cases, of compensation for losses flowing from dismissal. But where there has been no dismissal, no such problem exists. Where tainted information has led to a detrimental decision (which is not the dismissal of an employee) the claimant can recover compensation for losses caused by both the provision of the tainted information and the consequent decision.

277.2. The *Jhuti* approach, if applied to detriment complaints, would potentially expose an innocent decision-taker to personal liability (which in *CLFIS v. Reynolds* was Underhill LJ's main reason for rejecting the composite approach). It is doubtful whether a worker who is liable under section 47B(1A) can be ordered to pay compensation, but the innocent decision-taker would still suffer the stigma of an adverse tribunal judgment personally against his name.

278. Section 95 of the Employment Rights Act 1996 ("ERA") relevantly provides:

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… 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 it without notice by reason of the employer's conduct. …

279. An employee seeking to establish that he has been constructively dismissed must prove:

279.1. that the employer fundamentally breached the contract of employment; and

279.2. that he resigned in response to the breach.

(*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

280. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

281. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232.

282. The very serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

> 12....It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:
>
> > "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
>
> 13.That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of Tullet Prebon Plc v BGC Brokers LP [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

283. A fundamental breach of contract cannot be "cured", but if an employer takes corrective action the employer may prevent conduct from developing into a breach of the implied term of trust and confidence: *Assamoi-v-Spirit Pub Co Ltd* [2012] ALL ER (D) 17.

284. Where a fundamental breach of contract has played a part in the decision to resign, the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning: *Wright-v-North Ayrshire Council* [2014] IRLR 4 at paragraph 16. See also *Abbey Cars (West Horndon) Ltd v Ford* UKEAT 0472/07 at paragraph 34 and 35.

285. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract. All depends on the circumstances of the particular case: *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443,

286. In *Mari (Colmar) v Reuters Ltd* UKEAT/0539/13*,* HHJ Richardson reviewed the authorities relating to affirmation by employees who are on sick leave. The following principles were derived:

286.1. It is open to the tribunal to find that an employee has affirmed the contract simply by remaining in employment for a period of time, even if the employee was absent on sick leave for the whole of that period.

286.2. It is relevant to consider whether, during the period of sick leave, there was any affirmatory behaviour beside the receipt of sick pay.

286.3. It is also relevant to consider whether, during the period of sick leave, the employee continued to protest about the breach.

286.4. Each case depends on its own facts.

287. It is not uncommon for an employee to resign in response to a "final straw". In *Omilaju v. Waltham Forest London Borough Council* [2005] EWCA Civ 1493*,* [*2005*] IRLR 35*, CA* the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act was totally innocuous, in the sense that it did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history.

Claims and amendments

288. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

289. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in

essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

290. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

291. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

292. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

292.1. A careful balancing exercise is required.

292.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

292.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

292.4. The tribunal should have regard to the manner and timing of the amendment.

292.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

293. In *Amey Services Ltd v. Aldridge* UKEATS 0007/16, Lady Wise held that tribunals must not allow an amendment to a claim whilst leaving questions of time limits to be determined at a later stage. The case concerned what is known in the jargon as a *Prakash*-type amendment - adding an allegation based on events occurring since presentation of the claim form. Lady Wise did not, however, distinguish between such amendments, on the one hand, and applications, on the other hand, to amend claims based on the events that took place before the claim form was presented. The rationale for taking time limits into account was that an amendment has the effect of backdating the new claim to the date that the original claim form was presented, meaning that the respondent cannot revisit the time limit issue later (*Rawson v Doncaster NHS Primary Care Trust* UKEAT/0022/08). Unfortunately, Lady Wise did not distinguish between the period from original presentation to amendment, on the one hand, and, on the other hand, the time that elapsed between the alleged discriminatory act and the presentation of the claim.

294. It appears at least possible, therefore, that *Aldridge* will be interpreted as meaning that the time limit question must be determined at the amendment stage in every case. This could even apply where, as here, there is a long series of allegations stretching over a number of years, with a dispute as to whether the acts complained of were part of an act extending over a period. That is a notoriously fact-sensitive question.

## Conclusions

Disability

295. In our view, the claimant became disabled by reason of colitis from 21 August 2013. By then she had suffered from repeated attacks of vomiting, diarrhoea and bloating sufficiently frequently to be continuously off work for one month. She had been to hospital for tests. The cause of these symptoms was a physical impairment which was later diagnosed to be colitis. Her medical certificate on 21 August 2013 stated that the cause was likely to be colitis.

296. From July 2013, the claimant experienced flare-ups which, while they lasted, impacted severely on the claimant’s ability to eat, leave the house and walk the dog. The effect on her ability to sleep meant that she was tired and found it more difficult to carry out day to day activities generally. Overall, the frequency and severity of attacks meant that the claimant could not attend work, whereas previously she had been able to do so.

297. From 21 August 2013 we would describe these effects as long term. By that time the claimant had been absent from work for one month and had just begun a further period of absence with the same symptoms. Colitis is notorious for being a recurring condition subject to repeated flare-ups. Once colitis was suspected, we would say that it “could well happen” that the claimant would suffer repeated recurrences of the effects of her colitis over a period lasting more than 12 months

298. For the same reason, we would also regard 21 August 2013 as the date from which the respondent could reasonably have been expected to know that the claimant was disabled. “Likely colitis” on the medical certificate was enough to alert them to the chance that the claimant could well continue to suffer the effects of her impairment long into the future.

Victimisation

299. We have next considered the complaint of victimisation.

300. It is conceded that the two grievances were protected acts.

301. We have not found it necessary to consider whether the time limit should be extended. This is because we have been through the various allegations of detrimental treatment and were able to make a positive finding that the claimant was not treated as she was because of the grievances that she had brought. In particular:

301.1. The grievance outcome was not deliberately delayed and the delay was not because of the protected act (see paragraphs 214 and 215).

301.2. There was no deliberate delay in sending meeting minutes to the claimant and it was not because of the protected act Paragraphs 212 and 199 explain how we reached that conclusion.

301.3. Mrs Stott did not lie to the claimant prior to the meeting on 25 February 2015 about the preferred bidder for the CRC contract (paragraph 218).

301.4. There was no attempt by the respondent to make information inaccessible to the claimant so as to deprive her of the chance to make an informed choice about whether to work for the CRC. The way in which information was disseminated had nothing to do with her complaint of discrimination (see paragraph 217). In passing we might add that had this been a claim of failure to make adjustments we might have had some sympathy for it.

<u>Harassment</u>

*Aggressive and bullying behaviour from Ms Kuyateh on 1 May 2013 (Allegations 32 and 33)*

302. We considered first the alleged harassment by Ms Kuyateh. The specific incident on 1 May 2013 was, in our view, an isolated act. If it was capable of being viewed together with the alleged over-allocation of work as a continuous state of affairs, we would in any event conclude that that state of affairs ceased when the claimant began a long period of sickness absence in July 2013. The last day for presenting her claim in respect of Ms Kuyateh's conduct would therefore have been 31 July 2013. The claim was not presented until some two years later.

303. In our view it would not be just and equitable to extend the time limit. We have taken into account the reason for the claimant's delay. We accept that she had periods of ill health. On the other hand she did have advice from NAPO from May 2013 and she had specifically considered the possibility of bringing a formal complaint about Ms Kuyateh's behaviour as early as 2 May 2013. From 2 July 2014 she was convinced that she would resign and claim constructive dismissal and was intending imminently to instruct a barrister. This is not a case where the delay can be explained by the respondent's failure to comply with requests for information. The claimant knew about the alleged harassment from the moment it occurred. The delay has had a considerable effect on the evidence. Had the

claimant brought a complaint based on Ms Kuyateh's behaviour in 2013, there would have been a much improved chance that the respondent would have been able to secure the cooperation of Ms Kuyateh before she joined the National Probation Service.

304. We should make clear that we are **not** making a positive finding that Ms Kuyateh did not harass the claimant. It is quite possible that the harassment occurred in the way the claimant alleges. It would, however, be unfair for us to reach that conclusion against the respondent because of the delay in the claimant bringing the claim.

*Leaving the claimant in the same building as Ms Kuyateh after the incident on 1 May 2013 (Allegation 39);*

305. The decision to leave Ms Kuyateh in post at the St Helen's office was not related the claimant's disability (see paragraph 95).

*Ms Kuyateh's allocation of work May to July 2013*

306. In our view, if there was any unfair allocation of work, it was not part of an act extending over a period. It ended in July 2013 with the commencement of the claimant's long term sick leave.

307. It would not in our opinion be just and equitable to extend the time limit. In coming to this conclusion we have had regard to the same factors as for the 1 May 2013 incident and our difficulties in fact-finding about the allocation of work (see paragraph 96).

*Bombarding the claimant with contact*

308. We have divided the harassment allegation into three time periods.

308.1. Prior to 21 August 2013 the claimant was not disabled by reason of colitis.

308.2. Between 21 August and 23 September 2014, the respondent could reasonably have known the claimant was disabled but could not have known that its frequency of contact was aggravating the claimant's stress. It would not be reasonable of the claimant to perceive the frequency of contact as having the effect of violating her dignity or creating an intimidating, offensive, insulting, degrading or hostile environment for her. Moreover, there is nothing from which we could conclude that the purpose of the contact was to violate her dignity or create that kind of environment. There was nothing gratuitous about the contact that was being initiated by the respondent. There was a legitimate reason for each time Ms Churchill made contact with her; for example, Ms Churchill was trying to persuade her to attend attendance review meetings and she was trying to make sure the claimant got paid by making sure that she submitted a new fit note when her old fit note expired. The need to expect regular contact was clearly spelled out in the Attendance Management Policy.

308.3. From 23 September 2014 it was reasonably clear from the claimant's NAPO representative's comments at the meeting that the claimant wanted

reduced frequency of contact. We accept Mrs Churchill's evidence that she reduced the frequency of her contact with the claimant to monthly. The claimant did not complain to Ms Churchill or anybody else that she was being contacted too often. There were still frequent letters and telephone calls. These were necessary: the claimant had to be kept informed of progress in relation to her grievance, in relation to transforming rehabilitation and to make arrangements for her return to work.

*Issuing the attendance notice on 19 September 2013*

309. We return to this allegation under the heading of "reasonable adjustments", but we do not think that it was harassment. Issuing the Stage One Notice was unwanted conduct. That conduct was related to her colitis, which was the cause of her absence. The claimant perceived it as creating an intimidating environment. In our view, however, it was not reasonable for her to perceive it as having that effect. It was issued in accordance with the Attendance Management Policy. Indeed, under the policy, respondent could have issued a Stage One notice much sooner had it wished to do so. There was nothing in the notice itself that was offensive. Although we did not hear from Mr Kayani, we did not need to do so in order to determine the complaint. There was nothing from which we could conclude that his purpose in issuing the Stage One Notice was to violate her dignity or to create a hostile, humiliating, offensive, degrading or intimidating environment.

*Allocating the claimant more than 60 cases during the first 11 weeks of her return to work*

310. The allocation of cases to the claimant, extended over the period from late February to 22 April 2014, when she was told that no new cases would be allocated to her. It was not part of any course of conduct extending into a later period. We do not think it is just and equitable to extend the time limit. This is because of our difficulties in finding facts as to precisely what case load the claimant had compared to her colleagues and how Ms Kuyateh allocated the new cases.

311. If we were wrong in our conclusion about the time limit, we would find that Ms Kuyateh did not disproportionately allocate new cases to the claimant. We were struck by Ms Monteith's description of a service in flux and the way in which everybody was feeling the strain. Cases were allocated to and withdrawn from individual Probation Officers in batches. There was nothing from which we could conclude that the claimant was singled out for specially unfair treatment and nothing about the allocation of work (so far as we were able to make findings about it) that would make it reasonable for the claimant to think that her dignity was being violated or that an intimidating, hostile, offensive, degrading or humiliating environment was being created for her. We do not think that the comments made by Ms Kuyateh in January 2014 support an inference that the claimant was being unfairly allocated new cases.

*Using an agency worker as the claimant's support worker in a deliberate attempt to undermine her*

312. There was no attempt to undermine the claimant. Mrs Evans worked cooperatively with the claimant to attempt to ensure that a support worker was recruited in time for the claimant's return to work. Essentially it was up to the claimant and Adecco to arrange the recruitment. There was a delay because of Access to Work funding, but that was not Mrs Evans' fault. We believe the claimant's evidence that she had two colleagues who were interested in being support workers, but, as we have found, we do not think that they were seriously interested in resigning their employment and becoming agency workers. In theory, the Trust could have facilitated the process by terminating one of those colleagues' employment. That person might well, however, have regarded such intervention as unfair.

Duty to make adjustments – general

313. We turn to the complaint of failure to make adjustments.

314. When it came to assessing the reasonableness of each proposed adjustment, we bore in mind the type and size of the employer. This cut both ways. On the one hand, the Trust and CRC were large organisations which we would ordinarily expect to devote considerable resources to making adjustments for disabled employees. On the other hand, at the time with which we were concerned, they were having to cope with considerable change at a pace dictated, not by themselves, but by NOMS and by central government policy.

Duty to make adjustments – PCP1

315. Two disadvantages were alleged. The first alleged disadvantage we find did not exist. There was no incompatibility between ZoomText and OASys-R.

316. The second disadvantage did exist. We cannot put it any better than Mrs Watkin did in herself. The claimant's attempts to navigate the new system were like being "caught in a snowdrift without a compass".

317. It was not reasonable for the Trust to have to delay the implementation of OASys-R. Their hands were tied by NOMS so far as the implementation date was concerned.

318. It was not reasonable for the Trust to have to reduce the claimant's workload any more quickly than they did. The claimant reported her workload as being manageable on 23 April 2013 and did not then complain about being overworked until 3 July 2013. At that point, action was immediately taken to reduce her workload. We have not forgotten that it may sometimes be reasonable to have to make an adjustment even if the employee does not specifically ask for it. It may be reasonably apparent that it is required regardless of any request. In this case, however, it is hard to make any assessment of whether it was apparent to the Trust that the claimant was overworked. The evidence in relation to workload is vague because of the delay in bringing the claim. To the extent, therefore, that any findings were required in relation to her actual workload, we would hold that this part of the claim is out of time and it is not just and equitable for the time limit to be extended.

319. That leaves the second of the claimed adjustments. It would, in our view, have been quite easy for the respondent to have arranged training, both prior to and post implementation of OASys-R. We have examined each period separately. Prior to Go Live, there was a practical difficulty, which was that the claimant would have had to travel to Hemel Hempstead in order to undergo the training. Such a difficulty would by no means have been insuperable, provided that her workload was managed in the meantime and the claimant was given time away from her case load. Even if pre-implementation training was impractical, there should have been training for the claimant on the new system within a matter of days, not months.

320. We should add that we do not regard Mrs Watkin as being to blame for the fact that the training was not organised. She was doing her best to highlight the problems the claimant and others were facing. As an organisation, however, the Trust must have been able to pay for Astec, Steria or Laurus on how to navigate the new system. They could ensured that one of their own staff attended pre-implementation training in Hemel Hempstead so as to be in a position to cascade the training to assistive technology users immediately following Go Live. Even if they could not do that, they could have given the claimant a period of time for self-learning during which her caseload could have been managed by other means.

321. We have considered whether this case is affected by the time limit. The problems with navigation of the system appeared to have resolved themselves by the time of the claimant's 13 February 2014. Even prior to that date, the time limit began to run. In our view, a reasonable period for providing training expired no later than the end of May 2013 and the failure to make adjustments must be treated as being "done" from that date. The claim should ordinarily have been presented in August 2013. It is therefore nearly 2 years out of time.

322. Our view is that it would be just and equitable to extend the time limit, despite the long period of delay. We had regard to the claimant's reasons for delaying, which included her health, and the other factors suggesting that the claimant should have presented her claim sooner.

323. Most importantly, we did not think that, for this aspect of the claim, the delay significantly affected the evidence. Mrs Watkin's evidence was impressive and reliable and supported by contemporaneous e-mails. This allegation was untouched by the particular difficulty in sourcing witnesses from the National Probation Service. Taking into account all the factors, we thought that the balance lay in favour of the claimant.

324. The tribunal therefore has jurisdiction to consider the complaint under PCP1 and on its merits that complaint succeeds.

Duty to make adjustments – PCP2

325. The claimant was disabled because of her colitis from 21 August 2013. Up to that point there was no duty to make adjustments.

326. From 21 August 2013, PCP2 put the claimant at a disadvantage when compared to persons who did not have colitis. Frequent management contact increased the claimant's stress, which aggravated her condition.

327. From 21 August 2013 to 23 September 2013, the respondent could have been reasonably expected to have known of the claimant's *disability,* but could not have been reasonably expected to know about the *disadvantage* caused by PCP2. It was not until the 23 September 2013 meeting that the respondent could have known that routine management contact at the rate of once or twice per week would aggravate her colitis. Nor did they know that the claimant wanted less frequent management contact. There was therefore no duty to make any adjustment up to that date.

328. From 23 September 2013 onwards, and throughout the second period of absence, the claimant was contacted as infrequently as was reasonably possible. As we have already recorded in our conclusions about harassment, each occasion of contact was for a legitimate purpose. Contact in relation to sickness absence was reduced to monthly. Put in the language of section 21, it was not reasonable for the Trust, or the respondent, to have to reduce the frequency of contact any more than it did.

<u>Duty to make adjustments – PCP3</u>

329. By the time the Stage One Notice was issued, the claimant was disabled with colitis.

330. We have taken the view that the issuing of the Stage One Notice put the claimant at a disadvantage compared to non-disabled employees in a way that was more than minor or trivial. It was recognised by the respondent's witnesses that receiving an attendance notice can be unwelcome and stressful. Stress aggravated the claimant's colitis. As we have found, receipt of the notice triggered a colitis attack.

331. By the end of the 23 September 2013 meeting, Mr Kayani and Mrs Churchill ought to have known that the Stage One Notice might aggravate the claimant's condition. They knew that the claimant's NAPO representative had indicated that less management contact would be desirable. He did not spell out that contact was aggravating the claimant's stress and therefore her condition, but that was a conclusion that Mr Kayani could reasonably have been expected to have drawn for himself based on what was said at the meeting.

332. Was it reasonable for Mr Kayani to have to delay issuing the Stage One Notice? In our view it was. The claimant was awaiting surgery. Her condition was being investigated. Depending on the diagnosis and prognosis, a warning might spur the claimant into improved attendance, it might have no effect, or it might delay her return to work by aggravating her condition. It was therefore too early to tell whether sending the Stage One Notice would serve any purpose at all. Put another way, there would be little adverse impact on the respondent by waiting for a confirmed diagnosis or prognosis. Delaying issuing the notice held the potential to remove the disadvantageous effect of PCP3. It would spare the claimant the stress of receiving the notice and avoid the possibility of a further colitis attack.

333. Again, we have considered the impact of the time limits. The act of discrimination must be treated as having been "done" when Mr Kayani did an act that was inconsistent with the duty to make the adjustment. That inconsistent act was the issuing of the Stage One Notice. It was isolated, in the sense that it did not form part of any ongoing discriminatory state of affairs lasting beyond 23 September 2013. The claim was therefore presented some 20 months after the normal time limit.

334. In our view it is just and equitable to extend the time limit. The claimant had a good reason for waiting until June 2014 before bringing her claim because she was trying to exhaust internal procedures by appealing against the Stage One Notice. There is some disadvantage to the respondent because by the time the claimant actually presented her claim Mr Kayani was not working for the respondent. Nevertheless, we do not think that this is a particularly weighty factor, for two reasons:

334.1. Had the claimant presented her claim in June 2014 following her unsuccessful appeal, Mr Kayani would already have been working for the National Probation Service. Any difficulty in securing Mr Kayani's attendance was not therefore caused by the delay.

334.2. We do not need to examine the subjective thought processes of Mr Kayani in order to determine whether or not the claim is well founded. The test of whether it was reasonable to have to make an adjustment is an objective one. Likewise, we did not need to hear from Mr Kayani in order to determine what he could reasonably have been expected to know. We had Mrs Churchill's evidence, supported by the meeting minutes, to enable us to find what was said at the 23 September 2013 ARM meeting.

335. Taking all of those factors together we have found that it would be just and equitable to extend the time limit. In substance, this part of the claim succeeds.

336. We should add a footnote that may be relevant to any remedy hearing. The claimant should not take this judgment to mean that the respondent should never have issued an attendance notice. All we have decided is that the Trust should not have issued it on 23 September 2013. There would have come a time, especially in 2014, when the respondent would inevitably have had to issue an attendance notice. The claimant was off work for several months and had already received a confirmed diagnosis. Workplace stress appeared to be a significant cause. The respondent needed to take a formal step to emphasise to her the importance of returning to work and to prompt a discussion about adjustments that might make a return to work possible.

337. Had the Stage One Notice been issued in 2014 instead of 2013, the claimant would in all probability have still suffered the same sense of persecution. She would have believed, wrongly, that her disability was being used as a weapon to attack her.

<u>Duty to make adjustments – auxiliary aid</u>

338. Without a support worker, the claimant was at a disadvantage compared to her colleagues who did not have a visual impairment. Until the claimant was

given a caseload, that disadvantage would, in our view, be minor or trivial. As we have found, if there was any period of time during which the claimant had to manage new cases without a support worker, that period can only have lasted a few days. Even if, during that period, the disadvantage was substantial (in the sense of more than minor or trivial), it is unlikely to have been acute, because the claimant's workload was being phased in gradually. Our view about this is reinforced by the absence of any complaint by the claimant at the time.

339. We do not think it was reasonable for the respondent to have to provide a support worker before 5 March 2014. Mrs Evans did all she could. The delay was not the fault of the Trust. It was due to confirmation of funding of the hours from Access to Work and then subsequent dealings between the claimant and Adecco. We have already observed that it was unrealistic to expect the Trust to speed up the process by dismissing one of its own employees, thus freeing them to become an agency worker. And any steps that the Trust could have taken to accelerate the process would only have alleviated a few days' worth of disadvantage that was not acute.

Duty to make adjustments – PCP4 – 2 July 2014 meeting

340. We now turn to PCP 4, and the three disadvantages caused by the practice of restricting the claimant's choice of companion at the meeting on 2 July 2014:

340.1. The first disadvantage did not, in our view, exist in the sense of affecting the claimant's participation in the meeting. There was no real need at the 2 July 2014 meeting for the claimant to rely on her central vision to enable her to say what she needed to say. It was a process of listening to, and answering, questions. She did not try to read any documents and nobody expected her to do so. We did take into account that the claimant would find it difficult to take her own notes at the meeting. This was something that most people would find difficult without a companion. It is hard for anybody to write whilst simultaneously listening or answering to questions. We thought that such a disadvantage just about crossed the hurdle of being more than minor or trivial, but it was not a particularly acute disadvantage.

340.2. The claimant was not put to the second of the alleged disadvantages either. She did not mention the effects of her colitis at the meeting, even without a work colleague present. There is no reason for us to suppose, therefore, that it was presence of a work colleague that would have inhibited her from talking about such matters.

340.3. That takes us to the third disadvantage. The claimant had a condition that was aggravated by stress. The 2 July 2014 meeting was always going to be stressful. Being at that meeting on her own would be worse for her than it would be for a person who did not have a condition that was aggravated by stress.

341. The claimant also wanted a companion from outside the workplace for a reason that nothing to do with her disability and which weighed more heavily on her mind than any of her disability-related disadvantages. She believed, wrongly, that a work companion would be persecuted if he or she accompanied her.

342. In our view, Mrs McKevitt could reasonably have been expected to have known of the claimant's visual impairment and her difficulties with note-taking. She could also reasonably have been expected to know that the claimant suffered from a medical condition that was aggravated by stress. She should therefore have known of the particular importance to the claimant of having a companion with her. Mrs McKevitt was supported by Mrs Stott who would have had access to the claimant's medical certificates.

343. Was it reasonable for the respondent to have to permit a family member to accompany the claimant into the meeting? We think it was not. The respondent was applying a policy that had been agreed with NAPO. It encouraged objectivity and order at meetings. Making an exception for the claimant would have a disruptive effect on the respondent, in that it would make it more difficult for them to enforce the rule in subsequent meetings involving other employees. Allowing a family member would be over-compensating the claimant for the disadvantage that was caused by her disability. It would be compensating her for a disadvantage that was mainly caused by her unfounded perception that a workplace colleague would be subject to retaliation. There was nothing to stop the claimant from bringing a workplace colleague who was entirely unconnected to the case. One example might have been a colleague from the Disability Advisory Group. We did not have to resolve the factual dispute about whether Margaret Stott told her that that was a possibility. If bringing a companion to the meeting was so important to the claimant, she could have thought of it for herself.

Duty to make adjustments - PCP5 – 2 July 2014 meeting

344. Because of the claimant's visual impairment, it was harder for her to take an effective note of the meeting than it would have been for a sighted colleague. That disadvantage was more than minor or trivial. As we have mentioned, however, that disadvantage was not acute in that it would already be hard for a person with full vision to undertake the task of taking an accurate note without a companion.

345. Mrs Stott and Mrs McKevitt could have reasonably been expected to know that the claimant was put at a disadvantage in taking notes.

346. We also considered that it would be reasonable for the respondent to have to permit the claimant to audio record the meeting, subject to an important qualification. The respondent was entitled to make its permission conditional on the claimant providing a copy of her audio-recording to them.

347. We find that, subject to that reasonable condition, the requested adjustment was in fact made. She was offered the chance to audio record the meeting with the proviso that she must provide them with a copy of the recording. When the claimant then declined the offer, there was no more that the respondent could reasonably have had to do.

Duty to make adjustments – PCP4 and PCP5 – application to amend

348. We now deal with the application to amend to bring further meetings within the scope of PCPs 4 and 5.

349. First, in case there was any doubt, we were satisfied that an amendment to the claim was required. The claim form was very hard to follow. After a very careful exercise in trying to understand the claimant's claims, Employment Judge Shotter precisely identified the meeting in respect of which the claimant was complaining and set it out in a clear case management order. The tribunal and the respondent were entitled to proceed on the basis that, unless the claimant applied to amend the basis on which she was putting her claim, the tribunal would adjudicate on the claim as set out in the order.

350. We considered first the meetings on 15 May 2014 and 20 June 2014. For these meetings we refused the claimant's application. It came very late – on Day 7 of the final hearing. The amendment raises a substantial area of additional factual enquiry: what was discussed between the claimant and Ms Lavin prior to those meetings? Did the claimant ask for a family member to accompany her? Did she explain why a work colleague or union representative would not suffice? What, if anything, was agreed? It is hard to answer those questions without hearing from Ms Lavin. Granting the amendment would cause a significant disadvantage to the respondent. Ms Lavin was not called as a witness. She did not need to give oral evidence to answer the adjustments claim as it appeared in the case management order. That disadvantage could not be overcome without an adjournment, which would cause unacceptable delay and further expense. It outweighs the disadvantage to the claimant by refusing the amendment. We also took into account the time limit. The last meeting took place on 2 July 2014. It would not be just and equitable to extend the time limit because of the impact of the delay on the evidence.

351. The remainder of the application related to the meetings 19 May 2014 and 5 June 2014. Here we were persuaded to allow the amendment, despite its extremely late timing. We could not find any disadvantage to the respondent. We heard evidence from both Ms Goodwin and Mrs Evans. Both of them were able to deal with the allegation as they answered questions. Their evidence was impressive. Both meetings were fully audio-recorded and we accepted that the transcript of both meetings was accurate.

<u>Duty to make adjustments – PCP4 and PCP5 – 19 May 2014 and 5 June 2014 - merits</u>

352. In our view, the claimant suffered from the same disadvantages at these meetings as she did at the 2 July 2014 meeting. Ms Goodwin and Mrs Evans could reasonably have been expected to have known about them.

353. For the same reasons as with the 2 July 2014 meeting, however, our conclusion is that it would not be reasonable for the respondent to have to permit a family member.

354. It would not be reasonable for the respondent to have to permit the claimant to audio-record the 19 May 2014 meeting. The respondent was already audio-recording it and produced a full transcript. As for the 5 June 2014 meeting, the claimant's requested adjustment was in fact made: the claimant was permitted to record the meeting herself.

<u>Duty to make adjustments – PCP6</u>

355. The allocation of new cases to the claimant extended over a period which ended on 22 April 2014. It did not form part of any ongoing state of affairs which lasted beyond that date. Unless the time limit were to be extended, the last day for presenting the claim would have been 21 July 2014. The claim is over a year out of time.

356. We have already dealt with the claimant's reasons for delay. We found in this case that the biggest impediment to extending the time limit was the effect of the delay on the cogency of the evidence. We have set out in paragraphs 56 and 156 the difficulties in finding relevant facts and the extent to which the delay has contributed to those difficulties. These facts, to our mind, lay at the heart of the issues in relation to PCP6. In particular, it was hard for us to assess whether it would be reasonable to have to adjust the claimant's workload without a clear picture of what her workload actually was at any point in time. It was also unclear at what point Ms Monteith or Ms Goodwin could reasonably have been expected to know that the claimant's workload was stressful to a point where it risked aggravating her colitis. We did not know exactly when the claimant's support worker became fully trained, so as to remove one aspect of the disadvantage caused by PCP6. For those reasons we do not think it would be just and equitable to extend the time limit.

Discrimination arising from disability

357. We can dispose of the section 15 complaint relatively quickly. The alleged unfavourable treatment did not happen. The claimant's disability was not used as a weapon to attack her. There was no coordinated or individual effort to make information difficult for the claimant to access and they did not exploit the claimant's difficulties in reading written documents so as to mislead her about Purple Futures.

358. Strictly speaking, the logically prior question is whether or not to allow the claimant to amend her claim to introduce the section complaint on this basis. We refuse the application. That decision should cause no disadvantage to the claimant because our findings of fact mean that the complaint is doomed on its merits.

Protected disclosure on 9 October 2013

359. The claimant's grievance submitted on 9 October 2013 was not a protected disclosure. She disclosed information which in her reasonable belief tended to show breach of a legal obligation. As we have found, however, the claimant did not believe that she made her disclosure in the public interest.

Protected disclosure on 16 May 2013

360. The claimant disclosed the alleged information, with the exception that she did not disclose any information about Mr Metherell having deleted e-mails. The claimant did not believe that this information tended to show that it would be likely that a particular criminal offence would be committed or that any relevant wrongdoing was being concealed. She did believe that the information in her grievance tended to show that her own health and safety had been put in danger, that colleagues' health and safety had been put in danger and that public health

and safety had been put in danger, in particular by the increased risk of re-offending by individuals under probation supervision. She also believed that her disclosure was made in the public interest. For the reasons set out in paragraphs 174 to 179, those beliefs were in our view reasonable.

Detriment

361. The alleged detrimental act consists of deliberately ignoring the risks raised in the protected disclosures. We considered each alleged perpetrator individually and also stepped back to see if there was a pattern that could be gleaned from the evidence as a whole. Having done so, we were able to reach a positive finding that none of them ignored the risks raised in the 16 May 2004 document.

362. One consideration is common to all the individuals accused of having ignored risks. The 16 May 2014 document was difficult to follow. We had the benefit of reading it with hindsight, through the prism of an active search for ways in which risk was highlighted, as opposed to a general complaint about the way in which the claimant was treated. Our task was assisted by the parties' signposting certain passages for us. We should add, in passing, that it was not just the claimant who drew passages to our attention, but also the respondent's counsel, with commendable professionalism and awareness of the need to put the parties on an equal footing. The respondent's various managers did not have that benefit. They were faced with was an unstructured and difficult document that broadly tended to suggest that it was a complaint about bullying and harassment, and we cannot criticise the respondent too harshly for not seeing it as a document that was alerting them to risk to the public.

363. Turning to the individuals:

363.1. Mrs McKevitt did not deliberately ignore allegations of risk to the public. She asked relevant questions of witnesses and believed on their evidence that the claimant had a more cautious attitude to risk than her colleagues. She asked for evidence about the four cases involving MAPPA and was met by the claimant telling her that it was for the respondent to uncover the evidence rather than her to provide it.

363.2. As for Carla Beigan, we are not entirely sure at what point it is alleged that she deliberately ignored the risks. She appointed Mrs Stott in May 2014 to support Mrs McKevitt. She received Mrs McKevitt's report and, with some delay, caused it to be sent to the claimant. Though we did not hear from ms Beigan, there was nothing to suggest that at Ms Beigan had deliberately ignored risks at any stage in the process.

363.3. Rosie Goodwin was perfectly entitled to take the view that the concerns that the claimant was raising should be investigated outside the grievance appeal process. She did not abdicate responsibility by asking Mrs Evans to take advice.

363.4. Paul Gotts did not deliberately ignore the risks. He took the appeal seriously. He adjourned it to obtain relevant witness statements. He was not taking instructions via an earpiece. He followed up by email one of the concerns about victimisation based on protected disclosure, and his outcome

letter shows that he believed that her allegations in the public interests were unsupported by evidence.

363.5. Dealing very quickly with David Metherall and Anne Pakula, we do not have to find whether they deliberately ignored risks or not. Their involvement ended before the claimant submitted her 16 May 2014 grievance. The only exception was that Mr Metherell was interviewed as a witness. We could not find anything in that interview that suggested that he was deliberately ignoring risks.

Constructive dismissal

364. We have recorded the claimant's reasons for resigning at paragraphs 225 and 225.5 above. With one exception, those reasons were entirely innocuous.

365. The exception was the delay in providing the grievance outcome. The delay could have contributed, in some small way, to the undermining of trust and confidence. This was only a small part of the claimant's reason for resigning. By itself, this delay was nothing like the sort of conduct that could demonstrate an intention to abandon and altogether refuse to perform the contract. Although the delay was amongst the claimant's reasons, it was not what the claimant regarded as the "final straw".

366. For those reasons would find that the events that actually made the claimant finally decide to resign were incapable in law of amounting to a "final straw". She did not therefore resign in response to a fundamental breach of contract and was not constructively dismissed.

367. We have considered, for good measure, the claimant's allegations, set out in our list of issues, which did not actually feature in the claimant's reasons for resigning. One of these included her belief that the grievance had not addressed anything except for the bullying by Ms Kuyateh. Even if this had been among the claimant's reasons for resigning, we would not have found that it could have damaged the relationship of trust and confidence. Mrs McKevitt did in fact spend some time addressing matters that went beyond allegations of bullying. To the extent that Mrs McKevitt did not fully address every point, we would find that she had reasonable and proper cause. The claimant's grievance was not easy to follow and the claimant declined invitations to assist the investigation by providing documents.

368. In case we are wrong in our analysis of the final straw, we have looked back through the claimant's employment for the last episode of conduct that could have damaged the relationship of trust and confidence. Aside from the delay in the grievance, we could find nothing after January 2014. In our view, the last things we could find that might be said to have damaged the relationship of trust and confidence were the remarks made in January 2014 by Ms Kuyateh to the claimant. In the intervening time, the claimant affirmed the contract by working until 23 April 2014. Remaining employed on sick leave between 23 April 2014 and 3 March 2014 also affirmed the contract due to the sheer length of the delay. The claimant was pursuing her grievance during most of that time, but her conduct did not demonstrate that her pursuit of the grievance was the only reason why she was remaining in employment. When her grievance was upheld

in respect of Ms Kuyateh's behaviour, and day-to-day contact with Ms Kuyateh was eliminated, the claimant resigned anyway.

369. If the claimant ever had the right to resign and claim to be constructively dismissed, she had well and truly lost it by March 2015. In any event, as we have found, she did not resign in response to any breach of contract. Her complaint of unfair dismissal therefore fails.

Employment Judge Horne

28 April 2017

REASONS SENT TO THE PARTIES ON

28 April 2017

FOR THE TRIBUNAL OFFICE