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# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE HALL-SMITH

**MEMBERS:** Ms C Bonner  
Mr M Sparham

**BETWEEN:** Miss K Hodge Claimant

AND

(1) London Borough of Merton Respondents  
(2) Tracy Swan  
(3) Fiona Thomsen

**ON:** 1, 2, 3, 4, 7, November 2016; (Chambers) 10, 11 January 2017, 10 February 2017.

## **APPEARANCES:**

**For the Claimant:** In person

**For the Respondent:** Mr A Choudhary, Counsel

## **JUDGMENT**

1. The Claimant was not dismissed by the Respondent within the meaning of section 95(1)(c) of the Employment Rights Act 1996 and accordingly the Claimant's complaint of unfair constructive dismissal is dismissed.
2. The Claimant's complaints of disability discrimination are not well founded and are accordingly dismissed.
3. The Claimant's complaints of victimisation are not well founded and are accordingly dismissed.

## **REASONS**

1. By a claim form received by the Tribunal on 29 January 2016 the Claimant Ms Katherine Hodge brought complaints of constructive unfair dismissal and discrimination on grounds of disability and victimisation against the three named Respondents, the London Borough of Merton (“the Respondent”), Tracy Swan and Fiona Thomsen.
2. At the hearing the Claimant attended in person and gave evidence before the Tribunal. The Respondent was represented by Mr A Choudhary, Counsel who called the following witnesses on behalf of the Respondent, namely Ms Tracey Swan, Team Manager, Mr Gerald Gray, Solicitor, Ms Fiona Thomsen, Head of Shared Legal Services for the South London Legal Partnership, Ms Fabiola Hickson, Team Manager, and Ms Julie Oldhamstead, Corporate Governance Officer. There was an agreed bundle of document contained in three lever arch files paginated from page 1 to page 1155. there was also a bundle provided by the Claimant at the hearing numbered G1 to G118).

### **The Issues**

3. The parties agreed a list of issues set out in a document headed the Respondent’s list of issues. The issues to be determined by the Tribunal involved the following
  - 3.1 The Claimant’s Tribunal claims involved the following:
    - a. Constructive unfair dismissal against the First named Respondent the London Borough of Merton.
    - b. Unlawful disability discrimination involving direct discrimination (s.13 of the Equality Act 2010) discrimination in consequence of disability against the First named Respondent and Tracy Swan (s.15 of the Equality Act 2010,) failure on the part of the Three named Respondents to comply with their duty to make reasonable adjustments for the Claimant (s.20 of the 2010 Act).
    - c. Victimisation contrary to s.27 of the Equality Act 2010.
  - 3.2 The Respondent accepted that the Claimant was a disabled person within the meaning of s.6 of the Equality Act 2010 by reason of a condition of chronic/severe migraines.

- 3.3 In broad terms the Claimant contended that the Respondent was in breach of the implied term of trust and confidence and of clauses 29.1 and 29.2 of her contract of employment involving allegation that as an Equal Opportunity employer the Respondent failed to comply with its equal opportunities and valuing diversity policy and that it had discriminated, harassed and victimised the Claimant.
- 3.4 The specific allegations of breach of contract are set out in the agreed list of issues which were for the most part directed towards the alleged conduct of Tracy Swan, Gerry Gray and Fiona Thomsen.
- 3.5 Whether the breaches alleged by the Claimant was sufficiently serious to justify the Claimant's resignation or the last in a series of incidents which justified her resignation on 27 November 2015?
- 3.6 Whether the Claimant resigned in response to the alleged breaches or some other reasons such as obtaining an offer of alternative employment?
- 3.7 Whether the Claimant left it too late to resign in response to the alleged breaches or whether she affirmed the alleged breaches of her contract of employment?
- 3.8 Whether, if the Claimant was constructively dismissed, was the dismissal fair in all the circumstances?

***Disability Discrimination***

- 3.9 In broad terms the Claimant contended that the Respondents failed to address adequately or at all alleged before performance issues relating to the Claimant.
- 3.10 In relation to reasonable adjustments the Claimant contended that the Respondents were willing for her to be accompanied/supported by her trade union throughout the period of her complaint and that it failed to offer her mediation following a meeting on 24 September 2015.
- 3.11 In relation to victimisation the Claimant relies on the following alleged protected acts namely,
- a. The complaint lodged by the Claimant against Mr Fellowes on 1 November 2012.
  - b. The Claimant accompanying Ms Morgan to a one to one meeting with her line manager and
  - c. Initiation of early conciliation (via ACAS).

- 3.12 The Claimant alleged that she was subjected to less favourable treatment including being marked as a trouble maker by the Respondent, being given a rating of satisfactory in her 2014/2015 appraisal, an unfair investigation into complaints raised by her, a failure to be offered mediation, an instruction to attend Gifford House, correspondence to her from management dated 24 and 25 November 2015 and 21 December 2015 and 5 January 2016, and a reference provided by the Respondents to Pattinson and Brewer, Solicitors dated 14 January 2016.
- 3.13 The Claimant subsequently withdrew her complaints relating to correspondence in November 2015.
- 3.14 The Respondents denied the alleged or any breaches of the Claimant's contract of employment and the alleged or any unlawful discrimination on their part against the Claimant.
- 3.15** The Respondents raised time jurisdiction Issues in relation to allegations of the Claimant which predated 30 October 2015 and deny that there were any grounds for contending that there was a continuing course of conduct relating to the Respondent's alleged conduct.

### **The Facts**

4. The Claimant, Ms Katherine Hodge, was employed by the Respondent, the London Borough of Merton ("the Respondent") as an assistant Solicitor. The Respondent was the host authority for a shared legal service comprising the London Borough of Merton, the London Borough of Sutton, the Royal Borough of Kingston-upon-Thames and the London Borough of Richmond, which were known collectively as the "South London Legal Partnership".
5. The Claimant's continuous employment commenced on 7 November 2011 with the Royal Borough of Kingston-upon-Thames. On 1 October 2013 the Claimant's employment transferred to the London Borough of Merton the host Authority for the South London Legal Partnership ("SLLP").
6. The Second named Respondent, Tracy Swan, was a team manager in the SLLP. Tracy Swan's employment transferred from Sutton where she had worked as a principal Solicitor in Sutton Legal Services, to the Respondent. In her role as team manager Tracy Swan was responsible for a team consisting of 11 fee earners, one of whom was the Claimant.
7. Before her transfer to the SLLP the Claimant had been managed by a Mr David Fellows at Kingston. On 6 November 2012 the Claimant raised a grievance against David Fellows alleging unfair and less favourable treatment. The Claimant's grievance was dismissed. The Claimant

alleged that Ms Tracy Swan had been aware of the grievance and had accordingly requested to be the lead interviewer of the Claimant in 2013 when she had applied for a post within the SLLP. In addition the Claimant alleged that by raising a grievance against Mr David Fellowes she had been marked as a trouble maker.

8. The Tribunal found there was no evidence to support such allegations. In cross examination Tracy Swan stated that David Fellowes had been unable to sit on the interviewing panel and that she was asked to sit on it and that she did not think that she knew that he had been the Claimant's line manager. The Tribunal found Tracy Swan an impressive and credible witness.
9. During the period the Claimant had been working at Kingston, she had been provided with a number of adjustments because of her susceptibility to migraines, namely by the provision of blinds and locally controlled overhead lighting.
10. On 7 October 2013 the Claimant emailed Tracy Swan, page 275 in relation to adjustments. An occupational health report recommended that the Claimant reduce her hours to 18 hours per week until the second week in October.
11. On the same date 7 October 2013 Tracy Swan who had become the Claimant's line manager, had a meeting with the Claimant at which the Claimant raised the issue of her migraine condition. The Tribunal found that Tracy Swan was very sympathetic to the Claimant particularly in circumstances where she herself was susceptible to migraine and accordingly understood the Claimant's condition. Tracy Swan stated that she would arrange an occupational health referral for the Claimant and that the Claimant could continue working on reduced hours until the OH report was available.
12. The Claimant raised an issue about the date when Tracy Swan had made the referral to occupational health. In a letter to the Claimant dated 30 October 2013, page 287, Tracy Swan alleged that she had made a referral. The day of the referral was 31 October 2013 pages 287 to 288A. The Claimant at the hearing put it to Tracy Swan that she had been dishonest and that the delay, if indeed there was a delay, had been deliberate.
13. The Tribunal found the Claimant had tendency to raise very serious allegations against the Respondent, which the particular circumstances did not justify. We accepted the evidence of Tracy Swan that she genuinely believed that she had made a referral and that she had a concern that she had submitted the referral checking the personal details with the Claimant. The Tribunal found that the allegation of dishonesty on the part of Tracy Swan was entirely without foundation and we were surprised that as a lawyer the Claimant should direct such a serious

allegation against any individual, in the absence of any cogent evidence to support such an allegation.

14. Notwithstanding the Claimant's allegations of dishonesty directed at Tracy Swan, the Tribunal noted that in an email dated 17 December 2013, page 302 the Claimant included the following

**I would like to personally thank you for being a very supportive manager in terms of work and my personal health issues. It has meant a lot.**

**Thank you**

15. There were subsequent emails from the Claimant, pages 304 and 376 in which the Claimant recognised support which had been given to her by Tracy Swan. In her email to Tracy Swan dated 5 September 2014 page 376 the Claimant thanked Tracy Swan for her support and the Claimant added that it had been "immense".
16. At a meeting on 31 January 2014 between Tracy Swan and Marie Gadsden, HR manager for Kingston, Marie Gadsden stated that Kingston had not been happy with the legal support for Kingston's employment work. Marie Gadsden raised concerns about the Claimant's approach and her style and delivery and the Claimant's use of Counsel. Tracy Swan stated that she would discuss the concerns raised with the Claimant and we found that she had been specifically requested not to pass on Kingston's concerns about working with the Claimant because they had been raised on a confidential basis and Kingston did not want the Claimant to know the details of the discussion. When Tracy Swan queried how she could raise the concerns with the Claimant it was agreed that she could raise general concerns about style and delivery.
17. Tracy Swan met the Claimant on 3 February and pointed out in general terms the concerns which had been raised. In an email to Tracy Swan dated 4 February 2014, pages 306 to 307 the Claimant included the following

**Following your meeting with Marie Gadsden and Phillipa Haining on Friday 31 January 2014, I understand from you that some issues arose about the style and delivery of my advice and in particular apparently not providing full options to the client.**

**In response, I explained that I was criticised by my previous manager for providing a Rolls Royce Service; mainly proving the client with thorough and engaged advice setting out full options. I highlighted some issues which arose with compromise agreements eg omission to address notice periods/returning property.**

**I also provided you with a background of the Kingston working culture. In short, indicated that I was happy to take on board any tips you may have.**

18. It was the Claimant's case that against the background of the concerns which had been raised, the Respondent should have invoked its capability procedure. Tracy Swan contended that the concerns which had been raised did not amount to issues that required the operation of the Respondent's capability procedure and the Tribunal considered that they were the sort of issues which could properly be raised and addressed in discussions between Tracy Swan in her management role as the Claimant's line manager and the Claimant.
19. We noted that in her oral evidence Tracy Swan stated that Kingston had pressed upon her that the concerns had been raised confidentially and she thought that the client, namely Kingston was being hugely unfair in relation to the concerns or criticisms of the Claimant.
20. Tracy Swan did have a number of one to one sessions with the Claimant. There were issues concerning time recording for work undertaken on behalf of Kingston by another member of staff Joe Worrell.
21. In May 2014 the Claimant was appraised for the year 2014 pages 362 to 369. At page 364 the manager's summary of overall performance included the following

**Katherine recently returned from an extended holiday and I appreciated how well she had prepared in advance so that her cases were clearly marked up and up to date with clear instructions left for the team in what matters needed progressing whilst she was away, with much work carried out in anticipation of her holiday.**

22. On 23 December 2014 Tracy Swan held a one to one meeting with the Claimant at which the Claimant's appraisal was discussed, page 426. In the record of the meeting, under the heading 'issues for consideration', page 426A, there was the following entry

**need to review appraisal discussed need to focus on objectives.**

23. On 10 November 2014 in an email from Marie Gadsten to Tracy Swan, Marie Gadsten raised a number of concerns about the Claimant's management of a particular case pages 395A to 395B.
24. In her witness statement the Claimant stated she did not accept the accuracy of the one to one notes, which were included in the bundle and

she stated that she had reason to believe that these were not contemporaneous records made by Tracy Swan at the time and all later additions had been made by her.

25. At paragraph 42 of her witness statement the Claimant alleged that the record of a one to one with Tracy Swan on 8 July 2014 pages 351 to 352 had been tampered with by Tracy Swan at a later date to give an impression that she had given her an action point in respect of time recording, which was a concern which had been raised.
26. The Tribunal considered that this was a serious allegation to contend that documentary records had been tampered with. The Tribunal considered that such an allegation was entirely without foundation. We accepted that the Claimant did not see the notes at the time although we noted that endorsed at the foot of the standard 'one to one' form of the record of the one to one were the words 'supervisor to keep this form on file with copy given to supervisee, if requested'.
27. The Tribunal found no evidential basis for the Claimant's allegations and we considered that the raising of such allegations of dishonesty, particularly having regard to the Claimant's status as a Solicitor, including the allegation of fabrication of records, in the absence of any evidential basis as we found, significantly undermined the Claimant's credibility as a witness.
28. The Claimant did allege that the documentary record of a one to one of 6 March 2014, page 328, could not have been completed at the time in circumstances where she alleged the pro forma had not been available until April 2014. The Tribunal accepted the evidence of Tracy Swan that the form had been uploaded to the IT system in November 2013 and was available to be downloaded. It had previously been a standard form for Merton and Richmond and was officially formalised for SLLP in April 2014. We noted that the Claimant did not allege that the content of the one to one record of 6 March 2014 had been inaccurate.
29. The Claimant was cross-examined at significant length about her allegations of tampering of the one to one notes and it was pointed out that her allegation that the one to one record of the meeting on 23 December 2014, page 426A had been tampered with, had not been raised in her witness statement. When asked whether she wished to withdraw the allegation of tampering the Claimant replied

**There had been things which do not add up there are some one to ones in which things were added.**

30. In January 2015 Gerald Gray took over the Claimant's line management. Gerald Gray was a more "hands on" manager than Tracy Swan had been and he held one to one's with the Claimant on a more regular basis. Tracy Swan had had a significant number of direct reports which had



impacted upon her ability to hold as many one to ones with those she managed, to the same extent as Gerald Gray. Gerald Gray had less management responsibilities than of Tracy Swan.

31. Gerald Gray's first meeting with the Claimant took place on 3 February 2015. Prior to the meeting there had been an informal handover from Tracy Swan who raised the concerns of Kingston about the Claimant's style and general approach and she raised the Claimant's health issues.
32. The Claimant had concerns about the time recording of a legal assistant, Joy Worrell. The Claimant raised her concerns in an email to Gerry Gray dated 23 February 2015 pages 449 to 50. The Claimant's email included the following, page 450

**With the greatest of respect to Joy I do not (the majority of the time) delegate tasks which require her to draft, advice or research for several hours and as Joy does not report to me I have not previously reviewed her time recording. Tracy did mention the past about whether Joy and I duplicated in terms of time recording to which my response at the time was that Joy was doing a lot of property work and Kingston clients as a result of historic issues are not efficient and required at times a lot of lawyer support. Notwithstanding that, I am very concerned that Joy has been time dumping on my case files and in protection of my clients and my professional career as a Solicitor that has a duty to time record accurately I wanted to raise this with you.**

**I do feel that if Joy has been falsely time recording that this has put me in a very compromising position in terms of the costs to Kingston, my efficiency as lawyer.**

33. In an email to the Claimant in reply to her concerns, Gerry Gray on 2 March 2015 page 474 stated that he would be speaking to Joy Worrell about time recordings and other issues. Gerry Gray's email continued:

**On any file you have conduct of you are responsible for the charges to the client along with every other aspect of the file. This is part of the professional responsibility of being the lawyer from the time you start working on the matter. If you ask a junior member of staff to carry out task for you, you have to supervise what they do, including when they put time on your file.**

34. In her email reply of the same date 2 March 2015 the Claimant took issue

with the fact that as she stated she must be responsible for the time recording of junior staff under her case files and she added that it appeared that she was retrospectively being made a scapegoat which she vigorously objected to.

35. In his reply dated 2 March 2015 Gerry Gray included the following, page 481.

**Anyway, the best approach now is to move forward positively and for everyone to learn from the point we have reached. There is no “blamegame” or “scapegoat” retrospectively or otherwise. Of course I will raise the issues with Joy as need be once she is back, but now you know how important accurate time recording is, you can do your part to help out moving forward in a positive way. That’s all it is really, trying to steer matters so they go to the right way and the clients are happy with what we do. I will be here to support you as we go, but you are the one who has to win the confidence of/keep happy the clients on the matters you are responsible for. All my thoughts on this to date have just been aimed at trying to help you do that.**

36. The Tribunal considered that Gerry Gray’s approach to the Claimant’s concerns about time recording were measured and reasonable and we found the Claimant’s reaction to Gerry Gray’s approach as amounting to scapegoating to be unjustified.
37. In May 2015 the Claimant provided her comments in respect of her 2014 appraisal objectives pages 499 to 500. The Claimant provided no information in relation to objective ‘four’, namely responding constructively to negative feedback and in relation to job objective ‘seven’ she stated that no work had been undertaken with regard to that objective. Gerry Gray noted that in her comments to objective ‘five’ to which the Claimant had commented that she had been fostering good working relationships with the clients and had received positive feedback, the Claimant had not acknowledged that there had been any negative feedback. In relation to objective ‘eight’ namely developing TUPE experience the Claimant commented that she had attended a free breakfast seminar many months back and had listened to podcasts.
38. Gerry Gray held an appraisal meeting with the Claimant on 11 May 2015. The Claimant’s comments in respect of her 2014 appraisal were discussed and the Claimant accepted that there was more to be done in terms of meeting some of the objectives.
39. Following his meeting with the Claimant Gerry Gray had a discussion with Tracy Swan and he considered in circumstances of the Claimant’s own

self assessment and the discussions he had had with the Claimant at the appraisal meeting that the Claimant's overall rating should be 'satisfactory', based on the number of partly met, unmet and met objectives. The Claimant had nine objectives for the appraisal years 2014/2015 and it was Gerry Gray's assessment that two of the objectives had been met in full, six had been partly met and one was unmet. An overall rating of "good" required the individual appraised to meet the majority of all the targets and a 'satisfactory' rating was awarded where the appraisee meets some of the targets and part meets others, page 258.

40. The staff appraisal form for the Claimant pages 515 to 523 sets out in detail Gerry Gray's comments in relation to each of the objectives and the rating Gerry Gray had awarded for each of the objectives. The Tribunal noted that Gerry Gray summary of the Claimant's overall performance page 518 included the following "Katherine's performance has been satisfactory overall with enough evidence of strong performance at times to clearly suggest that a good or even better performance is well within reach.
41. On 20 May 2015 the Claimant emailed Gerry Gray, page 508 stating the following

**In confidence I just wanted to inform you that my father was diagnosed with prostate cancer last week which is very aggressive. This is having an impact on me emotionally and I just wanted to make you aware. I may have to on occasion attend hospital appointments with my dad but if this is the case I will give you as much notice as possible."**

42. Gerry Gray produced a draft appraisal on the Claimant on 5 June 2015, page 514. There was a reference to the Claimant's father at page 519 in the following terms:

**The need to support her father with a recently diagnosed health issue has impacted on Katherine and she may need to take occasional time off to lend support. Katherine will do her best to give as much notice as possible when she needs to take time off and I have indicated that we will be as flexible as we can.**

43. On 19 June 2015 the Claimant emailed Gerry Gray setting out her review to his proposed appraisal of her. The Claimant commented that in the round the entries against the objectives appeared fair with the exception of points she listed in her email. The Claimant did take issue with a number of issues raised by Gerry Gray in his proposed appraisal. At page 540 the Claimant stated that she took issue with the comment of mixed feedback, but it was the case as we found that the Claimant had received some negative feedback particularly from the Kingston client. The Claimant ended her email with the following "*I do not feel the appraisal in*

*its current form is a true reflection of me as an employment practitioner/advocate and I feel undervalued and quite deflated”.*

44. The Tribunal during the course of the hearing heard a significant amount of evidence in relation to the Claimant’s appraisal and her manager’s comments and ratings which she challenged. The Claimant alleged that she should not have been awarded a rating of ‘satisfactory’. The Tribunal reminded itself that it was not its role to reappraise the Claimant and that in the absence of any evidence supporting a contention that the appraising manager had adopted an approach to undermine the appraisee without justification or was motivated by reasons of bad faith or other unworthy motive such as unlawful discrimination, the Tribunal should not interfere.
45. In the circumstances of this case the Tribunal found on the evidence that Gerry Gray had acted wholly appropriately in his appraisal of the Claimant and that he had reached his conclusions and his rating of ‘satisfactory’ as a result of a genuine and comprehensive appraisal of the Claimant. We found that the entire appraisal process of the Claimant had not been tainted by any element of a discriminatory approach or that it had amounted to victimisation of the Claimant. We concluded that the appraisal had amounted to Gerry Gray’s true reflection of the Claimant in her role as an Employment Law Practitioner. In cross examination the Claimant stated that she had always maintained that her rating should have been ‘good’.
46. In an email to Gerry Gray dated 19 June 2015 the Claimant stated the following page 541

**I also omitted to say that can the comment be removed regarding my father which I told you in confidence. I do not feel it is appropriate to be contained in my appraisal which may be sent or reviewed by others.**

47. In his reply of the same date 19 June 2015 page 541 Gerry Gray pointed out the following

**I am quite content to remove the reference to your father’s illness (although I did try to keep the reference entirely general and I though it appropriate). My only reason for including it was because it seemed to be something likely to impact on your forthcoming work year. However I appreciate this is sensitive and so of course, as you don’t want any reference to it in the appraisal I will remove it.**

**As to the other issues shall we meet to discuss them? We could have done this at any time since I gave you the appraisal but shall we fix a slot as early as we can next week? How you are fixed on Monday and Thursday afternoon?**

**I am more than happy to explore the issues behind my assessment with you (and Tracy will in any case be reviewing).**

**In order to keep our clients, we are all going to have to raise the bar and, as we discussed, I do have to challenge you a bit to encourage this.**

**Sorry to hear you feel deflated. That certainly was not my intention. Rather the aim should be to look forward positively to the forthcoming year. I have indicated on the appraisal form wherever would seem very encouraging indicators.**

48. The Tribunal found that following her appraisal, the Claimant's relationship with the Respondent and in particular with management deteriorated. The Tribunal accepted the evidence of Gerry Gray, whom we found a credible witness that the Claimant became increasingly confrontational and that Gerry Gray endeavoured to maintain a constructive and amicable working relationship with her. We found that Gerry Gray was sympathetic to the Claimant in circumstances where he himself had been diagnosed with cancer on two occasions.
49. In July 2015 Marie Gadsten requested that the Claimant should be removed from a certain case she had been allocated, referred to as case "F". Tracy Swan to whom the request had been made discussed the matter with Gerry Gray and neither of them thought that the Claimant should be removed from the case. It was agreed that Gerry Gray would keep a close eye on the matter and that the Claimant would continue to work on the case under his supervision. On 30 July 2015 Gerry Gray emailed Marie Gadsten pages 599 to 600 copied to the Claimant, in which he pointed out that it was the Claimant's case but that given the sensitivities and potentially high cost do make sense for him to be involved as well as the Claimant.
50. On 3 August 2015 the Claimant emailed Gerry Gray in relation to the case, page 598, stating that she was unclear why the case required two fee earners and that she felt undermined by Gerry Gray's management style. In his reply of the same date 3 August 2015 Gerry Gray pointed out the following

**The short term reason for my involvement was that Marie rang me and said she felt the case lacked clear strategy. In response (and its all I have done) I emailed her and explained what the strategy is. I also made it quite clear that it is your case. In your absence, I endeavoured to do different things in order to get the meeting with the clients concern sooner rather than later. Nothing wrong with any of that is there?**

51. The Claimant's revised appraisal was produced on 24 August 2015 page

628. In his email to the Claimant attaching the appraisal document, Gerry Gray pointed out the following “

**please find attached the updated appraisal document. As you will see, I had been content to go along with most of your suggestions for amending. In particular, if you don't want to be responsible for monitoring junior staff time recording on your files (mostly this is likely to be joy) I am content to do that provided you keep me posted in all the tasks that you delegate to them, so I know which files to look at. You will, though need to keep an eye on the total time on the particular file where (as should happen in most cases) you have given the client a cost's estimate at the beginning of the matter in the AOI. This is just so that if the cost target looks like it would be exceeded, you can let the clients know. The ISO inspector like six examples of this, so it well worth doing.**

**We were agreed on the general appraisal rating when we met, which is governed by the rating system set out on the form itself.**

52. Gerry Gray also removed any reference to the Claimant's father in the revised appraisal.
53. Following receipt of her revised appraisal the Claimant and another lawyer, Nigel Cameron, who had been unhappy with his appraisal rating of good raised an informal complaint to Fiona Thomsen the head of legal services in relation to the following
  - (i) **Issues arising from Gerry's management style; and**
  - (ii) **Content and conclusions made in our appraisals.**
54. On 3 September 2015 the Claimant returned the revised appraisal which she had not signed. In her comments the Claimant stated that at the very least her performance had been good and she alleged that there had been a stark difference in management style between Tracy Swan and Gerry Gray. The Claimant also stated that she felt that she was on the verge of resigning.
55. Fiona Thomsen arranged a meeting with both the Claimant and Nigel Cameron to consider their informal complaint. The meeting took place on 3 September 2015 and at that stage Fiona Thomsen did not know what was to be discussed at the meeting. By the time of the meeting the Claimant had received the revised appraisal.
56. On 4 September 2015 Gerry Gray wrote to Tracy Swan, pages 691 to 692, with his comments on the Claimant's feedback on her appraisal. In his email he acknowledged there had been a delay in sending the revised

appraisal form to the Claimant and he provided a number of reasons for the delay including the fact that the Claimant had told him that a serious health issue from a member of her family was impacting on her emotionally so that he was trying to be sensitive to such. On 7 September 2015 page 654, Tracy Swan forwarded to Fiona Thomsen, Gerry Gray's comments on the Claimant's feedback to her appraisal and added her own comments to Fiona Thomsen and copied her email to the Claimant (. In her comments as review manager Tracy Swan included the following

**Given the appraisal assessment guidelines and the number of part met objectives with one unmet, as well as the balance of comments within the appraisal, Gerry's assessment of Katherine's performance is satisfactory appears to me to be appropriate. However I am pleased to note the improvement in Katherine's more recent practice mentioned in the attached and I hope that we can now move forward in the new appraisal year with a focus on working towards achieving the appraisal objectives outlined for this year and so enabling a good assessment in a next appraisal end of year review which I am sure is completely achievable.**

57. On 8 September the Claimant emailed Tracy Swan copied to Gerry Gray and Fiona Thomsen page 658 in which she pointed out that she had informed Gerry Gray about her father's condition in complete trust and confidence and had made it clear that she had wanted this information to be kept private. The Claimant with some justification, as the Tribunal considered, stated that she was appalled that Gerry Gray had used the confidential information about her father as a reason for the delay. The Claimant demanded an immediate apology.
58. On 15 September 2015 Gerry Gray emailed an apology to the Claimant, page 730, in the following term

**Just picking up on the apology issue in your email. It will be for Tracy/Fiona to respond on the other points. My comments were included by way of explanation of the context. I believe in the circumstances this was appropriate and I made the reference general and non-specific. It was not my intention to cause any upset or distress and if the inclusion of the reference did so I am generally sorry. My aim in relation to your father's ill health issues was to be supportive. By allowing you to take other "leave" at short notice and on one occasion dealing with work issues on my own annual leave day to enable you to accompany your father to the hospital, for example, I had hoped I had been of some help.**

59. The Tribunal considered it unfortunate that Gerry Gray had made reference again to the health of the Claimant's father, but we noted the terms of Gerry Gray's apology. We also noted that in his explanation for the delay in revising the Claimant's appraisal Gerry Gray had not identified the Claimant's father as a family member or the fact that the health issue involved cancer. There was no evidence before the Tribunal which supported a contention that the reference to the health issue of the Claimant's family member was malicious or had been referred to, to undermine the Claimant or to cause her distress. We found that the Claimant's concerns about the inclusion of such reference were dealt with genuinely and speedily.
60. On 10 September 2015 Katherine Hodge emailed Tracy Swan pages 674 to 675 in which she referred to the informal meeting she had had with Fiona Thomsen together with Nigel Cameron in relation to Gerry Gray's management style and the appraisal's issue. Tracy Swan had proposed a meeting on the following day on 11 September. The Claimant in an email to Tracy Swan declined the meeting on the following grounds, pages 699 to 700.

**In terms of the meeting tomorrow, I would like to decline this for two reasons. Firstly, I would like to be accompanied by a trade union representative and they are not available at such short notice. Secondly as highlighted above this is a collective complaint and is only right that Nigel should be present, further, I would like Fiona to be present to avoid there being any further misunderstanding and there are some points that I would like to raise I wish Fiona to be party to.**

61. At this stage the Claimant had raised concerns which she described as an informal complaint about Gerry Gray's management styles and the appraisal process. In circumstances of a proposed meeting to be about the informal complaint, the Claimant did not provide any reason in her email for her wish to be accompanied by her trade union representative.
62. On 22 September 2015 Fiona Thomsen wrote to the Claimant and Nigel Cameron proposing a meeting on 24 September 2015 and pointed out the following:

**My understanding is that informal meetings do not usually involve trade union representatives attending and on the basis we are able to meet previously without your trade union representative I would hope that we can do the same again with me.**

63. In an email to her trade union representatives dated 16 September 2015, page 74,1 the Claimant stated that she had gone home in complete and



utter tears she was finding the whole situation untenable and she wanted management to refrain from treating her with a lack of dignity and respect and she felt that she had no support. The Claimant added the following:

**Both I and Nigel Cameron raised, heavy heartedly a collective complaint about our line manager's management style and anticipated there being a round table meeting. Instead management have done everything in their power to separate our collective complaint and there has been a barrage of emails of management explaining actions with the benefit of hindsight instead of acknowledging the distress Nigel and I have and continue to endure. I am also very upset that my father's ill health is still being used as a reason for Gerry's delay turning round the appraisal.**

**I've no idea whether I will be in tomorrow but please can UNISON inform management that I have as a result of management's approach today broken down in tears and gone home.**

**Management clearly do not want me there I have on more than one occasion that I have already stated that I am on the verge of resigning and no one has been concerned or just met with me which I think speaks volumes.**

64. The Tribunal considered that the content of the Claimant's email misrepresented management's approach to her, as evidenced in the documentary evidence referred to. We noted that only the day before the Claimant had received a fulsome apology from Gerry Gray which had not in fact identified her father and she had been assured that no further reference would be made to such. The Tribunal considered that by this stage the Claimant had adopted an approach which no longer involved the engagement of a constructive relationship on her part with management.
65. We noted that at that stage the Claimant had made references to her being on the verge of resigning. In an email to her union representative on 23 September 2015, page 795 the Claimant included the following

**I wondered whether on a without prejudice basis it can be approached about reaching a settlement agreement. I have lost complete confidence in management and I do not see from their actions how the matter will be amicably resolved. It just seems where there is an opportunity to have a pop they will, particularly against the background where I said that I was on the verge of resigning and left the office in tears it does not instil much confidence in me.**

66. On 24 September 2015 Fiona Thomsen held a meeting with the Claimant and with Nigel Cameron. The notes to the meeting are at pages 796 to 800. The opening comments to the meeting, page 796 the notes recorded the following

**I convened this meeting as a follow up to the meeting with Katherine and Nigel held on 3 September 2015 I explained at the end of the first meeting I took the view that Tracey could deal with the complaints raised as Gerry's line manager as she had not heard any specific complaints against Tracy. I indicated that I had been reflecting on the emails sent this time in which it appeared that there were complaints against Tracey and therefore, a further meeting was required in order to go over the complaints again in order that I could take notes upon which I would undertake an informal investigation. Nigel indicated that he had not made a complaint about Tracy.**

67. At the meeting Fiona Thomsen asked both the Claimant and Nigel Cameron what outcomes they were seeking and the Claimant replied that she did not know as she had lost confidence and that she was really disappointed, page 799.
68. Fiona Thomsen sent her notes of the meeting to the Claimant on 25 September 2015 and she wanted them returned as quickly as possible before she had discussions with Tracy Swan and Gerry Gray. The Claimant did not make any amendments to the notes of the meeting on 24 September 2015.
69. Fiona Thomsen met both Gerry Gray and Tracy Swan on 14 October 2015 pages 832 to 836. At the meeting the matters raised by the Claimant were discussed. Fiona Thomsen decided to treat the complaints by Nigel Cameron and the Claimant separately in circumstances where she considered they were different in nature.
70. Fiona Thomsen produced her response to the Claimant's informal complaint on 4 November 2015, pages 872 to 879. In relation to the appraisal issue Fiona Thomsen concluded with the following, page 874

**I cannot see anything unreasonable in Gerry's assessment. Indeed when reading the documents the whole of Gerry's comments and assessment come across genuinely positive in nature with areas identified for improvement. Katherine's comments seem to be incongruous and not proportionate with the matters raised by Gerry.**

71. In relation to Gerry Gray's management style she found no evidence to support the complaint relations as such. The Tribunal noted the following

observation by Fiona Thomsen, page 878:

**I also think however that Katherine has difficulty in accepting a performance management culture where negative feedback needs to be addressed, and which should be taken as an opportunity to improve performance and service delivery rather than an opportunity to fall out with her managers.**

72. Although the Tribunal took on board the fact that an employee such as the Claimant may well be upset about an appraisal process and its outcome, we found that in the circumstances of this case the Claimant had adopted a position which involved an unjustified overreaction to management's observations and ratings in the appraisal process. We accepted Gerry Gray's evidence that the Claimant had originally not challenged her rating of 'satisfactory'. We found that management had reacted constructively to the Claimant's concerns and we considered it unfortunate that the Claimant failed, as we found, to engage constructively with her management.
73. The Claimant's complained that Fiona Thomsen in her response to Nigel Cameron's complaint had offered mediation whereas in her response to the Claimant's complaint the issue of mediation had not been raised. The Tribunal noted the concluding paragraph of Fiona Thomsen's recommendations to the Claimant's complaint page 879:

**I expect normal line management arrangements to resume with appropriate lines of communication and supervision. If all parties think a meeting would be useful to build bridges and agree a way forward then that should be pursued between Katherine and her direct line managers.**

74. The Tribunal considered that Fiona Thomsen had undertaken a fair and reasonable investigation into the Claimant's complaint. Fiona Thomsen did not recollect the Claimant requesting mediation. The reason the issue of mediation had been raised in relation to Nigel Cameron's complaint was that in her view the relationship between Gerry Gray and Nigel had broken down and there had been significantly more history between Gerry Gray and Nigel Cameron.
75. In an email to Fiona Thomsen dated 12 November 2015 pages 884 to 885 the Claimant stated that she did not agree with Fiona Thomsen's findings she questioned Fiona Thomsen's impartiality and objectivity and she stated that she would be escalating the matter to the next stage of the process. The Claimant concluded her letter with the following

**I do not agree with your findings as stated in our last meeting in order for me to be able to work with Gerry, my respect for him would have to be built back by way of mediation and this**

**has not occurred to date.**

76. In an email from the Claimant's union representative Peray Ahmet dated 25 November 2015 to Gerry Gray, Peray Ahmet included the following:

**In the meantime I will talk to Katherine about a mediation meeting and see if we can resolve matters before they escalate any further.**

:

77. On 27 November 2015 the Claimant sent a letter of resignation to Fiona Thomsen in which she ,

**The reason for my resignation is that I found it untenable to work at SLP owing to**

- **Failure by management to address sensitively and impartially a collective complaint by Nigel Cameron and I on 3 September 2015 to own up to Fiona Thomsen in respect of Gerry Gray's management style and the content/rating of appraisals;**
- **Gerry Grays oppressive and difficult management style constituting bullying and harassment;**
- **Failure by management from 3 September 2015 to have a round the table meeting with Gerry Gray and Tracy Swan and or mediation to date, to attempt to promptly resolve our complaints and or clear up any misunderstandings;**
- **Disclosure of sensitive information about my father's ill health in an appraisal where I expressly stated in writing that I wanted to no reference to my father's ill health, which was subsequently agreed and removed. However disingenuously reference was made to my father's ill health and my alleged well being to explain Gerry Gray's shortcomings in terms of the delay with the appraisal process. I still remain incredibly hurt by this;**
- **Attempt by Tracy Swan to make me a scapegoat for the declining relationship with the Royal Borough of Kingston upon Thames despite highlighting with her Fiona Thomsen and other colleagues orally and in written correspondence the historical reasons behind high chargeable hours. No response or action was ever received or taken by management. In addition, I highlighted discrepancy with some of Joy Worrall's time recording of which Tracy Swan and Gerry Gray have/headlined management responsibility for an endeavour to shoehorn their responsibility to me by way**

of an appraisal objective;

- **Introduction of new information in the informal grievance outcome that allegedly RBK (Royal Borough of Kingston) had an issue with my performance and allegedly Tracy Swan never raised this with me at the material time owing to my condition of chronic migraines which I find totally abhorrent. No referrals were made to occupational health by Tracey Swan to support this proposition and again it's an attempt by management, with the benefit of hindsight to explain their actions and omissions;**
- **No opportunity to review have a right to reply to documentation/new op information referred to by Fiona Thomsen at the termination of her investigation into the collective and formal complaints made by Nigel Cameron and I.**

**In the light of the above, I have lost total trust and confidence in management and I no longer wish to work for an organisation and of more concern a department where staff are mistreated for speaking out or challenging management on important issues or just doing a good job of which I have. I have had no alternative but to seek employment elsewhere.**

**It is my expectation that when a reference is sought from a future employer that I will not be victimised for proactively raising a genuine complaint with a colleague. It's my expectation the content of any reference should be true, fair and accurate.**

78. The Tribunal found that by the time she wrote her letter of resignation the Claimant had been interviewed by a firm of Solicitors, Pattinson and Brewer, on 16 November 2015. The Tribunal asked the Claimant about the time when she applied for the job but we found the Claimant was evasive in her reply to the Tribunal's question when she said that she had sent a covering letter by post but had not retained a copy.
79. In circumstances where the Claimant prided herself on her abilities as an Employment Lawyer we found the Claimant's evasiveness unconvincing. The Tribunal noted that the Claimant had raised the possibility of settlement proposals with her union representative in September 2015 and we considered that her reference to her expectation that when a reference is sought from a future employer, evidenced the fact that, on the balance of probabilities the Claimant was aware that she would be offered a position with Pattison and Brewer by the time she sent her letter of resignation. Indeed in a letter to the Claimant dated 30 November 2015 pages 900 to 901, three days after the Claimant had sent her letter of resignation to the Respondent, Pattinson and Brewer stated the following

**Further to your recent interview with our employment partner in London, Binder Binsel, I am pleased to confirm our offer of employment as an assistant Solicitor in the employment department at our Bristol office. This position is a permanent one but will be subject to satisfactory references and a six month probationary period.**

80. The letter also stated that the Claimant should provide Pattinson and Brewer with a definite start date once she had handed in her notice. The date of the letter, 30 November 2015, was the next working day after the date of the Claimant's letter of resignation and in our judgment we concluded that the reference to confirming her offer of employment and the expectation the Claimant would hand in her notice reinforced our conclusion that the Claimant was aware of the job offer when she resigned from her employment.
81. In an email to the Claimant dated 24 November 2015, page 886 E Gerry Gray informed the Claimant that she would need to let her manager know when she returned to work. Gerry Gray added that if the Claimant didn't want it to be him he could ask for an alternative arrangement to be made with another manager. In a reply to Gerry Gray dated 25 November 2015, page 886D, the Claimant included the following

**Save for the referral of work, I would prefer that you have no management line responsibility for me. I have made it clear to Fiona that I have lost complete trust and confidence in management following your complaints related to my father and further new information introduced in response to my complaint.**

82. Gerry Gray responded to the Claimant's concerns, and arranged for Fabiola Hickson, team manager of the business improvement team, to manage the Claimant's attendance.
83. Fabiola Hickson met the Claimant on 25 November 2015 and the Claimant informed her that she normally worked one day a week at home because of her medical condition and Fabiola Hickson requested the Claimant gave her reasonable notice when she was working from home.
84. The main office for shared services was at Gifford House in Morden. Fabiola Hickson expected Fiona to be present at Gifford House on average two or three days per week. We found that when Fabiola Hickson started managing the Claimant in November 2015 she was unaware that the Claimant had any issues or objections to working at Gifford House.
85. On 15 December 2015 the Claimant sent the following email to Fabiola

Hickson, page 956;

**As my temporary line manager I am sure that you are aware that I have been party to early conciliation via ACAS against the London Borough of Merton and others.**

**As I find the working environment at Gifford House untenable, amongst other things I am just letting you know that I have been working from alternative touch down sites down and home working. I expect this to continue until my last day of service.**

86. On 21 December 2015 Fabiola Hickson replied to the Claimant's email, stating the following

**Notwithstanding the fact that as we serve four Boroughs flexible working across all the sites is a feature of how we work, the SLLP base is Gifford House. It is important for the needs of the business that all team members maintain a presence at Gifford and this management expectation is clear to all team members.**

**A decision not to come your primary work place is not a decision which you or any member of staff can make unilaterally. It requires your manager's approval and your email provides me with no substantive reason as to why I would permit you to work away from Gifford House permanently pending your departure, and so treat you substantially differently from any other member of staff within the service.**

**You are therefore required to attend Gifford House and your off site working arrangements need to be agreed with myself as I am currently your line manager solely for attendance. I am aware that you work from home one day a week and that will continue as agreed between us in our last meeting you will advise me when that would be. I also appreciate that there may be days that is far more effective with regards to your time to be based at another site. However, apart from this I would expect you to be at Gifford House and therefore request that you comply with this.**

87. The Tribunal considered Fabiola Hickson's email represented no more than a reasonable management instruction to a member of staff, in reply to an email from a member of staff dictating to her manager where she intended to work. Unfortunately the Tribunal found that the Claimant was becoming increasingly confrontational with management as evidenced in her reply to Fabiola Hickson's email copied to Fiona Thomsen, Paul

Evans and Tracy Swan, at page 954.

**I treat this email as victimisation and an unreasonable management instruction.**

**With respect I emailed you on 15 December outlining that I could not work at Gifford House. It seems coincidental that you only responded to my email following Tracy's email yesterday whereby for the first time, I was informed that you are my line manager in respect of attendance which seems odd.**

**I am very concerned. As you are aware, I suffer with chronic migraines and one of the triggers of a migraine attack is stress. As you will appreciate this situation which unfortunately has not been amicably resolved and is having to be escalated to legal action is causing significant stress for me and so I have had to take the decision to not work at Gifford House in order to minimise the stress so that I can continue to work and serve my clients in this difficult time.**

**I trust that management will make this reasonable adjustment in light of my condition in order to assist me to carry out my work in the time I have left in this service.**

88. In reply to the Claimant the same date 22 December 2015, page 953 Fabiola Hickson stated

**I am sorry Katherine I cannot accept your contention that this is victimisation and in my role as your line manager with regards to attendance, this is an email I would send to any member of staff who sent me an email making unilateral decisions as to their working patterns.**

**I apologise you did not appreciate that when I said I would be line manager with regards to attendance, what that entailed.**

**The delaying in responding to your email on 15 was largely down to pressures of workload and the impending Christmas break. I also wanted to consider very carefully my response to your request.**

**As your reason for not attending Gifford House is stress related and that you are concerned this may lead to migraines, it may be helpful if I make a referral to OH?**

**I appreciate that you are leaving on 27 January 2016 they may be helpful to do this in order to support you in the remaining weeks.**



**In the meantime I would be grateful if you would keep me informed of where you are working and if you are suffering from ill health please email me or call me.”**

89. The Tribunal considered Fabiola Hickson’s reply to the Claimant’s email measured. We found that there was no evidence to support the Claimant’s contention in her email to Fabiola Hickson that Fabiola Hickson requirement as the Claimant’s line manager that the Claimant should work at Gifford House involved victimisation of the Claimant or that in any respect there was a causal link between Fabiola Hickson’s requirements and any alleged protected act. It was not put to Fabiola Hickson that she had any knowledge of the protected acts relied upon by the Claimant.”
90. The Tribunal noted that clause one of the Claimant’s contract of employment pages 129 to 148 stated the following in relation to “expected place of work”

**Your expected place of work is Gifford House, 67C St Helier Avenue, Morden, SM4 6HY; however the Council reserved the right to require to work at any other place(s) in the United Kingdom. The Council can require you to work for any section or department of the Council.**

91. We found Fabiola Hickson a credible witness and we accepted her evidence that she was aware that there were issues and nothing more. In cross examination Fabiola Hickson stated that it had not been correct that she had made a request to occupational health to cover up for Tracy Swan and Gerry Gray, she had not been aware at the time what had gone in the past. Fabiola Hickson also stated that the correspondence she had had with the Claimant was in relation to attendance to ensure business needs and that the demands of practice were being fulfilled.
92. At the beginning of January 2016 Fabiola Hickson requested the Claimant to provide a screen print of her calendar for the week commencing 4 January 2016. The Claimant was not attending Gifford House and we considered Fabiola Hickson’s request as the Claimant’s line manager was reasonable to enable her to know where the Claimant was working in circumstances where the Claimant was not attending Gifford House. The Claimant replied on 5 January 2016 with the following page 994

**I usually put in the calendar where I am on the day. This would either be at RBK or working from home.**

**I note that recently I have received candid screen shots from both Tracey and yourself as if to prove a point or that there is an element of distrust.**

**I have not previously been requested to forecast where I**

**would be working and I feel this is now being requested owing to the complaints/difficulties I am encountering with management.**

93. The Tribunal considered the Claimant's email just quoted evidenced conduct on the part of the Claimant involving an unwillingness to engage on any reasonable level with management. The Tribunal found no evidence to justify the Claimant's assertion that a request from a line manager to be informed of the Claimant's whereabouts had been motivated by complaints/difficulties that she had been encountering with management. The Claimant had not followed the instruction to work at Gifford House and was herself deciding where she would work.
94. In December 2015 Fiona Thomsen received a request for a reference from Pattinson and Brewer in respect of the Claimant. The letter requesting the reference, page 915A dated 2 December 2015 enclosed a reference request form which included matters such as attendance, standard of work, suitability, conduct and attitude to employers and to colleagues. The Claimant had stated that she did not want subjective views or delays to jeopardise her job offer and having taken legal advice against the background that a number of the matters set out in the reference form could be contentious, Fiona Thomsen decided to provide a factual reference at page 926. In an email copied to Fiona Thomsen in relation to her reference dated 3 December 2015, page 922 the Claimant stated the following

“in light of the fact that I made a protected act; early Conciliation via ACAS and given that I challenged the truth, fairness and accuracy of my appraisal, understandably, I require an assurance that the reference will be dealt with in an objective and fair manner.

It is my expectation that the contents of my reference will be dealt with via ACAS and that I will have sight of this prior to being returned particularly as I have stated that I have lost trust and confidence in the LBM.”

95. The Claimant left her employment with the First named Respondent on 27 January 2016 and subsequently started working for Pattinson and Brewer in Bristol. The occupational health reference was not pursued in circumstances where the Claimant stated that in the event of an OH appointment she would not consent to a report being released.

#### **Time/Jurisdiction**

96. The Claimant's claim form had been received by the Tribunal on 29 January 2016. Accordingly the Respondent contended that acts of detriment which occurred before 29 October 2015 were out of time. The Tribunal heard evidence on the issue of time/jurisdiction from the

Claimant. When asked why the Claimant had left it to the 29 January 2016 before presenting her complaint the Claimant replied that lots of things had been going on. There had been issues with her health and she had been hoping that things would get resolved and that she was keen to get things resolved at the lowest level. The Claimant further stated that she was an employment Solicitor, there had been very difficult events and that she wanted to get the issue addressed.

### Submission

97. At the conclusion of the evidence the Tribunal directed the parties to provide written submissions. Accordingly the Tribunal received closing submissions from Mr Choudhary on behalf of the Respondent and submissions from the Claimant. The Tribunal also received a response from the Respondent in relation to the Claimant's submissions and supplementary submissions from the Claimant. The party's submissions are not repeated in these reasons.

### The Law

98. The substantive complaints before the Tribunal were the Claimant's complaints of unfair constructive dismissal and unlawful disability discrimination, namely direct discrimination under s.13 of the Equality Act 2010, , discrimination arising in consequence of disability under s.15 of the 2010 Act and a failure on the part of the Respondent employer to make reasonable adjustments for the Claimant under s.20 of the 2010 Act. In addition the Claimant complained of victimisation contrary to s.27 of the 2010 Act.
99. It was the Respondent's contention that the Claimant's allegations of unlawful discrimination and victimisation which predated 29 October 2015 were out of time and that accordingly the Tribunal had no jurisdiction to consider such complaints.
100. S.13 of the 2010 Act provides

***(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.***

101. S.15 of the 2010 Act, under the heading Discrimination Arising from Disability, provides:

***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.**

102. Section 20 of the 2010 Act imposes a duty to make reasonable adjustments. Under section 20(2) of the Act, the duty comprises the following three requirements.

**(3) the first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

103. Section 27 of the 2000 Act provides

**(1) a person (A) victimises another person (B) if A subjects B to a detriment because –**

**(a) B does a protected Act or**

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

104. Section 27(2) defines a protected act. In the circumstance of this case the raising of a complaint or a grievance by the Claimant on her own behalf or on behalf of another which alleges unlawful discrimination would amount to a protected act. The protected acts relied upon by the Claimant involve her complaint against Mr Fellowes on 1 November 2012, accompanying Ms Morgan to a one to one meeting with her line manager and the initiation of early Conciliation via ACAS.

105. In relation to time jurisdiction s.123 of the 2010 Act provides:

**(2) .....proceedings on a complaint within s.20 may not be brought after the end of –**

**(a) the period of three months starting with the date of the Act which the complaint relates, or**

**(b) such other period as the Employment Tribunal thinks just and equitable.**

106. In **Robertson-v-Bexley Community Centre [2003] IRLR 434** the Court of Appeal (Auld LJ) held that a Tribunal should not hear a complaint unless the Claimant convinces it that it is just and equitable to extend time. The Tribunal also had regard to the criteria under the Limitation Act, s.33.

### Constructive Unfair Dismissal

107. The Claimant alleged that her resignation was justified or triggered by a repudiatory breach of contract on the part of the Respondent's employer which involved a breach of the implied term of trust and confidence.

108. Section 95(1)(c) of the Employment Rights Act 1996 provides:

**(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.**

109. To found a complaint of constructive dismissal the Claimant has to show that her resignation has been caused or justified by a fundamental or repudiatory breach of his contract of employment by the Respondent employer, namely a breach which goes the very root of the contract between them; in other words conduct on the part of the employer which evidences the employer treating the contract of employment as discharged.

110. In the circumstances of this case the Claimant alleged that the Respondent's conduct involved breaches of the term of trust and confidence implied into her contract of employment. In **Malik –v- BCCI [1997] ICR 606, HL**, the implied term of trust and confidence was defined as:

**The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.**

111. The Claimant also contended that the alleged discriminatory conduct of the Respondent involved repudiatory breaches of her contract of employment

### Conclusions

112. The Tribunal reached its conclusions having regard to the evidence to the submissions of an on behalf of the parties and to the relevant law.

113. During the course of these reasons the Tribunal has commented upon the unsubstantiated nature of the Claimant's complaints. Thus we found no evidence to support the Claimant's allegation that Tracy Swan the Second named Respondent had requested to be the lead interviewer of the Claimant in 2013 was because of the grievance the Claimant had raised

against David Fellows. We considered that the Claimant's wholly unsubstantiated allegations of dishonesty involving the creation of false documents or of tampering with documents were wholly without foundation. We had regard to Mr Choudhary submissions on this point and his reference to Lord Millett's speech in *Three Rivers District Council-v-Bank of England [2003] 2 AC 1* when he said that allegations of dishonesty must be pleaded with full particulars and that

***This is an essential procedural safeguard on which the courts insist. It is not open to the Court to infer dishonesty from facts which have not been pleaded.***

114. The Tribunal concluded that the First named Respondent London Borough of Merton, had acted both reasonably and flexibly in the way in which it engaged with the Claimant, its employee. The Claimant was permitted to work from home one day a week and to leave at 4pm. The Claimant's request to work additional days at home when she was feeling unwell, were nearly always accommodated.
115. The Tribunal found that there were genuine concerns about the Claimant's style and delivery and that Tracy Swan had been expressly asked by Kingston not to identify them but that she could raise the Claimant's style and delivery as a general issue.
116. We found that unfortunately the Claimant had a tendency to challenge any management decision with which she disagreed and to attribute a sinister cause to management decisions such as Gerry Grays direction to the Claimant that as supervising Solicitor she should keep an eye on the costs incurred by a more junior colleague, namely Joy Worrell.
117. The Tribunal has considered at length the Claimant's complaints relating to her appraisal. The Claimant challenged her rating of 'satisfactory' and it was her case that she should have been rated good. The evidence from the Respondent's witnesses led us to conclude that their approach had been fair and objective. There was no evidence which supported any contention that the approach of Tracy Swan and of Gerry Gray had been tainted or motivated by unlawful discrimination or had involved victimisation of the Claimant.
118. As Mr Choudhary pointed out in his submission the Claimant had received a fair amount of negative feedback as well as positive feedback.
119. The Tribunal accepted that it was unfortunate that there was a reference to the state of health of the Claimant's father in the draft appraisal produced by Gerry Gray. However in the revised appraisal he did accept changes proposed by the Claimant, namely the removal of any reference to her father and the reference to the Claimant being responsible for Joy Worrell's time recording in respect of delegated tasks.

120. Further Gerry Gray apologised in fulsome terms, page 730, about his reference to the health of the Claimant's father. We considered that there was force in Mr Choudhary's submission in behalf of the Respondents that the Claimant's reaction to the revised appraisal namely of being utterly shocked and disappointed amounted to rather an extreme reaction.
121. The Tribunal concluded that although as in most employment relationships, issues can and do arise between management and the staff they manage, the Claimant's reaction to any issue or concern she raised about her managers, particularly Tracy Swan and Gerry Gray was disproportionate. The following was put to the Claimant in cross examination

**when you have a problem with a manager – they can do nothing right”**

122. Although the Claimant stated that she did not accept that suggestion, we concluded that unfortunately, as far as the Claimant was concerned, there was nothing which management could in their endeavours to engage with her in relation to proposals for a revised appraisal, which satisfied her.
123. The Tribunal noted that as early as 22 September 2015 the Claimant had requested her union representative to explore a settlement agreement and we have commented upon what we found was the Claimant's evasiveness in her evidence relating to her involvement with Pattinson and Brewer before her resignation at the end of November 2015.
124. In relation to the Claimant's informal complaint we considered that her attempts to contrast her treatment during the process of the investigation of her informal complaint with that of Tracy Swan and Gerry Gray by alleging that, unlike them she had not been interviewed, whom she alleged had been interviewed, were without foundation.
125. We accepted Fiona Thomsen's explanation of why the Claimant's co-complainant Nigel Cameron had been offered mediation and we found that the issue of mediation had never been rejected by the Respondent as far as the Claimant was concerned. The Tribunal has referred to the email exchange between the Claimant's union representative and Gerry Gray about talking to the Claimant about the mediation meeting to see if matters could be resolved before they escalated any further.
126. The Tribunal was driven to the conclusion that the Claimant by the time of her informal complaint was no longer prepared to engage in any constructive sense with management and that it was her intention to obtain a settlement offer from the Claimant and to seek alternative employment, which she did. The Tribunal concluded that there was no conduct on the part of the Respondent employer which evinced an intention to treat the Claimant's contract of employment as discharged, namely conduct involving breaches of the term of trust and confidence

implied into the Claimant's contract of employment.

127. The Tribunal found that throughout its dealings with the Claimant, the Respondent had genuinely endeavoured to engage constructively with the Claimant and that throughout, it had adopted a flexible and well intentioned approach to concerns and issues raised by the Claimant, an approach on its part, which the Claimant unfortunately failed to recognise or to respond to in any meaningful manner. The Tribunal considered that the Claimant's unconstructive approach was evidenced by a question she put to Fiona Thomsen namely, that Fiona Thomsen had deliberately failed to offer the Claimant mediation in order to break her. Fiona Thomsen, as we found, had not refused to offer the Claimant mediation and the Claimant at the time of her resignation was either near reaching or had reached a successful outcome in her job application to Pattinson and Brewer.
128. In relation to the post resignation allegations of victimisation, the Tribunal considered that they were wholly without foundation. There was no evidence before the Tribunal that Fabiola Hickson was aware of any of the details of the protected acts relied upon by the Claimant and in any event we did not consider that a requirement, which in any event was never honoured by the Claimant, that the Claimant should work at Gifford House in accordance with her contract of employment could amount to an act of victimisation.
129. The Claimant as an employee appeared to consider that it was her right to dictate where she worked and that management had no business to enquire notice of her whereabouts. Again in relation to the reference, having regard to the Claimant's own conduct, we found that there were sound reasons for Fiona Thomsen's decision to provide a factual reference for the Claimant. In any event the reference did not impact upon the Claimant's success in obtaining alternative employment with Pattinson and Brewer, and in those circumstances we concluded that there was no detriment.
130. The Tribunal concluded that the Claimant's complaints of unlawful discrimination and of victimisation were not well founded and they are accordingly dismissed.
131. The Tribunal concluded that the Claimant had not been dismissed by the Respondent within the meaning of s.95(1)(c) of the Employment Rights Act 1996 and that accordingly she was not constructively dismissed by the Respondent.
132. Notwithstanding our conclusions about the merits of the Claimant's Tribunal complaints, the Tribunal concluded that those complaints of discrimination and victimisation which predated 30 October 2015 were out of time and that they did not involve a continuing act with complaints which surfaced after 30 October 2015. Accordingly the Tribunal concluded



that it had no jurisdiction to determine complaints of discrimination and victimisation which predated 30 October 2015.

133. We considered that the Claimant had provided no grounds to enable an Employment Tribunal on just and equitable grounds to exercise its discretion to extend time. At the material time the Claimant was and remains an Employment Lawyer. A substantial part of the Tribunal hearing focused upon the Claimant's case that her qualities as an Employment Lawyer should have justified her in being awarded a rating of good rather than one of satisfactory. This was not a case where the Claimant had prayed in aid any ignorance of time limits.

Employment Judge Hall-Smith  
Date: 8 May 2017