

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107963/2015

5 Held in Glasgow on 6, 9, 10, 11, 12, 13, 16, 17, 18,
19, 20, 23 & 24 January 2017

10 Employment Judge: Shona MacLean
Members: Mrs EA Farrell
Mr AB Grant

15 Mrs Joan Newlands Claimant
Represented by:
Mr Ewan Campbell
Advocate

20 Student Loans Company Limited Respondent
Represented by:
Mr Sam Jones
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that the claim of constructive
dismissal and discrimination on the grounds of the protected characteristics of sex,
are dismissed.

REASONS

Background

301. The claimant presented a claim form to the Tribunal's Office covering multiple
claims arising from her employment with the respondent. During the Tribunal
proceedings issues were focused and at the Hearing the outstanding claims
which the Tribunal had to consider comprised two elements. Firstly, the
claimant claims that she had been constructively and unfairly dismissed. She
35 relied upon the breach of the implied term of trust and confidence between her
and the respondent. Secondly, she claims to have been discriminated against

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on the grounds of sex: she was not given the opportunity to participate in live deployments which took place outwith her normal contractual hours and attracted additional remuneration.

2. In relation to the constructive unfair dismissal claim it was clear that this was a “*last straw*” case and that the claimant’s position in her claim form was that she resigned from her employment with the respondent in response to a course of conduct which cumulatively amounted to a breach of the implied term of mutual trust and confidence.
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3. The claimant gave evidence on her own account. The following witnesses gave evidence on her behalf: Vincent Breslin, Senior Release Analyst; John Ramsey; Developer, Lillian Maltby, Resistance Tester; Alan Graham, Senior Configuration Analyst; Scott Wilson, Administrator and Full-time Trade Union Official (PCS); Christopher Newlands, the claimant’s husband; and Jonathon Campbell, Financial Advisor. For the respondent, the Tribunal heard evidence from Lorraine Curran, Assistant Manager; Susan Lindley, Project Manager; and Deborah Crawford, former HR Project Manager.
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4. The parties produced a joint set of productions to which witnesses were referred during the Hearing. The issues to be determined by the Tribunal were:
 - a. Did the incidents so far as proved to have occurred, amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employee and employer?
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 - b. If so was there reasonable and proper cause for that conduct?
 - c. If not and there was therefore a fundamental breach of contract, did that conduct cause the claimant’s resignation? (It being noted that it need not be the sole cause.)
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 - d. If there was a fundamental breach, did the claimant affirm the contract by delay in the resignation?

- e. If the claimant was unfairly dismissed, what should be awarded by way of compensation?

5. The Tribunal found the following essential facts to have been established or agreed.

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Findings in Fact

6. The respondent employed the claimant from 7 February 2000 until 5 March 2015. She was initially employed as an Administrator (production 3).
7. Around December 2008 the claimant was employed as a Trainee Configuration Analyst. Her training completed on or around September 2009. The claimant worked with Joseph Phillips, Senior Configuration Analyst. She reported to Paul Stanislaw-Smith, Environments Co-Ordinator.
8. On 22 February 2010, the claimant performed the role of Release Co-Ordinator during a live deployment outwith her contracted hours of employment (production 106).
159. The claimant was promoted to Configuration Analyst with effect from 21 June 2010. She continued to work with Mr Phillips but reported to though she then reported to Craig Allison (production 4).
10. The job description of a Configuration Analyst stated that the job purpose was to support the Environments Co-Ordinator and Senior Configuration and PVCS (Release) Analyst in maintaining multiple environments by carrying out all necessary preparation work for releases to the live environment. Further to provide input and feedback on all associated planning scheduling deployment implementation tasks associated with software deployment and associated processes and procedures to support the Environments Co-Ordinator achieve objectives.

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11. Following the birth of her son Christian, the claimant was on maternity leave, from around May 2011 until 2 May 2012. During this period Mr Phillips was appointed Environments Co-Ordinator and became the claimant's line manager. Lillian Maltby covered for the claimant's maternity leave.
512. Before returning from maternity leave the claimant made a flexible working request to reduce her full time working to 27 hours per week working only Wednesday to Friday. This request was granted (production 6).
13. Around May 2012 Ms Maltby applied for a vacancy in Mr Phillips' team. Mr Phillips showed the claimant the CV of another internal candidate known to her who was also applying for the position. Mr Phillips indicated to the claimant that this was the calibre of candidate against whom Ms Maltby was competing for the post. Ms Maltby was successful and appointed to the role of Trainee Release Analyst.
- 10
14. Shortly after the claimant's return to work she discovered that she was pregnant with her fourth child who was expected on 20 January 2013.
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15. In late June 2012 while on holiday in Egypt the claimant had emergency surgery. The claimant was informed that there was a risk of her losing her unborn child. After the operation, the claimant returned home but was unable to return to work for three weeks. Mr Phillips was informed of the claimant's health difficulties. He commented to the claimant's colleagues, "*I'm not being funny, but there is always something with Joan*" or words to that effect.
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16. The claimant required to attend a routine midwife and hospital appointment. Mr Phillips asked the claimant if she could reschedule the appointments to a day on which she did not work. The claimant indicated that she was unable to do so. The claimant attended all appointments on the scheduled date.
- 25
17. Around September 2012 the claimant attended a hospital appointment. The claimant was delayed unexpectedly. On her return to the office Mr Phillips

interrupted a conversation between the claimant and Ms Maltby by asking how the claimant had got on at the appointment. The claimant indicated that she was fine. Mr Phillips confirmed that he was pleased with the news.

18. On or around 31 October 2012 the claimant was aware that her midwife was
5 concerned that she was suffering from polyhydramnios. During a break the claimant researched this condition on the Internet. The website displayed a range of possible causes. As the claimant was reading this Mr Phillips rolled his seat over to look at the claimant's screen which displayed details about condition called Edwards Syndrome. Mr Phillips said, "*It will not be that*" or
10 words to that effect. The claimant felt that Mr Phillips had invaded her privacy and her space had been infringed.

19. On 7 November 2012, the claimant required to attend a consultation with her Obstetrician. The claimant's maternity leave was due to commence on 26
15 December 2012 and to end in 2013. As the claimant was leaving the office Mr Phillips said to her, "*See you in 2014*".

20. The claimant was signed off work from 7 November 2012. She commenced her maternity leave early after being advised of the risks to her and her baby. Stephen Forrester covered the claimant's maternity leave.

21. Around November 2012 Mr Phillips' team was restructured to include Alan
20 Graham, Senior Configuration Analyst, Vincent Breslin, Senior Release Analyst and John Ramsey, Release Analyst (production 8). Mr Phillips reported to Ruth Porter, Service Transition Manager who in turn reported to Natalie Watt, Service Delivery Manager.

22. Sometime during 2012 when all the team members were present at a team
25 meeting Mr Phillips commented about Ms Porter's position as a manager to the effect that "*she is a manager by name only, all she does is update a spreadsheet*".

23. The claimant gave birth to Robbie on 26 December 2012. He suffered from Edwards Syndrome. Robbie passed away on 29 December 2012. Christopher Newlands, the claimant's husband informed the respondent's HR department.
24. Following Robbie's passing the claimant struggled to cope with everyday life. She
5 did not open any mail and would place flowers in the bin because they reminded her of Robbie.
25. The first contact the claimant received from the respondent in response to Robbie's passing was a text message from Ms Porter. The text message was sent on a Friday evening in March 2013 and informed the claimant that she
10 required to attend her GP to explain her absence. The claimant queried this as she understood she was on maternity leave. The following Monday the claimant was informed that she did not require to attend her GP as she was on maternity leave.
26. Around 11 June 2013 the claimant received a letter from the respondent which
15 congratulated her on the birth of her baby (production 19). The letter was addressed to the claimant. It was a mail shot issued by the respondent to employees on maternity leave. The claimant was deeply upset about the letter.
27. Mr Newlands contacted Fiona McGowan the respondent's HR Adviser. She suggested that flowers would be sent to the claimant to apologise for the
20 inadvertence in sending the letter. Mr Newlands advised that the respondent should not do so under any circumstances. He also advised there should be no contact with the claimant during this time as it would cause too much stress.
28. Despite this request the respondent sent a letter to the claimant around 12 June
25 2013 apologising and offering to send a £100 to be given to a charity of her choice as a memento for Robbie (production 20). The claimant was upset.

29. The claimant was due to return from maternity leave around September 2013 when she was diagnosed with Post Traumatic Stress Disorder (PTSD). She did not return in September 2013 as she was unfit to work.
30. In November 2013, the claimant received a letter suggesting that her line manager would attend a meeting at her home. Mr Newlands contacted Ms McGowan and asked that anyone apart from Mr Phillips attend the meeting.
31. Around 4 December 2013 Ms Porter and Ms McGowan visited the claimant at home. Mr Newlands was also present. At this meeting the claimant raised concerns about being managed by Mr Phillips. Ms Porter informed the claimant that Mr Phillips had gone through management training following a respect at work complaint. The claimant was aware that Ms Maltby had raised respect at work complaint against Mr Phillips. The claimant had not been involved in that process.
32. On 4 February 2014, the claimant attended an occupational health consultation following which a report was issued (the OH Report) (production 22).
33. The OH Report concluded and recommended amongst other things that the claimant was hoping to return on 12 February 2014 and was fit to do so provided adjustments were in place. The proposed adjustments were a phased return starting with 50 percent of the claimant's normal hours for the first three weeks then gradually increasing this over a three-week period. Initially the start time was to be 8.30am as this would allow the claimant's husband to drive her to work providing her with additional support. On the initial return the claimant was to be allocated tasks that require lower levels of concentration and gradually increasing this in line with her phased return. The claimant was to be given time to catch up with any changes that had taken place during her absence, read emails etc as this would allow her time to familiarise herself with the working environment. Consideration was to be given to allowing the claimant to take short breaks from her work station when she was feeling

emotional. It was recommended that the claimant be reviewed regularly on a weekly basis to monitor her progress and identify any concerns that she may have. The reviewed timescale was to be guided by progress and altered if necessary.

534. The claimant returned to work on 12 February 2014. She and Mr Phillips had a constructive discussion during which he apologised for saying “*See you in 2014*”. The claimant accepted his apology. Mr Phillips indicated to the claimant that he was pleased to have her back and commented that the team was “*full of weirdos*”.

1035. Members of the team continued to be involved in bi-monthly live deployments which took place on a Sunday (rather than a Wednesday evening as before). There was no formal overtime rota for live deployments. Overtime was undertaken on a voluntary basis. The team required to supply a Release Co-ordinator and a Release Analyst for live deployments. It was advantageous to have a strong technical knowledge. Mr Phillips organised cover. He initially acted as Release Co-ordinator but subsequently he alternated with Mr Graham. Mr Breslin and Mr Ramsey acted as Release Analysts.

36. The claimant had a phased return over a six-week period working 50 percent of her hours initially and gradually building up to her contracted hours of 27 hours per week. Mr Forrester, who had been covering the claimant’s maternity leave continued to work within the Team for about a month after the claimant’s return.

37. Mr Phillips said that if the claimant had any issues she should tell him and that he would make himself available to assist her. The claimant indicated that she was feeling overwhelmed and that it would be helpful to have a training plan more structured to her day. The claimant did not receive a training plan.

38. After four weeks of the phased return to work the claimant was only paid for hours worked. Mr Phillips agreed that the claimant could use annual leave to make up hours. This avoided triggering any action under the sickness absence policy.

The claimant's absences still required to be managed and this lead to operational difficulties given the high level (production 10).

39. The claimant's appointments for cognitive behavioural therapy fell on a Wednesday. Treatment was difficult and the claimant was anxious before and
5 after these appointments. The claimant was asked whether these appointments could be scheduled for one of her non-working days. The claimant explained this was not possible and the matter was not raised again.

40. The claimant did not volunteer; request nor was she offered any overtime for live
10 deployment. The claimant did not raise this issue at any time during her employment.

41. On 30 April 2014 Mr Newlands telephoned Mr Phillips to advise that the claimant would not be in work that day. Mr Phillips responded by saying "*While I have some sympathies this just isn't good enough. We are a small team and this just cannot continue*" or words to that effect (the Telephone Call). Mr Newlands
15 considered that Mr Phillips' tone was angry and aggressive. Vincent Breslin was present during the telephone conversation. Mr Breslin heard what Mr Phillips said. From Mr Phillips' tone Mr Breslin thought that Mr Phillips was fed up and slightly annoyed.

42. Mr Phillips immediately regretted mentioning to Mr Newlands the impact of the
20 claimant's absences on the team. Mr Phillips sent an email to Ms Porter at 8.07 advising her of the Telephone Call which he described as "*all very cordial*" (production 26). He also stated that in hindsight he should not have mentioned the impact on the team.

43. Later that day Mr Newlands told the claimant about the Telephone Call. The
25 claimant sent an email to Ms McGowan on 30 April 2014 at 21:28 (the April Email) (production 28). It was copied to Ms Porter because the claimant was considering following the grievance procedure.

44. The claimant explained the reason for the April Email was the Telephone Call with Mr Newlands during which the claimant said Mr Phillips sounded angry, aggressive and that his comments were extremely unprofessional especially the nature and circumstances of the claimant's long term absence. The claimant also complained about her workload and considered the fact that Mr Phillips had made the comments that he did to Mr Newlands in an open forum was highly inappropriate and increased her feelings of anxiety in entering the workplace. She also felt unsupported by HR as Mr Phillips had been left to deal with her and she did not consider that he acted professionally at times.
1045. Ms McGowan was out of the office and was not returning to business until 6 May 2014.
46. The claimant returned to work on 1 May 2014. She asked Ms Maltby if she had overheard the Telephone Call. Ms Maltby advised that she had not. The claimant also spoke to Mr Breslin who confirmed that he had overheard Mr Phillips' side of the conversation. Mr Breslin informed the claimant that Mr Phillips sounded "*pissed off*". Later that day Mr Graham informed the claimant that Pauline Walker from another team had told him that Rhonda Carmichael also from another team had overheard Mr Phillips' side of the conversation and described it as "*appalling*".
2047. The claimant and Mr Phillips did not discuss the Telephone Call. Mr Phillips asked the claimant how she wanted to "*play yesterday's absence*". The claimant indicated that she wanted to discuss the matter in private. Mr Phillips apologised not realising that there were other members of staff in the area.
48. Ms Porter met with the claimant on 1 May 2014. She told the claimant that she was going to discuss the Telephone Call with Mr Phillips.
49. Mr Phillips was scheduled to have a flexi day absence on 2 May 2014. However, he came into the office in the morning.

50. On 7 May 2014, Ms McGowan returned from leave. She sent an email to the claimant at 10.06 acknowledging the April Email (production 29). Ms McGowan said that she knew the claimant had met with Ms Porter and it was her intention to meet with the claimant again but she was off work ill but would do so on her return.

51. On 7 May 2014, the claimant and Mr Phillips had an objective setting meeting. It was held in the bothy. At the end of the meeting Mr Phillips referred to the Telephone Call. He said that he realised that he should not have made the comment that he did to Mr Newlands and he had raised this with Ms Porter. He had unaware until informed by Ms Porter that the claimant knew of the conversation and this had been the first opportunity he had had to apologise. The claimant did not accept the apology. She considered that it was reactive; that it could have been made sooner and Mr Phillips was smiling while making the apology.

52. On 7 May 2014 at 11.33, the claimant sent an email to the respondent's HR Department and copied to Ms Porter complaining about Mr Phillips (the May Email) (production 28). The subject was "*Formal Grievance*". It included the April Email. The claimant indicated that she wished to be contacted via her personal email. She also asked to be accompanied by a colleague or a trade union representative. The complaints were:

- a. On 30 April Mr Phillips spoke to Mr Newlands in an angry and aggressive manner stating, "*while I have some sympathies, this just isn't good enough. We are a small team and this just cannot continue*".
- b. Mr Phillips asked about the claimant's medical appointments in an open forum.
- c. Mr Phillips being aggressive.
- d. Mr Phillips making inappropriate comments.
- e. The claimant was unsupported or protected from Mr Phillips inappropriate comments or actions.

- f. The claimant was unsupported by Mr Phillips.
- g. On 1 May Mr Phillips asked how the claimant wished to play her absence of 30 April 2014 in an open forum.
- h. Mr Phillips did not apologise for his actions on 30 April 2014 until 7
5 May 2014.

53. Mr Phillips sent an email to the claimant on 7 May 2014 at 12.39 noting what was discussed at the meeting earlier that day (production 29). The claimant replied at 13.34 explaining why she did not accept the apology. Mr Phillips proposed discussing matters in a forum of the claimant's choice. The claimant replied that
10 she had raised the matter with HR who would decide how matters proceeded.

54. The claimant had a discussion with Ms Porter on 7 May 2014.

55. Mr Phillips did not carry out any subsequent one to one objective setting meetings with the claimant.

56. On 9 May 2014 Susan McGuinness, HR Adviser (who job shares with Ms
15 McGowan) sent an email to the claimant (production 30). Ms McGuinness said that before going down the route of a formal complaint she encouraged the claimant to allow Ms Porter to resolve the matter informally. This would involve Mr Porter meeting the claimant to establish the main concerns and agreeing with the claimant and Mr Phillips how the situation might be resolved. This was
20 the first step in the "Respect at Work" process. If Ms Porter felt that further action was required or merited at that point she could still take action. If the claimant was not happy with the outcome of her meeting with Ms Porter the claimant could still pursue the matter formally. The claimant was asked to call either Ms McGowan or Ms McGuinness.

25 57. The claimant replied to Ms McGowan and Ms McGuinness with a copy to Ms Porter, by email sent on 14 May 2014 at 9:16 explaining that she had asked for correspondence to be sent to her personal email address (production 30). The email continued:

“As HR and Ruth will be aware, this issue has escalated since and it is still my opinion is now beyond informal resolution. I have already had a meeting with Ruth Porter on 7 May, however I felt then as I do now, without the additional incidents since, that his behaviour is not only unacceptable 7
5 unprofessional, but intimidating, unnerving and undermining...”

58. On 14 May 2014, Ms Porter and Ms McGowan asked met with the claimant. She was told that the meeting was informal, no notes were to be taken and she did not need to be accompanied (production 32). The meeting lasted approximately 2.5 hours. Ms Porter wanted to discuss the May Email. She advised the
10 claimant to follow the correct procedure for reporting sick absence and the situation would be avoided. Ms Porter agreed to gather inbox statistics to gauge the workload and ensure that the claimant was receiving sufficient training to allow her to carry out DAT deployments. Ms Porter suggested the claimant may wish to consider changing her working pattern. If she worked 27
15 hours per week Ms Porter was happy to accommodate holidays and doctor’s appointments therefore negating the need to have frequent discussion about this. The claimant indicated that she was content for Ms Porter to deal with these matters informally. The claimant was adamant she wished to pursue the grievance against Mr Phillips about his behaviour. She was referred to the
20 Respect at Work Policy (the Policy).

59. The Policy has been agreed with the PCS Union (production 16). Employees raising a complaint should do so in writing and clearly state that the complaint is being raised under Step 1 of the Respect at Work procedure. An employee should set out their desired resolution to the issue. The Company Grievance
25 procedure is not appropriate and cannot be used to raise such issues.

60. The claimant consulted Scott Wilson, a full-time PCS trade union representative. He considered that Mr Phillips behaviour during the Telephone Call was a disciplinary matter.

61. Mr Wilson met Ms Porter and Ms McGowan and advised them that unless disciplinary action was taken against Mr Phillips in relation to the Telephone Call the claimant would raise a complaint under the Policy.
62. Between 28 and 30 May 2014, Mr Phillips restricted his communications with the
5 claimant to the extent that the claimant felt ignored.
63. On 30 May 2014, the claimant asked Mr Phillips if she could leave work at 4.30pm due to illness. Mr Phillips pointed out that the claimant would be in "*negative flexi*" if she left. Mr Phillips was also leaving work early that day and he asked the claimant to email Ms Porter. The claimant left at 4.30pm and her absence
10 was recorded as annual leave.
64. On 3 June 2014, Ms McGowan wrote to the claimant agreeing to a flexible working request submitted by the claimant on 28 May 2014 to reduce her hours from 27 to 25.5 per week (production 7). The claimant was reported to Ms Porter in relation to personnel issues.
- 15 65. On 4 June 2014 Mr Phillips emailed the team to advise the claimant would be absent from work due to an ear infection (production 31). The claimant was absent on 4, 5 and 6 June 2014.
66. The claimant returned to work on 11 June 2014. The claimant considered that Mr Phillips was ignoring her. He would ask others what they were doing at
20 weekend but excluded her. The claimant spoke to Ms Porter on 12 June 2014 advising her of this and she spoke to Mr Phillips. The claimant was on annual leave on 13 June 2014.
67. On 17 June 2014, the claimant sent an email to Ms McGowan and Mr Wilson seeking an update about "*the stage of the grievance process [her] complaint was at*" (production 33). Mr Wilson was on holiday.
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68. Ms McGuinness replied by email on 18 June 2014 which was copied to Mr Wilson and Ms Porter explaining that she would speak to Mr Wilson on his return and

then advise the claimant of the outcome and decision reached by Ms Porter. The email continued, "*although you had put a formal grievance in writing it was our intention to manage and try and resolve this informally as we want to ensure that the informal route is exhausted first before we would progress to a formal respect at work process*".

69. The claimant was at work on 18 June 2014 and was then absent from work due to work related stress between 19 June and 25 July 2014.

70. Mr Wilson was advised that after what he believed to be an informal investigation about the Telephone Call no disciplinary action was to be taken against Mr Phillips.

71. The claimant received an email from Ms Porter sent on 11 July 2014 advising that she had investigated all the points raised and could not "*find nor substantiate/corroborate evidence to support [her] complaint and accordingly no further action [would] be taken in this regard*" (production 34). The claimant asked if she could appeal this decision and was advised that she could not but she should speak to Ms Porter on her return from leave on 28 July 2014.

72. The claimant returned to work on 30 July 2014 when she had a return to work meeting with Ms Porter (production 35). The Telephone Call was discussed briefly. However, the meeting focused on the other points that had been raised by the claimant in the May Email.

73. On 31 July 2014 sent an email to Ms Porter in which she attached the May Email and advised that she wished to raise a formal complaint under the Policy (the July Email) (production 36). In addition to the earlier complaints the claimant complained that:

- a. Mr Phillips was ignoring her.
- b. Mr Phillips had shouted loudly to Brian Raitt that "*aye, I thought you heard every conversation over here, clearly not*".

- c. The claimant required to inform Ms Porter that she was leaving at 4.30pm on 30 May 2014.
- d. Mr Phillips had emailed colleagues informing them that she would be absent from work due to an ear infection.
- 5 e. Mr Phillips did not value her skills and attributes and placed greater importance on IT qualifications. Reference was made to Mr Phillips showing the claimant the CV identifying the level of IT qualifications as well as comments made about Mr Forrester's IT background.
- 10 f. There was a poor atmosphere in the team when Mr Phillips was present. Mr Phillips was confrontational. The claimant considered that this atmosphere contributed to her feelings of anxiety.

74. The claimant attended an occupational health appointment with Karen Fleming on 6 August 2014 (production 37). Ms Fleming reported that the claimant had good progress with regards to her PTSD following her last occupational health
15 review. It was anticipated that this would continue. The work situation appeared to be having a negative effect on her health. As the Respect at Work process is a very long and complex process which will involve various meetings it was important that she was fit enough to participate in the process. The claimant indicated that she felt fit to be at work and robust enough to participate in the
20 process. The claimant indicated that she had no concerns regarding carrying out her contractual role. The opinion was that the claimant was fit for work. However, without resolution to her perceived work concerns there was potential in resulting in an exacerbation of her symptoms. It was recommended that management meet with the claimant to discuss her current work situation and
25 future plans and try to reduce the level of anxiety which she is experiencing.

75. Consideration was to be given so that the claimant was not sitting next to Mr Phillips. The desk move was recommended and this was facilitated following which the claimant sat opposite Mr Phillips.

76. Around 21 August 2014 the claimant accompanied by Lindsay MacKenzie, PCS trade union representative attended a meeting with Ms McGuinness to discuss the scope of the Respect at Work complaint (the Scoping Out Meeting). Ms Campbell was present to take notes (production 38). The Respect at Work process was explained. The claimant elaborated on the Telephone Call, events on 1 May 2014 and why she felt excluded by Mr Phillips in late May/June 2014.
77. Ms McGuinness asked the claimant to elaborate on the alleged unacceptable behaviour. The claimant referred to Mr Phillips making remarks about people who do not have IT qualifications and therefore they should not be in IT roles. The claimant referred to Mr Phillips being sexist at all times but *"this was not directed at all women. She said that he prays on people's weaknesses."* The claimant also referred to the incident where Mr Phillips had shown her a colleague's CV.
78. In relation to the atmosphere in the team the claimant indicated that Mr Phillips *"had a go"* at the majority of the team *"everyone one except Mr Breslin"*. His managerial style was confrontational, blame orientated and very negative hunting out faults. As a result the team had resorted to sending emails or speaking while Mr Phillips was away to avoid pointing out if they were unsure of something. The claimant referred to Mr Phillips interrupting a conversation with Mr Graham and comments made about Ms Maltby's seat position.
79. The claimant also stated that Mr Phillips had passed other remarks such as the sexuality of a colleague who was gay; *"I just don't understand that, it's not my bag"*. The claimant said that Mr Phillips had heated and volatile conversations with other employees in open forum relating to Rangers and Celtic. She also did not think it was appropriate that after discussion he changed the password frequently used by others within the system to *"Hoops no7"* and *"Paradise"* knowing that she would have to give out these passwords to other employees. The claimant stated that she challenged Mr Phillips on this and stated that he was being juvenile and that he could issue the passwords to others as he knew

what kind of reaction they would have. This happened in March 2010 (production 66). She also referred to the remark about Mr Phillips mentioning that this place when she had returned in February 2014 as *“the team is full weirdos”*.

580. The key points were summarised in the notes of the Scoping Out Meeting were (production 38, page 183):

“Summarise key points raised

JN finds JP’s behaviour and management style confrontational and aggressive. Specific example given:

- 10 • *30 April telephone conversation with JN’s husband.*
- *Brian (Surname) being shouted at, then stating ‘thought you could hear everything that goes on over here’*
- *Being ignored – 12 June incident and for days prior to this.*
- *JP talking about private sickness absence issues in public with her –*
- 15 *at her desk and in the Bothy rather than in private (1 May).*
- *Interrupting conversation between JN and Alan Graham on 3 occasions.*

Inappropriate behaviours

- *Creating inappropriate passwords*
- 20 • *Discussing colleagues sexuality*
- *Discussing applicants CVs for a Release Analyst vacancy with her and other candidates ‘see this is what she is up against’.*

81. The notes of the Scoping Out Meeting recorded that the claimant said that she wanted the behaviours to stop. She did not know what should happen next; it was up to HR. However, outcomes of previous grievances against Mr Phillips by other people had been ineffective.

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82. The notes of the Scoping Out Meeting also recorded that there was discussion about who would most likely be interviewed: Mr Breslin; Rhonda Carmichael; Ms Maltby; Mr Ramsey; Mr Graham; and Pauline Walker.

83. The claimant was advised that the next steps would be to let her have a copy of the notes of the Scoping Out Meeting which the claimant and Ms MacKenzie would be able to review and mark any changes that were appropriate. Ms McGuinness would then prepare a scoping out document which could be reviewed by the claimant and if she was content with it, it would be submitted as a final record. When this was finalised it would be shared with the claimant and Mr Phillips following which an investigating officer would meet with the claimant and Mr Phillips and then the witnesses. Once all the interviews and notes were agreed and signed off they would be provided to the claimant and Mr Phillips. The investigating officer's report would be finalised and the matter would be referred to a decision-making panel. It was noted that this was going to take weeks. From experience it could be lengthy but Ms McGuinness would endeavour to keep it moving and certainly would keep the claimant up to date with progress.

84. Ms McGuinness prepared the Scope of Complaint as follows (the Newlands Scope of Complaint) (production 40):

20 *“Joan has raised a complaint against her Currant line manager, Joe Phillips. She describes his behaviour as ‘challenging’ and ‘intimidating’. She alleges that he has deliberately ignored her, been verbally aggressive towards her and others, singled her out by applying different rules to her and that his behaviour is verging on bullying.*

25 *Specifically she refers to a telephone conversation on 30 April 2014 between her husband and Joe, when her husband had called in to report her sickness absence. She alleges that Joe was angry and aggressive. Furthermore she goes on to state that the way he dealt with this incident*

when she returned to work the next day was inappropriate and that her trust and confidence in him to deal with things sensitively and privately is seriously compromised. Joan alleges that he did not acknowledge her at all for the first hour and then asked her how she wanted to 'play her absence' while she was still at her desk and others could overhear.

Joan states that Joe also deliberately ignored her. She stated that on the 12 June she had noted that he had been ignoring her for 4 days. She refers to a specific incident on this day when Joe went round the whole team and asked them what they were working on. She states that he missed her out. She then complained to Ruth Porter (Joe's boss). When Joe returned to his desk later he had the very same conversation but this time included Joan. She described feeling 'confused' and 'intimidated' by this.

Joan states that Joe applied different rules to her as opposed to others in the team. She reported feeling unwell on 30 May. She asked to leave early to allow her to pick up a prescription from her GP. She states that Joe then asked her to email his line manager Ruth. She felt she was treated differently to the rest of the team as this was not a normal requirement.

Joan alleges that Joe is confrontational with others too. She described 2 incidents. Firstly around the 21 May, where Joe out of the blue shouted loudly on Brian Raitt. When he responded, Joan states that Joe said 'yeah thought you heard everything that goes on over here. Clearly not!'. The second incident was when he interrupted a conversation between Alan Graham and Joan on 3 separate occasions asking 'is there a problem' and then rolling his chair between the 2 on the opposite side of the desk.

Finally she reported some historic incidents to support her allegation of confrontational and inappropriate behaviours. She refers to a previous password which was a general password which was issued to certain IT staff when required. After an argument with someone about football, Joe had changed the passwords to 'Hoops no7' and 'Paradise'.

In addition she states that Joe spoke about another colleagues sexuality saying 'he did not understand it' and it was 'not his bag'.

Key Questions to be considered as part of this investigation:

What evidence supports the above allegations.

5 *Are the behaviours inappropriate and unacceptable.*

Could the behaviours be reasonably described as bullying?"

85. The Newlands Scope of Complaint detailed the list of potential witnesses. The list did not include Mr Newlands. The claimant did not ask for his name to be added to the list.

1086. Ms Maltby completed her training programme as a Release Analyst in August 2014. On occasions when Mr Breslin or Mr Ramsey were on leave she would participate in live deployments. The claimant was still not asked to participate in live deployments nor did she ask to do so. The claimant thought that the reason for this was either that Mr Phillips wanted the benefits of overtime payments for himself or he did not have faith in her abilities.

15 87. On 27 August 2014 Mr Phillips raised a Respect at Work complaint against the claimant and Ms Maltby (production 39). In the complaint Mr Phillips stated that he did not believe that mediation via an informal process would be a worthwhile exercise as it this would not motive the claimant and Ms Maltby to change their behaviours. He referred to what he considered to be an ongoing campaign by the claimant and Ms Maltby to undermine his role as Environments Co-Ordinator.

25 88. On 11 September 2014 Ms Curran who had been appointed Investigating Officer for the Newlands Scope of Complaint met with the claimant who was accompanied by Mr Wilson (production 41). During the meeting the claimant was asked to describe how Mr Phillips had passed remarks on the sexuality of a gay colleague. The claimant explained that there had been a recent discussion about Celebrity Big Brother and there was talk about one of the

contestants who was "*homosexual*". The claimant alleged that Mr Phillips stated that it was "*a house full of weirdos and that it was not right*". The claimant took the comment to be directed towards a "*homosexual contestant*". This made her feel uncomfortable. The claimant alleged that Mr Phillips had also previously referred to a colleague who was gay. The claimant could not recall exactly when this was said but that he said that, "*He did not get it and it was not his bag*". She did not describe the way it was said.

89. When asked to give examples of Mr Phillips having "*heated and volatile conversations with other employees in an open forum relating to Celtic and Rangers*" the claimant stated that she did not get involved as she was not interested in football. However, she did recall that the conversations did get heated and that the conversations could be derogatory towards Rangers. The claimant said that the conversations were latterly with Chris Bainbridge (production 41, page 197).

1590. On 12 September 2014 Ms Curran met with Mr Phillips who was accompanied by his PCS representative Mr Young. Mr Phillips was surprised by the Newlands Scope of Complaint. He considered that before the Telephone Call he had had no issues and since then he had tried to remain professional but was more detached discussing work issues only. Before the Telephone Call he was being sensitive to the claimant's issues both on a work and a personal level. He explained the agreement that was in place and the fact that the claimant would take annual leave for hospital appointments thereby minimising sick absence which could triggering the sick absence procedure. He had endeavoured to be flexible. In relation to the Telephone Call he said throughout the claimant's husband's tone was overly familiar. Mr Phillips acknowledged that he had overstepped the mark and had not handled the Telephone Call well. He did not discuss the Telephone Call with the team although he was aware that the team had been discussing it amongst themselves. Mr Phillips confirmed that Mr Breslin was present during the Telephone Call. There was confusion as to the four days when the claimant alleged that Mr Phillips had ignored her. His

position was that morale was good at a team meeting on 29 May 2014 and the claimant took a half day on 30 May 2014 and was then on sick absence the following week. She returned to work on 11 June 2014. Mr Phillips was aware that the claimant was not well on 30 May 2014 and that she had asked if she could leave early. Mr Phillips said that he had no problem with this but as he was also leaving early that day he felt that they should let Ms Porter know and asked the claimant to send an email to Ms Porter. He did not consider this unacceptable given the claimant had sent emails to Ms Porter in the past in relation to her absence. Mr Phillips felt that the claimant was in a unique situation which was changing frequently and difficult to manage. It was not normal procedure to take annual leave for sickness but this was done to support the claimant. His motivation was trying to support her and he felt that by being flexible he had left himself open to criticism. Mr Phillips pointed out that the allegation in respect of disclosing the CV had been two years ago and related to Ms Maltby's Respect at Work complaint. Ms Maltby applied for a job along with two other applicants and she was appointed.

91. Ms Curran then met separately with Ms Maltby (production 43); Mr Graham (production 44); Mr Breslin (production 45); Mr Ramsey (production 46); Mr Raitt (production 47); Ms Walker (production 50). Mr Breslin, Mr Graham and Mr Ramsey were re-interviewed on 2 October 2014 (productions 51, 52 and 53). The claimant was re-interviewed on 3 October 2014 (production 54).

92. Ms McGowan attended a scoping out meeting with Mr Phillips (production 48). She then prepared separate Scope of Complaint for the claimant and Ms Maltby (production 49). The claimant was issued the Scope of Complaint on 1 October 2014 (the Phillips Scope of Complaint).

93. Ms Curran also received a copy of the Phillips Scope of Complaint as she was to act as investigation officer in respect of the complaints against the claimant and Ms Maltby. However, owing to the pressure of Ms Curran's Currant workload

and annual leave she was unable deal with it until her return 27 October 2014 (production 55).

94. Before going on annual leave Ms Curran re-interviewed Ms Maltby and Mr Phillips about the Newlands Scope of Complaint (productions 56 and 57). She also
5 interviewed Ms Porter (production 58).

95. On 31 October 2014, the claimant sent an email to Ms McGowan and Ms McGuinness about an incident that occurred on 29 October 2014 involving Mr Phillips (the October Email) (production 62, page 293). The claimant said that Mr Wilson had asked her to send the email. The claimant said that two
10 colleagues in another team Chris Bainbridge and Ryan Smith were going to a Halloween party and then to the boxing dressed as Kelly Maloney. It was suggested that they take turns dressing as Ms Maloney. Mr Phillips was alleged to have said, "*Aye more like bum boxing*". The claimant and Mr Graham were present during the incident. The claimant discussed the matter with Mr Graham
15 the following day. They were offended by Mr Philips' comment which the claimant considered unacceptable and offensive (the Boxing Incident).

96. On 4 November 2014 following a request from Mr Wilson the claimant moved desks so that she was sitting next to Natalie Watt (production 59). The claimant reported to Ms Watt for personnel issues. Otherwise the claimant continued to
20 be line managed by Mr Phillips.

97. On 11 November 2014 Ms Curran met with Mr Philips about the Phillips Scope of Complaint (production 61.)

98. On 11 November 2014 Ms Curran also met with the claimant to discuss the Mr Phillips' behaviours and the October Email (production 62). The claimant was
25 accompanied by Mr Wilson. Ms McGuinness was also present.

99. The claimant also raised a further example of Mr Philips' offensive behaviour. She referred to a contractor who was having his lunch and came up with a bottle of

spicy sauce and asked Mr Ramsey if he wanted to try some. Mr Ramsey agreed to try some later. Later that day the contractor asked Mr Ramsey if he had tried the sauce and he replied that he had but he did not find it spicy. When the contractor walked away Mr Phillips turned around and asked Mr Ramsey
5 whether he had given the sauce to Ryan. When Mr Ramsey replied he did not think so Mr Phillips said "*he would give Ryan the sauce with a sausage and add an extra bit of mayo*". When asked what, the claimant thought about this she stated that she took it to mean that Mr Phillips meant ejaculation and was extremely uncomfortable with hearing this type of comment in the workplace.
10 Mr Ramsey had laughed. (the Sausage Incident).

100. In relation to the comment made by Mr Phillips that "*I don't get it, it's just not my bag*" the claimant said that it was difficult to say when this was said.
101. Ms Curran interviewed Mr Graham about the Boxing Incident and the Sausage Incident on 13 November 2014 (production 63).
15102. She interviewed Mr Phillips about the Boxing Incident and the Sausage Incident on 14 November 2014 (production 64). He could not recall making the alleged innuendo. In relation to the Boxing Incident Mr Phillips stated that what he said was "*bare bum boxing*" which he described as banter and a phrase that he would use in the pub to his friends. He would use this phrase talking about
20 boxers who were rubbish. He stated that he was not implying anything about sexual orientation.
103. Ms Curran spoke to Mr Ramsey about the Sausage Incident (productions 65). Mr Ramsey could not remember the incident exactly and took it as a stupid joke.
25104. Around 14 November 2014 Ms Watt had an objective setting meeting with the claimant followed by a mid-term review later that month (production 68).

105. On 24 November 2014 Mr Wilson sent an email to Ms McGowan advising that in his view 90 percent of the Phillips Scope of Complaint fell out with the Policy and was an attempt to muddy the waters (production 67).
106. On 1 December 2014 in relation to the Phillips Scope of Complaint Mr Curran interviewed Mr Forrester (production 70); Mr Ramsey (production 71); Mr Breslin (production 72); Mr Graham (production 73).
107. There was an attempt to interview the claimant about the Phillips Scope of Complaint in December 2014. Mr Wilson was unavailable. The claimant said that she was content to proceed with his colleague Ms MacKenzie. The claimant was not interviewed.
108. Ms Curran was aware that several issues that had been raised in the Phillips Scope of Complaint had been investigated as part of the Newlands Scope of Complaint. As a result the rescheduled meeting with the claimant and Mr Wilson to discuss the Phillips Scope of Complaint was postponed.
109. Around 11 December 2014 Ms Curran issued her complaint investigation findings report (the Investigation Report) (production 74).
110. The Investigation Report was then referred to the decision making panel comprising Susan Lindley and Daniel Meikle (the Decision Making Panel). The claimant and Mr Phillips were provided with a copy.
111. The Decision Making Panel met with the claimant on 17 December 2016. The claimant was accompanied by Mr Wilson. Ms McGuinness was also present (production 74, page 347). The claimant indicated that she was disappointed with the findings and outcome outlined in the Investigation Report. She had the following particular comments:
- a. The Telephone Call (Incident 1): the claimant was surprised that no disciplinary action was being taken given that Mr Phillips what was said and his subsequent apology was insincere as he smirked all the

way through. She felt that Mr Breslin's statement supported her claim and that his version was the most valid.

b. The Boxing Incident (Incident 7): the claimant was amazed that this had not been founded.

5 c. The claimant felt that there were omissions from the Investigation Report as there was no reference to the CV incident and that Mr Phillips had challenged Mr Ramsey following his statement in Ms Maltby's Respect at Work complaint in 2012.

112. The Decision Making Panel also met with Mr Phillips who was accompanied by
10 Mr Young (production 75, page 352).

113. Mr Wilson sent an email to Ms McGowan on 7 January 2015 asking for an update on the Phillips Scope of Complaint given that they had not met to discuss it (production 77). He enquired if there was a reconsideration given that so little fell within the remit of the Policy.

15 114. Ms McGowan advised that several issues that had been captured in the Investigation Report (production 77). To deal with matters in the most practicable and pragmatic way Ms McGowan said that it was decided to revisit the Phillips Scope of Complaint to ensure that when Ms Curran met with the claimant the meeting was focused. It was indicated that such a meeting was
20 likely to take place around the week commencing 26 January 2015 probably 28 January (production 75).

115. On 20 January 2015 Ms McGuinness sent an email to Ms McGowan which was copied to Ms Curran (production 76). Ms McGuinness identified incidents that potentially were covered by the Newlands Scope of Complaint. She also
25 identified incidents which, "*look more like conduct issues which have not been addressed by management: misuse of flexi time scheme; failure to follow correct procedure for requesting flexi; adhering to a management request.*"

116. Mr Wilson replied by email sent on 21 January 2015 challenging whether changing a scope of complaint in the manner proposed was permitted.
117. Ms McGowan met Mr Phillips on 26 January 2015 providing a proposed revised Scope of Complaint (production 78). She said that, *"I haven't shared the details about any of this (i.e. some of it being conduct rather than respect at work) with either Joan or Lillian and their reps until Joe has confirmed that he is happy with the revised scope so would appreciate it you could keep this to yourself for the time being"*.
118. On or around 29 January 2015 the Decision Making Panel issued its decision (the Decision) (production 79). Three of the allegations made were categorised as founded: the Telephone Call; applying different rules in relation to taking flexi time and interrupting conversations and wheeling his chair in-between people (alleged intimidating behaviour). Recommendations were made proposing positive action in the form of training and coaching. The claimant's complaint regarding the CV incident in May 2012 was not included within the Decision. It was out with the Newlands Scope of Complaint and no new evidence had been provided. The complaint that Mr Phillips had emailed his team informing them that the claimant had an ear infection was not specifically referred to in the Decision
20119. The Decision Making Panel met with the claimant on 2 February 2015. Mr Wilson was present as was Ms McGuinness (production 80). The claimant expressed her anger that the CV issue had been glossed over in the Decision and not dealt with. Ms McGuinness explained that while the CV incident was discussed at the Scoping Out Meeting it was not one of the key points in the Newlands Scope of Complaint. It had also been discussed during the investigation with Ms Curran but when the Investigation Report was finalised she referred to the Newlands Scope of Complaint and considered that it was out with the scope. Further, there was no new evidence being presented during

this process to suggest that the point was not appropriately dealt with during Ms Maltby's Respect at Work complaint in 2012.

120. The claimant expressed concern that in relation to the Telephone Call her husband had not been interviewed. Ms McGuinness explained as it was an internal matter relevant witnesses were asked about the call at the time. Mr Wilson pointed out that if a complaint had been received from a customer they would have been spoken to as part of the disciplinary process. In relation to inappropriate behaviour the claimant maintained that she was not alleging sectarian behaviour or homophobic behaviour. Her position was that Mr Phillips conduct was inappropriate. The Decision Making Panel explained that evidence suggested it may have been said as part of a wider discussion which was taking place within the department. While they were ill advised comments, the Decision Making Panel did not deem them to be misconduct. The claimant indicated that she would exercise her right to appeal.
15121. A similar outcome meeting took place between the Decision Making Panel and Mr Phillips (production 81).
122. The claimant exercised her right of appeal in an email sent on 5 February 2015 (production 83). The grounds of appeal were:
- a. During her the Scoping Out Meeting the claimant referred to the CV Incident and that Mr Phillips advised the team about her ear infection. These incidents were not referred to in the Decsion.
 - b. There was evidence supporting the claimant's position in relation to inappropriate behaviour regarding conversations about Rangers and Celtic and the Boxing Incident and Sausage Incident.
 - c. Mr Ramsey's statement refers to him being challenged by Mr Phillips regarding a previous statement he made when he was cited as a witness for Ms Maltby's Respect at Work complaint in 2012. This unacceptable breach of confidentiality was not addressed in the final report.

123. On 18 February 2015 Mr Phillips sent an email Ms McGowan advising that he was not pursuing his Respect at Work complaints against the claimant and Ms Maltby (production 85). The email stated:

5 *"I believe that I am still subject of the behaviours highlighted in my complaint, but feel that the whole process has been exhaustive and is best left outside RAW.*

As discussed, there are elements within my original complaint which can be investigated further via a conduct investigation. I believe there is enough content there for you to proceed although please contact me if you need
10 *further information to support any conduct investigation."*

124. On receipt of this email Ms McGowan met with Mr Wilson and Ms MacKenzie who represented Ms Maltby. They were informed that Mr Phillips' Respect at Work complaints were withdrawn. Ms McGowan indicated that consideration was being given to bringing a "disciplinary" case against the claimant and Ms Maltby. Mr Wilson was angry about this as he felt that any disciplinary case
15 was weak and should have been dealt with in the workplace.

125. On 25 February 2015, the claimant met with Mr Wilson. During this meeting at 14.27 he received an email from Ms McGowan (the February Email) (production 86). The February Email stated:

20 *"Just to follow up from our meeting last week and to confirm that we have now received feedback from the independent manager who had reviewed the edits from Joe's scope of complaint. Their feedback is that a disciplinary investigation is not the best course of action in this instance as records of discussions are not in place at present. In moving forward and concluding*
25 *on this case the decision will be to have a record of discussion with both Joan and Lillian in relation to the issues that were in the scope e.g sickness absence reporting, flexi-time, requests of flexi, use of flexi and completion of time-sheets. I am not able to provide the finer details as yet of what exactly*

will be included in the record of discussion (the content will be different for them both) as we will have to arrange a meeting with Natalie Watt to go through this as it will essentially be Natalie leading on this and delivering the message to them.

5 *Hopefully this outcome is acceptable to yourselves as well as Joan and Lillian- with clearly stipulating what the expectations and guidelines as re in terms of what is expected of them for the above e.g. when reporting in sick that they do so by themselves where possible and who to contact in the first instance, if they require flexi then who should they request this from then*
10 *there will be no ambiguity and they can all begin to move forward and bring closure to these issues.*

In terms of time-scales – I will arrange time with Natalie early next week to go through this with her with a view to concluding on this by next week.”

126. Mr Wilson advised the claimant of the content of the February Email. The
15 claimant was upset.

127. A record of discussion is a meeting where conduct is discussed with an employee and their comments are noted. The record of discussion is placed on the employee's HR file. It can be relied upon in future if there is a repeat of any of the behaviour which record of discussion seeks to address.

20 128. At 16:57 on 25 February 2015 the claimant sent an email to Ms Watt and Ms McGuinness resigning with four weeks' notice (the Resignation Email) (production 87). The Resignation Email included the following paragraphs:

25 *“I feel that I have been left with no other choice to protect myself from the constant stress and anxiety I have experienced both historically and currently within my workplace despite the Company being aware I suffer from Post Traumatic Stress Disorder which is a recognised disability. I have been subjected to a prolonged period of unfair and emotionally cruel*

treatment by the Company's representatives. The final straw occurred this afternoon when I was told the Respect at Work issue raised against me by my line manager Joe Phillips, a process which commenced over 23 weeks ago now and has caused me immeasurable stress for almost 6 months was withdrawn without adequate explanation as to why or the right of reply.

My union representative and I both believe the Respect at Work was raised maliciously to 'muddy the waters' of the grievance that I had raised against him. This has been communicated on several occasions to Fiona McGowan in HR, as well as the content contained within this document challenged as not being listed under the scope of the Respect at Work policy, as well as the totally unacceptable delays in the entire process. Even after almost 6 months I still haven't even been interviewed regarding his claims against me and left in the dark as to why this is the case. I understand that if a Respect at Work is deemed to be malicious this is treated as a disciplinary matter. Either he continues with his Respect at Work and I get to answer his 'complaints' or HR take action against him for dropping this at the end of my formal process against him. It cannot be an either/or scenario. That said, I no longer have any faith in any of SLC's processes, procedures or their application and delivery, having experienced systemic failures at every turn, therefore believe I have no other choice but to remove myself from this constant state of anxiety.

Despite there being a clear Data Protection breach on my scope of complaint, I have been forced to appeal the decision not to include this on the final report and, yet again, HR have missed the deadlines set out in their Respect at Work policy as I still await details of when the appeal will take place and who will be conducting this, however, my 4 week notice period is more than an ample time frame to conclude this, hence why I am sending this today. Today is the last of many ordeals and situations I have been placed in by the Company, that I am willing to endure as this continues to have a detrimental affect on my health. I defy anyone to deal with the daily

grief experienced of losing a child, manage daily P.T.S.D. symptoms and deal with intolerable work related stress for 10 months to feel anything other than pushed out and unfairly treated as a human being.

5 *HR have not followed their own Company policies, which I consider to be a fundamental and unreasonable breach of our contract on SLC's part. I have detailed evidence of systemic failures, which include unfair and differential treatment shown towards me, as well as totally unacceptable, hurtful and cruel correspondence received on 3 separate occasions by different Company representatives, at a time where I would have expected support and understanding from a professional employer.*

10 *Documentary evidence of all of the above has now been passed onto my legal representatives who I have already instructed to act on my behalf in the legal arena.*

15 *I would be grateful if you could acknowledge receipt of this letter at the earliest available opportunity."*

129. Around 2 March 2015 Ms Crawford, wrote to the claimant advising that she had considered the claimant's grounds of appeal and found that there were sufficient grounds of appeal and the Decision stands. (production 88).
130. On 5 March 2015, the claimant informed the respondent that she would not work the remainder of her notice (production 90).
131. The claimant ceased receiving income from the respondent on 6 March 2015. Since then the claimant has been unfit for work. She suffers from a relapse of her PTSD and depressive disorder. The claimant waits for further cognitive behavioural therapy. No date has been fixed for this.
25132. At the date of termination, the claimant was 41 years of age. She had been continuously employed by the respondent for 15 years. Her gross weekly pay was £377. Her net weekly pay was £166.

133. The claimant was a member of the respondent's pension scheme. Had the claimant remained a member of the pension scheme until the end of 2017 she would have had a total pensionable service of 12 years which would entitle her to a pension of £3,535 per annum and a lump sum of £10,605. This is £491 per annum more pension and £1,473 more lump sum. This would have meant an actuarial factor of 22. The loss of pension would be £12,275 (22 x £491 + £1,473).

134. The claimant has a recurrent depressive disorder together with Post Traumatic Stress Disorder. The cause of the recurrent depressive disorder is likely to be attributable to the birth and passing of Robbie and the workplace experiences. The cause of the Post Traumatic Stress Disorder was likely to have been the birth and death of Robbie with the condition being exacerbated by experiences in the workplace given some of the Post Traumatic Stress Disorder chronology relates to events there.

15 *Observations on Witnesses and Conflict of Evidence*

135. The Tribunal considered that the claimant gave her evidence honestly and overall was a credible and reliable witness. The Tribunal's impression was that she was keen to ensure that she told the Tribunal all the facts as she recalled them. The Tribunal had no doubt that the claimant genuinely felt angry and upset about the incidents to which she referred. The Tribunal at times felt that she had a heightened sensitivity and did not appear to be willing to acknowledge that any of her colleagues or managers might similarly find the process and allegations stressful and challenging to deal with.

136. Several witnesses gave evidence for the claimant. Everyone appeared voluntarily and remain employees of the respondent. None so far as the Tribunal could understand continued to report to Mr Phillips.

137. The Tribunal's impression was that Mr Breslin was the most skilled and respected colleague within the team. He gave his evidence in a measured and

considered manner. The Tribunal felt that he endeavoured to answer the questions honestly and keep to the facts that were within his knowledge. The Tribunal could understand why particularly in relation to the Telephone Call Mr Breslin's statement was of importance to the Ms Curran and the Decision Making Panel.

138. In contrast Mr Ramsey appeared to be keen to elaborate in his evidence on his criticism of Mr Phillips as a line manager. The Tribunal did not doubt that Mr Ramsey was being truthful in what he said. However, the Tribunal felt that his comments in relation to the Sausage Incident went considerably beyond what was said by him during the investigation. The Tribunal also felt that it was unfortunate that if during the investigation Mr Ramsey's recollection and feelings were as he conveyed at the Hearing, he did not tell Ms Curran.

139. Ms Maltby gave her evidence in an honest, straightforward manner. The Tribunal's impression was that having already gone through the Respect at Work Policy in 2012 she was endeavouring to move on. She acknowledged that particularly in relation to workload between February and May 2014 she had not complained about this before the claimant complained. Overall the Tribunal felt that Ms Maltby's position was broadly consistent with the position that she took during the investigation.

20140. Mr Graham was overall a credible witness. The Tribunal felt that he was undoubtedly partisan towards the claimant and tended to over gild the lily. The Tribunal noted during the Hearing Mr Graham maintained that he was present in the office at the tail end of the Telephone Call. He maintained that was his position at the time but it had not been recorded in the contemporaneous notes. The Tribunal did not consider that this was plausible. Mr Breslin did not refer to Mr Graham being in the office while the conversation was ongoing. The subject was obviously fully discussed amongst the team and the claimant appeared unaware of this. Significantly in the Tribunal's view Mr Graham did not amend the notes of his interview to reflect this despite taking the trouble to formally

amend the minutes to indicate that on reflection he felt that Mr Phillips had ignored the claimant.

141. Mr Wilson's evidence was not of particular assistance to the Tribunal. His recollection of the key events was vague. He could not recall the detail of
5 discussing the outcome of his meeting with HR following the withdrawal of the Phillips Respect at Work complaint nor could he specifically recall the claimant's response on being advised of the content of the February Email. The Tribunal appreciated that it was some time ago. However, in the circumstances of this case and the claimant's evidence of her emotional response to the
10 information the Tribunal found this surprising.

142. Mr Newlands was in the Tribunal's view a credible and honest witness. The Tribunal had no doubt that he considered Mr Phillips' tone and comments on the Telephone Call to be inappropriate. The Tribunal also accepted that
15 decision to tell the claimant about the Telephone Call was wholly motivated out of concern for her. The Tribunal considered that he had significant level of skill and experience as a manager that did not equate to that of Mr Phillips or indeed Ms Porter. The Tribunal noted that he did not particularly look forward to contact with Mr Phillips. The Tribunal noted that it was not unusual that Mr Newlands was the person who contacted Mr Phillips to advise of the claimant's
20 absence.

143. Mr Campbell gave evidence in relation to the claimant's pension loss. He was not cross-examined and the Tribunal accepted the evidence at face value.

144. Turning to the respondent's witnesses, the Tribunal appreciated that the events about which Ms Curran gave evidence had happened some time ago. The
25 Tribunal's impression was that in preparation for the Hearing she had not reread the witness statements and the Investigation Report. As a result, her evidence added little beyond what was actually said in the Investigation Report. Indeed, at times she appeared to need to be referred to Investigation Report or

statements before having any recollection of her position. That said, the Tribunal did not doubt that at the time of the investigation Ms Curran was on top of the facts and issues. The Tribunal's impression was that Ms Curran was defensive when some of her findings were challenged. In the absence of any rationale for those findings in her Investigation Report the Tribunal was unable to get any further assistance and understanding why certain findings had been made.

145. Ms Lindley was in the Tribunal's view an honest and credible witness. She had a better recollection of what was said during the meetings on 17 December 2014 and 5 February 2015. She also recalled what was said in the Decision. The Tribunal did not get the impression that either she or Mr Meikle questioned the findings reached by Ms Curran.

146. Ms Crawford was no longer employed by the respondent. Her role had been to deliver projects and she worked part-time. Ms Crawford had been asked to deal with the appeal as her colleague was on holiday. The Tribunal's impression was that Ms Crawford prioritised the appeal from a work perspective and undertook a detailed consideration of the grounds of appeal. She went over each point and referred to the original process to ensure that it had been addresses. The Tribunal was satisfied that Ms Crawford carried a comprehensive review of the paperwork.

Submissions

147. The representatives made oral submissions but kindly provided the Tribunal with a written copy which is summarised below.

The Claimant's Submissions

25148. The claimant's claim comprises of two elements. First, she claims that she has been constructively and unfairly dismissed. She relies upon a breach of the

implied term of trust and confidence between her and the respondent. Second, she claims to have been discriminated against on the grounds of sex.

Unfair Constructive Dismissal

149. The respondent did not lead evidence that if the claimant was dismissed, that dismissal was for a fair reason. The question was therefore whether the claimant was dismissed. The claimant contended that she was dismissed due to the respondent's breach of the implied term of trust and confidence in the employment contract between them ("the Implied Term").
150. It is an implied term of the claimant's contract of employment that the respondent will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence which should exist between employer and employee. This is judged objectively. The subjective intention of the employer is irrelevant. Every breach of the implied term of trust and confidence is a repudiatory breach of contract.
151. There are a wide variety of circumstances which have been held to amount to a repudiatory breach of the duty of trust and confidence. Constructive dismissal can result because of the actions of a fellow employee if the employer is vicariously liable for that employee. Where the employee has a supervisory capacity, that will bind the employer providing the supervisory employee is acting during their employment. There can be a breach of trust and confidence where there has been a course of conduct considered as a whole, which amounts to constructive dismissal, even if each individual conduct would not be a repudiatory breach in itself. A repudiatory breach may consist of a series of small incidents over a period which, taken individually, may not amount to a breach of contract, but when taken together amount to a breach of contract. There must however be a 'last straw' which contributes, no matter how slightly, to the breach.

152. To have been constructively dismissed an employee must have resigned in response to the breach of contract. It is sufficient that the breach played a part in the decision to resign. It is only where it is shown that the resignation was unconnected with the employer's breach that the breach must be disregarded.
5153. The claimant submits that a series of acts by the respondent amounted to a breach of the Implied Term:
- a. The actions towards her by Mr Phillips and Ms Porter.
 - b. The failure to support her at work.
 - c. The way her complaint against Mr Phillips was handled and decided.
 - 10 d. The way the complaint against her by Mr Phillips was handled.
154. It is not necessary for the Tribunal to find as proved each of the matters relied upon. It was submitted that the claimant can succeed without proving all matters.
155. The key was whether there was sufficient evidence to prove, objectively, a
15 breach of the implied term.
156. To have been constructively unfairly dismissed an employee must have resigned in response to that breach of contract. It is sufficient that the breach played a part in the decision to resign. It is only where it is shown that the decision to resign is unconnected with the employers breach that the breach
20 must be unconnected.

Sex Discrimination

157. The Tribunal was referred to section 13 of the EqA.
158. The claimant has to prove facts from which the *inference* could be drawn that the respondent has treated her less favourably on the grounds of sex. If that is
25 done, the burden of proof moves to the respondent and it is for the respondent to prove that it did not commit that act, by proving on the balance of probabilities that the treatment was in no sense whatsoever on the ground of

sex. The discharge of this burden of proof normally requires cogent evidence to be led by the employer.

159. Full guidance on the proper approach of the Tribunal in this regard is provided in *Igen Ltd v Wong* 2005 ICR 931 para 76 The discrimination need not be the
5 only reason why certain action was taken. For discrimination to be made out, it need only be part of the reason. It must be more than trivial.
160. Throughout the period that the claimant was line managed by Mr Phillips she was not given any opportunity to be involved in the live deployments. There was no formal rota for live deployments. The claimant's exclusion by Mr Philips
10 from the live deployments was a continuing act extending over the entirety of this period.
161. Ms Maltby was treated in the same way, there being only one exception when no one else was available. The evidence was that others in the team found it strange that they were not involved in the live deployments. There was no
15 evidence presented to the Tribunal that the claimant was incapable of undertaking the role of release co-ordinator. The claimant gave evidence that she had carried out this role in the past. Mr Graham recalled one time that this had occurred. Mr Graham and Mr Ramsey stated that they considered the claimant to be capable of carrying out the role of release co-ordinator. Ms
20 Curran gave evidence that any employee should be given the opportunity to be involved in overtime if they are capable of doing the work.
162. It was suggested that the claimant was not telling the truth in relation to matters connected to the live deployments. No evidence existed that would support such a finding.
25163. The male members of the team were involved in live deployments. The team was a small one so there is no direct comparator within that team. On the hypothesis that Mr Phillips did not consider the claimant capable of carrying out a live deployment (about which the Tribunal has heard no evidence) no attempt

was made to train the claimant to carry out this role, which would have been a natural development for her role. This is in contrast to Mr Forrester, who was permitted to shadow a live deployment whilst covering the claimant's maternity leave.

5164. There was clear evidence from each member of the ICT team that Mr Phillips treated women differently from men. He appears to have had very little respect for women in the workplace. This is (directly supportive) evidence which can be taken into account when assessing the claimant's sex discrimination claim.

165. Taking these matters into consideration, the claimant has proven facts from
10 which the inference could (and should) be drawn that the employer has treated the claimant less favourably on the grounds of sex. The burden of proof therefore shifts to the respondent.

166. The respondent has led no evidence on this issue. Suggestions put in cross
15 examination are not evidence. The Tribunal should therefore find in the claimant's favour.

Remedy

167. The claimant worked with the respondent for 15 years. The total basic award is therefore £5,831.32.

168. The claimant has not worked since 5 March 2015. Both medical reports confirm
20 that she is unfit for work. Before March 2015 she was fit to work. Had it not been for the respondent's breach she would have continued to work with the respondent and continued to earn £19,631. That position is not changed by the contribution that events surrounding the passing of Robbie has to her current state of unfitness. Applying the 'but for' test, but for the actions of the
25 respondent the claimant would still be working with them and earning £19,631. There is no evidence that suggests otherwise.

169. The claimant awaits treatment. There is no date fixed for this. Treatment will be a process and take some time. When the claimant is fit again for work she will

require to find alternative employment. It is reasonably estimated that the claimant will not be fit to work prior to 5 January 2018. It was therefore submitted that the period over which loss should be assessed is 6 March 2015 to 6 January 2018 (34 months).

5170. The loss of basic income from the respondent over a period of 34 months is £55,621.17. Mr Campbell gave evidence that the pension loss in that period can reasonably be estimated to be £12,275. A value of £350 is placed on the claimant's loss of statutory rights. The starting figure is therefore £68,246.17.

171. Mr Newlands provided evidence of the sums received by the claimant from
10 Talkholiday Limited during and since her dismissal. He explained that any income she receives from that business is for tax efficiency purposes only. He is allocating his own income to her. He increased his allocation to the claimant because of her dismissal from the respondent. He gave evidence that the tax saving each year is no more than £4,000. Accurate figures have now been
15 provided. In tax year 2015/16 the tax saving was £2,132. For 2016/17 it was £3,419.

172. The primary submission for the claimant is that her loss she be seen to be mitigated by this amount only. Over a period of 34 months that amounts to £8,400.17.

20173. This approach is in accordance with s.123. It is a just and equitable approach, taking into account the benefits that she has lost. She would previously have received the benefit of Mr. Newland's higher salary, independent of anything concerning the respondent or her dismissal. To calculate her loss in any other fashion is unjust and would not reflect reality. It would mean that she is actually
25 worse off than she would have been had her husband not taken advantage of legitimate tax planning.

174. It was submitted that it is open to the Tribunal to take such an approach. Whilst factually different, *Lytlarch v Reid 1991 ICR 216* is an example of a Tribunal

invoking the 'just and equitable' principle and underlining that it is the overriding consideration.

175. Reducing the starting figure by £8,400.17 gives a total pecuniary loss of £59,846. The statutory cap is then applied and this is reduced to £19,631.
5176. If this primary position is not accepted, the claimant's secondary position is that the Talkholiday Ltd income is only relevant insofar as it exceeds what she was receiving prior to her dismissal.
177. In 2014/15, the year before she was dismissed, the claimant earned £24,437 from Talkholiday. In the year after she left, 2015/16, she earned £35,220. It is anticipated that she will earn £41,536 in tax year 2016/17. It is submitted that it is reasonable to extend that amount into the following year, 2016/17.
- 10
178. The pecuniary loss for the first year after dismissal is therefore £19,631 + £24,437 - £35,220 = £8,848. The net figure is £6,971. For the second year, it is £19,631 + £24,437 - £41,536 = £2,025. For the 10 months claimed in the third year after dismissal, the loss will be 10/12 of the second year, namely £2,110. The net figure is £1687.50.
- 15
179. The net figure totals £10,683.50. In addition to this, the pension loss an £350 loss of statutory rights must be added, giving a total loss of £23,308.50. This is the claimant's fall-back position. Again, the statutory cap reduces this to £19,631.
- 20
180. The consequence of the discrimination against the claimant is (i) injury to feelings; (ii) loss of wages. The injury to feelings can reasonably be placed in the middle *Vento* band and valued at £15,000.
181. The loss of wages can be reasonably calculated as follows. The live deployments were generally for 4 hours. They occurred fortnightly. There were three members of the ICT team who could have undertaken the role of release co-ordinator. Assuming therefore that the claimant carried out one live
- 25

deployment every six weeks, her loss is four hours wages per six weeks. Recognising that there were periods of time when the claimant was absent, it is contended that she would have been available for five live deployments. This totals 20 hours pay. The claimant's hourly rate of pay with the respondent was approximately £13.75. The total lost wages are therefore reasonably estimated at £275.

182. A global claim for loss resulting from sex discrimination of £15,000 is advanced.

The Respondent's Submissions

Constructive Unfair Dismissal

10183. The parties agreed that events after the claimant's resignation on 25 February 2015 were not relevant to the question of whether the claimant was constructively dismissed. The respondent's decision that the Claimant did not have sufficient grounds to appeal against the outcome of her Respect at Work complaint, which was communicated to the claimant on 2 March 2015, therefore has no bearing on the issue of whether the claimant was constructively dismissed.

184. The claimant has pled a "last straw" case. Her position is that she resigned from her employment with the respondent in response to a course of conduct which cumulatively amounted to a breach of the implied term of mutual trust and confidence.

185. The Tribunal must apply an objective test in determining whether the respondent has in fact committed a repudiatory breach of the implied term of trust and confidence. The subjective views of the claimant, her husband or any of her former colleagues in relation to the respondent's alleged conduct are of no legal relevance to the issue of whether the claimant was constructively dismissed. Whilst the Tribunal has heard evidence from other witnesses about their relationship with Mr Phillips, that is of no relevance to the claimant's claim.

186. To succeed with her claim of constructive dismissal the claimant must not only show that the respondent conducted itself in a manner calculated or likely to

destroy the relationship of trust and confidence between the parties, but also that the respondent had no reasonable and proper cause for its actions.

187. The Tribunal was referred to the judgment of the Court of Appeal in *Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ 149.

- 5 a. The final straw must be the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract *by the employer*
- b. The final straw, when taken in conjunction with the earlier acts, must contribute something to the breach of the implied term of mutual trust and confidence and be more than utterly trivial.
- 10 c. The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the “final straw” consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.
- 15 d. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence.

188. The Resignation Email and paragraph 40 of the paper apart to the claim form both identify the act which the Claimant is relying upon as the “final straw” as being Mr Phillips withdrawal of his Respect at Work complaint against the claimant, without the claimant having been given the right of reply. It is the case as set out in the claim form which the respondent has been required to meet in these proceedings.

25 189. The Tribunal is first required to assess the character of the final straw relied upon by the claimant before it examines any of the alleged prior conduct of the respondent which the claimant says contributed to her decision to resign from her employment.

190. If the act which is relied upon by the claimant as the final straw is entirely innocuous then the claimant cannot then rely on any of the alleged earlier conduct of the respondent in support of her claim for constructive dismissal. Any other approach would be an error of law (See *Omilaju* (above)).
- 5 191. Similarly, for the claimant to be able to invoke the final straw principle, the final straw which she relies upon must be the last in a series of acts or incidents which cumulatively amount to the repudiation of the employment contract by the respondent.
192. To be the last in a series of acts which cumulatively amount to a repudiatory
10 breach of contract by the respondent, the final straw which is relied upon by the claimant must also be an act which was done by the respondent. Otherwise, the claimant is not permitted to invoke the final straw principle.
193. The Policy cannot be invoked by or on behalf of the respondent in the same way as a disciplinary or grievance procedure. The Policy can only be
15 invoked by individuals who are seeking redress for matters which are personally affecting them in the workplace.
194. Mr Phillips' withdrawal by of his Respect at Work complaint can in no sense be said to be an act which was done by the respondent. Once Mr Phillips decided that he wished to withdraw his Respect at Work complaint, the
20 respondent was in no position to stop him from doing so.
195. An individual who raises a grievance remains entitled to withdraw the grievance at any time should they no longer wish to pursue matters any further, seeing as how the pursuit of a grievance is a matter which is entirely personal to the individual concerned. If an individual no longer wishes to
25 pursue a grievance, then an employer cannot force them to continue to do so. It cannot be said that an individual who wishes to withdraw a grievance requires the consent of the employer or indeed any other parties who are affected by the grievance before doing so.

196. The withdrawal by Mr Phillips of his Respect at Work complaint was not an act which was done by the Respondent. This cannot be the last in a series of acts done by the respondent and the claimant is therefore not entitled to invoke the final straw principle. The claimant therefore simply voluntarily resigned from her employment on 25 February 2015. A voluntary resignation does not amount to a dismissal in law.
197. The respondent behaved entirely reasonably in relation to the manner in which it handled Mr Phillips' decision to withdraw his Respect at Work complaint. At paragraph 40 of her claim form, the claimant makes criticism of the fact that no explanation was provided to her as to why Mr Phillips' complaint was withdrawn and that Mr Phillips was allowed to withdraw his complaint before she had been given the right of reply. It cannot be said that the respondent 'allowed' Mr Phillips to withdraw his Respect at Work complaint or was in any way complicit in that decision. It was an entirely personal decision for Mr Phillips to decide to invoke the respondent's Policy and to then subsequently withdraw his complaint. There is therefore no force in any argument that the respondent had the power to restrain Mr Phillips from withdrawing his Respect at Work complaint until the claimant had been given a right to reply to the allegations in a manner which she considered to be satisfactory.
198. In any event, the claimant had already made her position clear in respect of Mr Phillips' complaint before the complaint was withdrawn on 18 February 2015. The claimant was provided with a copy of Mr Phillips' Scope of Complaint on 1 October 2014. She thereafter made it clear via an e-mail sent by Mr Wilson on 24 November 2014 that she refuted the allegations in their entirety and that she felt that Mr Phillips had raised his complaint maliciously.
199. The claimant also acknowledged in her evidence that several the issues identified in Mr Phillips' Scope of Complaint overlapped with issues raised in

her own complaint. The claimant therefore had the opportunity to comment on these matters as part of her own complaint. The respondent's HR department informed Mr Wilson on 13 January 2015 of the overlap between the two complaints and explained that efforts were being made to refine the scope of Mr Phillips' complaint to address this issue and to identify any other issues which might be more appropriately pursued through one of the respondent's other procedures, rather than the Policy. There would have been little point in the respondent investigating the same issues twice through two separate processes and it was therefore appropriate for the respondent to postpone the investigation of Mr Phillips' complaint until the scope of complaint had been suitably refined.

200. Once Mr Phillips elected to withdraw his Respect at Work complaint, the process was at an end. It would have been a complete waste of time and completely nonsensical for the respondent to have continued the process simply to give the claimant a 'right of reply'. Such an approach would have been a waste of time, effort and resources and would have made no difference to the overall outcome, given that Mr Phillips had already indicated that he did not intend to pursue his complaint any further.

201. An individual who chooses to withdraw a grievance may do so for a variety of reasons. They are not under an obligation to explain their particular personal reasons for doing so. Even if an individual does provide an explanation for their decision to withdraw their grievance, then the employer cannot be under an obligation to divulge the reasons for the withdrawal of the grievance to any other interested parties. An individual who raises a grievance has a legitimate expectation of confidentiality in relation to the grievance process, which would extend to their reasons for deciding not to pursue a grievance any further. As such, an employer can only be required to inform any individuals who were the subject of the grievance that the grievance has now been withdrawn and that the process is therefore at an end.

202. The claimant believes that Mr Phillips raised his complaint maliciously to 'muddy the waters' in respect of the claimant's complaint. Ms Curran said that she did not believe that Mr Phillips did raise his complaint maliciously. Ms Curran felt that Mr Phillips genuinely believed that attempts were being made by the claimant and Ms Maltby to undermine him in his role of Environments Coordinator. Ms Curran also spoke of the detrimental impact that the claimant's complaint was having on Mr Phillips' health. Ms Curran's evidence was that Mr Phillips had raised a complaint as a means of defending himself against the allegations which had been made by the claimant, which Mr Phillips believed to be untrue. Ms Curran's evidence in relation to Mr Phillips' reasons for raising a Respect at Work complaint was not challenged by Mr Campbell in cross-examination.
203. The claimant said in her evidence that she was first aware that Mr Phillips had withdrawn his Respect at Work complaint against her when she met with Mr Wilson on 25 February 2015. The claimant's evidence was that she was told by Mr Wilson that Mr Phillips' complaint had been withdrawn and that was all. The claimant resigned a matter of hours after her meeting with Mr Wilson, without having first discussed matters with the respondent. At the time that she resigned from her employment, the claimant therefore cannot have been aware that the respondent did not intend to take any disciplinary action against Mr Phillips relative to his decision to raise and subsequently withdraw a Respect at Work complaint against the claimant. This therefore cannot have played a part in the claimant's decision to resign.
204. Had the respondent decided that there was a basis for taking disciplinary action against Mr Phillips, then the claimant would not have been entitled to be informed of that fact. Whether any formal disciplinary action was contemplated or indeed taken against Mr Phillips would have been a confidential matter between Mr Phillips and the respondent.

205. Viewed objectively, the respondent therefore behaved reasonably in respect of the way in which it handled the withdrawal by Mr Phillips of his Respect at Work complaint. To the extent that the final straw relied upon by the claimant in respect of her resignation on 25 February 2015 is in any way attributable to the respondent, it is submitted that the actions of the respondent were entirely reasonable and therefore wholly innocuous and do not entitle the claimant to invoke the final straw principle.
206. The claimant in evidence suggested that the respondent's intention to have a 'record of discussion' with her concerning the reporting issues highlighted in Mr Phillips' Respect at Work complaint formed part of the 'final straw' which caused her to tender her resignation on 25 February 2015. There is, however, no mention of this incident forming part of the final straw in either the Resignation Email or her claim form. The claim form and Resignation Email are consistent in identifying the final straw upon which she relies as being the withdrawal by Mr Phillips of his Respect at Work complaint.
207. The claimant acknowledged in her evidence that, before she composed the Resignation Email she had seen the February Email which referred to the respondent's intention to put a 'record of discussion' in place with the claimant. Given that the February Email must have been fresh in the claimant's mind when she sent the Resignation Email it is significant that the Resignation Email makes no reference to the intended 'record of discussion'. If this had formed part of the final straw which caused the claimant to resign, then the Resignation Email would have said so. Instead, it only referred to the withdrawal of Mr Phillips' Respect at Work complaint as being the final straw.
208. In any event, it was submitted that the claimant's mistaken belief that she was to be subject to formal disciplinary action cannot amount to a final straw. The Tribunal was referred to paragraph 22 of the judgment in *Omilaju: An entirely innocuous act on the part of the employer cannot be a*

final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence."

- 5 209. The February Email was clear that no formal disciplinary action was to be taken against the claimant. As Mr Wilson confirmed in his evidence, a record of discussion would simply have been an informal conversation between the respondent's HR department and the claimant, during which the claimant would have could put across her point of view. Mr Wilson confirmed that a record of discussion would not have amounted to formal disciplinary action, as the terms of the February Email made clear.
- 10
210. The respondent accepted that the claimant did not need to show that a repudiatory breach of contract by the respondent was the effective cause of her resignation. The correct test is that the claimant is required to establish that her resignation was at least in part caused by a course of conduct by the respondent which cumulatively amounted to a repudiatory breach of the implied term of mutual trust and confidence.
- 15
211. The final straw principle does not allow the claimant to simply rely upon any and all historical acts of the respondent in support of her claim for constructive dismissal. Logically, the Claimant can only rely upon conduct which actually played a part in her decision to resign in support of her claim for constructive dismissal. Any alleged conduct of the respondent which did not play a part in the claimant's decision to resign is not relevant to the question of whether the claimant was constructively dismissed.
- 20
212. The claimant said in her evidence that she initially felt well supported by Mr Phillips on her return to work in February 2014 and that following 'clear the air talks' with Mr Phillips she was content to 'let bygones by bygones' in relation to any alleged prior conduct of Mr Phillips. The minutes of the meeting between the claimant and Ms Curran on 11 September 2014 record the claimant as having said that, following her initial conversation with Mr
- 25

Phillips on her return to work, the claimant felt that *“it was a fresh start and she felt supported.”*

213. It was clear from the evidence of the claimant and Mr Wilson that the Telephone Call was the catalyst for the claimant raising a Respect at Work complaint against Mr Phillips. The claimant said in her evidence that she was content for the other issues which she raised in her [May] Email complaint to be dealt with informally, but that she wished for the Telephone Call to be escalated through the Policy.
214. The claimant’s evidence was also that had the respondent taken disciplinary action against Mr Phillips in respect of the Telephone Call then she would not have felt the need to raise a Respect at Work complaint. Mr Wilson said in his evidence that when the claimant first consulted him in relation to the possibility of raising a Respect at Work complaint, the claimant was primarily concerned about the Telephone Call. They were of the view that Mr Phillips should have been subject to disciplinary action in relation to the Telephone Call. Mr Wilson said in his evidence that in May 2014, he told the respondent that unless disciplinary action was taken against Mr Phillips, the claimant would feel the need to raise a Respect at Work complaint.
215. The claimant wanted the respondent to punish Mr Phillips about the Telephone Call. She saw the Policy as a possible means of achieving that end and that was why she raised a Respect at Work complaint against Mr Phillips.
216. The claimant’s complaint was not raised in accordance with the proper spirit of the Policy. The fundamental purpose of a grievance procedure is for individuals to seek redress for matters which are personally affecting them at work. It is not a mechanism for employees to seek to have other employees disciplined.

217. Whether it would have been appropriate for disciplinary action to be taken against Mr Phillips was solely a matter for the respondent. The remit of the Tribunal is not to consider whether Mr Phillips should have been disciplined, but whether the respondent considered the claimant's Respect at Work complaint seriously and took appropriate steps to address the apparent breakdown in the relationship between her and Mr Phillips.
218. It is more appropriate for the Tribunal to consider the steps which the respondent ultimately took to address the apparent breakdown in the relationship between the claimant and Mr Phillips, rather than focusing on the minutiae of how the respondent handled each aspect of the claimant's Respect at Work complaint.
219. The Decision Making Panel did recognise that there had been managerial failings on the part of Mr Phillips and that the relationship between the claimant and Mr Phillips had broken down. The Decision Making Panel recommended a review of the structure of the Environments Team as a matter of urgency.
220. The Tribunal has heard evidence from the claimant that the respondent did in fact undertake a review of the structure of the Environments Team in January/February 2015. A new post was created for Mr Phillips and it was announced that he was to be moved out of the team in February 2015. Had the claimant not resigned, she would no longer have been required to work in the same team as Mr Phillips.
221. The real reason that the claimant resigned from her employment was simply because the respondent decided not to take any disciplinary action against Mr Phillips. Unless the outcome of the respondent's investigation into the claimant's Respect at Work complaint was to recommend disciplinary action against Mr Phillips, it was inevitable that the claimant was going to consider her relationship with the Respondent to have broken down.

222. A belief that Mr Phillips had not been appropriately punished was not sufficient for the claimant to treat herself as having been constructively dismissed, when the respondent took appropriate action to address the deterioration in the relationship between the claimant and Mr Phillips.
- 5 223. The core purpose of the Policy is to ensure that problems which individuals may be experiencing in the workplace are addressed. By moving Mr Phillips out of the Environments Team, there is nothing more that the respondent could have done in terms of seeking to improve the quality of the working environment for the claimant going forward.
- 10 224. Compensation in respect of the constructive dismissal claim should be capped at £19,631. There was no basis for the statutory cap being held not to apply. The Tribunal heard no evidence that the alleged act of discrimination in any way formed part of the conduct which caused the claimant to resign from her employment. The discrimination complaint is an
15 entirely separate head of claim and is not relevant to the claim of constructive dismissal.
225. The Tribunal has heard evidence from Mr Newlands that the Newlands' household income has reduced since the claimant resigned from her employment with the respondent. It was submitted that this is not a relevant
20 factor for the Tribunal to consider. By analogy, if Mr Newlands had himself received a large salary increase since the claimant resigned from her employment, then that would be of no relevance to assessing the measure of the claimant's loss.
226. In assessing the claimant's financial loss, credit must be given for the sums
25 which the claimant has received from Talkholiday. Mr Newlands' rationale for paying a salary to the claimant is not relevant. Sums which are paid to the claimant through her personal tax code from Talkholiday are earnings which require to be taken into account in assessing the measure of the

Claimant's loss. The overarching principle of awarding compensation which is 'just and equitable in all the circumstances' cannot entitle the Tribunal to award the claimant compensation which exceeds the loss which she has actually sustained.

- 5 227. The claimant received a gross salary of £24,000 from Talkholiday whilst she was employed by the respondent. The Claimant would have continued to receive a gross salary of £24,000 from Talkholiday had she remained employed by the respondent. It was therefore accepted that the net value of the £24,000 gross salary which the claimant would have continued to receive from Talkholiday in any event therefore does not require to be taken into account by the Tribunal in assessing the measure of the claimant's loss. However, the net value of the subsequent pay increases which the claimant has received from Talkholiday since her resignation from her employment with the Respondent do require to be taken into account.
- 10
- 15 228. The claimant received a gross salary of slightly in excess of £35,000 a year for the 2015/16 tax year and will be paid a total salary which is slightly in excess of £41,000 for the Currant tax year. The difference between the net value of these increased salary payments and the net value of the £24,000 gross salary which the claimant would have received from Talkholiday in those years had she continued to be employed by the respondent requires to be taken into account in assessing the measure of the claimant's loss. All Talkholiday staff (including the claimant) generally received a 4 percent pay rise each year. This is something which the Tribunal is required to take into account when quantifying future loss.
- 20
- 25 229. If the Tribunal finds that the claimant has been constructively dismissed the claimant's loss of earnings is not attributable to her dismissal and the Tribunal is therefore not empowered to make a compensatory award.

230. Both medical reports indicate that the claimant has been unable to work since 5 March 2015, this being her last day of employment with the respondent. The medical reports both state that the claimant's inability to work is partially because of the respondent's conduct towards her during her employment. Neither of the medical reports concludes that it was the fact of losing her employment which caused the claimant's illness.
231. For the purposes of section 123(1) of the ERA, the Tribunal can only make a compensatory award to reflect financial losses which are attributable to the dismissal.
232. To the extent that the claimant's illness which has prevented her from obtaining alternative employment is attributable to the conduct of the respondent, it is submitted that there is a distinction to be drawn between damage which flows from the respondent's conduct towards the claimant and damage which flows from the claimant's decision to treat that conduct as bringing the employment relationship to an end.
233. Conduct which causes a constructive dismissal does not constitute the dismissal itself. If the Tribunal finds that the claimant was dismissed, then that dismissal was effected purely by the claimant's decision to resign from her employment. Any damage inflicted by the respondent's conduct toward the claimant is independent from the act of dismissal.
234. To the extent that the claimant's inability to obtain alternative employment has been caused by the respondent's conduct, the loss sustained by the claimant in consequence of that does not stem from the dismissal (i.e. the claimant's act of resignation) itself. If the Claimant can identify that the respondent's conduct which contributed to or exacerbated her illness amounted to some breach of the implied term of trust and confidence, then she is required to raise a separate contractual claim to recover her resultant loss of earnings.

235. Authority for this proposition can be derived from the decision of the Court of Appeal in *GAB Robins (UK) Ltd v Triggs [2008] I.C.R 529*. The facts of that case are broadly similar to those in the present case: the claimant resigned citing a breach of the implied term of trust and confidence and had suffered
5 illness as a result of the way in which she had been treated by the employer, which prevented her from obtaining alternative employment.

236. It is clear from the decision of the Court of Appeal in the case of *Aegon UK Corporate Services Ltd v Roberts 2010 ICR 596, CA* that the Tribunal cannot apply different standards of causation to pension loss and loss of
10 earnings. In *Roberts*, the Court of Appeal stated that pensions do not enjoy any special status in the calculation of loss, are essentially part of the remuneration package (albeit in a deferred form), and must be assessed according to the same principles as loss of earnings. The principle derived from the *Triggs* case therefore also applies to the claimant's pension loss.

15 *Sex Discrimination*

237. The claimant has failed to establish a *prima facie* case of sex discrimination. To establish a *prima facie* case, the claimant required to do more than establish a difference in status and a difference in treatment. The claimant is
20 required to establish facts from which the Tribunal could properly conclude, in the absence of an adequate explanation, that the respondent had committed an act of unlawful discrimination; not simply that the respondent could possibly have committed an act of unlawful discrimination.

238. Only if the claimant established a *prima facie* case would the burden of proof fall on the respondent to provide an adequate explanation for the
25 treatment.

239. The Tribunal was referred to *Madarassy v Nomura International plc [2007] I.C.R. 867*

240. The claimant has not adduced any evidence which is capable of establishing a *prima facie* case of sex discrimination. The claimant has simply alleged that she was not considered for overtime and invited the Tribunal to draw the conclusion that this must be on the grounds of her sex.
5 All that the claimant has pointed to is a difference in status and an alleged difference in treatment. Based on *Madarassy*, this is not sufficient to establish a *prima facie* case of discrimination.
241. The claimant spoke of having regularly participated in live deployments prior to Mr Phillips' appointment to the role of Environments Coordinator.
10 However, the ex-colleagues which she called to give evidence on her behalf could only recall her having participated in a live deployment on one occasion.
242. The claimant's job description and the objectives which she agreed with Ms Watt in November 2014 do not mention the claimant being required to participate in live deployments. These documents only mention the claimant being required to assist the Environments Coordinator and Senior Configuration Analyst in *preparing* for releases to the live environments. There is a distinction between participating in live deployments and simply being involved in the preparation work for live deployments. Contrary to the
15 evidence given by the claimant, participating in live deployments was not, therefore, at any time a core aspect of her role.
20
243. The Tribunal has heard from several witnesses that there was no formal overtime rota for live deployments. Overtime was undertaken on a voluntary basis. If the claimant was genuinely aggrieved about not being included on the rota for live deployments, then she would have raised this matter as part
25 of her Respect at Work complaint. The claimant did not mention this at any stage of the Respect at Work process. When it was mentioned at the claimant's meeting with Ms Curran on 11 September 2014 that working practice had changed within the team and that live deployments were now

carried out on a Sunday, the minutes of the meeting do not record the claimant as having raised any objection to the way in which overtime was organised. If the claimant had felt that the allocation of overtime was unfair, then she would have raised it at this stage.

5 244. In her evidence the claimant said that a PCS trade union representative raised the issue of the allocation of overtime potentially being discriminatory to the claimant whilst the claimant's Respect at Work complaint was ongoing. If the claimant had felt strongly about not being considered for overtime, then she would have amended her Scope of Complaint to include
10 this issue. The claimant was aware of the process for amending a scope of complaint, having done so on 31 October 2014 to include the further allegations of inappropriate/homophobic comments by Mr Phillips. The claimant was simply not interested in working overtime.

15 245. The Tribunal heard evidence from a number of witnesses that the Environments Team was required to supply a Release Coordinator and a PVCS Analyst for the purpose of the bi-weekly Sunday live deployments. The claimant has acknowledged that she would not have been capable of performing the role of PVCS Analyst, but maintains that she should have been considered for the role of Release Coordinator.

20 246. Mr Graham that, at the time that the Environments and PVCS teams merged, Mr Phillips was solely responsible for acting as the Release Coordinator relative to live deployments. Subsequently, Mr Phillips approached Mr Graham, who was the Senior Configuration Analyst (and more senior than the claimant), to alternate with Mr Phillips in respect of the
25 live deployment schedule. This occurred whilst the claimant was on maternity leave from November 2012. As such, at the time that the claimant returned to work in 2014, arrangements for covering live deployments had already been put in place and there was no need for Mr Phillips to seek additional cover for live deployments. It would be advantageous for the

Release Coordinator for a live deployment to have a strong technical knowledge. Mr Graham also gave evidence that if a live deployment was not coordinated successfully, this could have serious ramifications and would potentially attract attention from the UK government.

5 247. The claimant offered two reasons in her evidence as to why she felt that Mr Phillips did not include her on the rota for live deployments. The first was that Mr Phillips was eager to secure the benefit of overtime payments for himself. The second was that Mr Phillips did not have faith in her abilities. Neither of these two explanations relate in any way to the claimant's sex
10 and they do not constitute discrimination.

248. The claimant's male colleagues who did participate in live deployments as the Release Coordinator (namely Mr Phillips and Mr Graham) were not in a directly comparable position to the claimant. The claimant was less senior, less experienced, less qualified and far less technically minded than Mr
15 Phillips and Mr Graham. The Claimant admitted herself on a number of occasions during the course of her evidence that she was not 'IT minded' and that she had limited technical skills. These material differences are all reasons why the claimant was not included on the live deployment rota; that Mr Phillips and Mr Graham are not appropriate comparators for the purpose
20 of a sex discrimination claim; and the claimant has therefore failed to establish a *prima facie* case of discrimination.

249. The claimant sought to draw parallels between her situation and that of Ms Maltby. Ms Maltby was appointed to the role of Trainee Release Analyst in 2012 and did not complete her training programme until August 2014. Ms
25 Maltby was far less qualified and experienced than the two male Release Analysts (Mr Ramsay and Mr Breslin) who did participate in live deployments. As such, Mr Breslin and Mr Ramsay are not appropriate comparators for Ms Maltby. The Tribunal has heard evidence that Ms Maltby also did in fact participate in live deployments on occasion.

- 5 250. The claimant initially returned to work on a phased basis and had multiple extended periods of absence. She did not feel fully fit to attend work regularly until August 2014. As such, it is submitted that the claimant would not have been fit enough to do any additional hours over and above her contractual hours until August 2014 at the earliest.
- 10 251. The claimant said that she required to gradually 're-learn' her job when she returned to work. The claimant's position that she had to re-learn the fundamentals of her job is entirely inconsistent with a proposition that she could have undertaken additional, more advanced duties by participating in live deployments.
252. Had the claimant participated in live deployments, then she would not have been eligible to receive any premium overtime payments due to her part-time status.
- 15 253. The Tribunal should also take into account the claimant's absence record in considering when, if at all, the claimant would have been fit to work overtime.
- 20 254. In respect of an injury to feelings award, the claimant's failure to raise the issue whilst she was in employment with the respondent belies any suggestion that exclusion from the overtime rota caused the claimant any particular distress.

Discussion and Deliberation

Constructive Unfair Dismissal

- 25 255. The Tribunal referred to the statutory provisions. Section 94 of the Employment Rights Act 1996 (the ERA) provides that employees have the right not to be unfairly dismissed. Section 95(1)(c) states that a dismissal can include a constructive dismissal where: *"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."

256. The test for what is commonly known as constructive dismissal is whether the employer's conduct constitutes a significant breach, going to the root of the contract, or shows an intention no longer to be bound by an essential term of the contract. Furthermore, the employer's conduct must be serious enough to entitle the employee to resign with or without notice.
257. To claim constructive dismissal the Tribunal considered that claimant must establish that:
- a. There was a fundamental breach of contract on the part of the respondent;
 - b. The respondent's breach caused the claimant to resign; and
 - c. The claimant did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.
258. The claimant's position was that she resigned following a "*last straw*" and relied upon a series of acts by the respondent which she said amounted to a fundamental breach of contract.
259. The Tribunal considered that a course of conduct could cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "*last straw*" incident even though the "*last straw*" by itself did not amount to a breach of contract (see *Lewis v Motorworld Garages Limited [1986] ICR 157, CA*).
260. The claimant relied upon the implied term of mutual trust and confidence which is found in every contract of employment. The Tribunal referred to the House of Lords Judgment in *Malik & Another v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] ICR 606, HL* where their Lordships concluded that there was an implied contractual term

that an employer “*will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.*”

261. The Tribunal also referred to *Omilaju v Waltham Forest London Borough Council (above)*, the Court of Appeal explained that an act constituting the last straw does not have to be of the same character as the earlier acts, and nor must it constitute reasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee’s trust and confidence has been undermined is objective.
262. The claimant submitted that her resignation was prompted by a last straw. The Tribunal referred to the Resignation Email. It stated that the last straw was Mr Phillips’ withdrawal of the Phillips Scope of Complaint after 23 weeks, without adequate explanation why or the right to reply.
263. The Tribunal also referred to the claim form which stated that the respondent’s failure to consider her appeal in the usual way was the last straw. It was however conceded that this handling of the appeal post-dated the Resignation Email and could not be the last straw.
264. The Tribunal noted that the essential quality of the last straw was that when taken with the earlier acts upon which the claimant relied it amounted to the breach of the implied term of trust and confidence. When viewed in isolation the last straw may not always be unreasonable, still less blameworthy. An entirely innocuous act on the part of the employer cannot be a last straw.

265. The Tribunal considered whether the withdrawal of the Phillips Scope of Complaint was a last straw. The Tribunal accepted that the respondent was bound by acts done in the course of the employee's employment. Accordingly, if Mr Phillips behaved in a way that which if done by the respondent would amount to a fundamental breach of contract of the claimant's contract of employment the respondent would be bound by Mr Phillips' misdeeds. However, the Tribunal agreed with the respondent's submission that the Policy can only be invoked by individual employees seeking to redress personal matters affecting them in the workplace. Therefore, once Mr Phillips' decided to withdraw the Phillips' Scope of Complaint the respondent could not prevent him from so doing. The withdrawal was not an act by the respondent.
266. The Tribunal then turned to consider the respondent's conduct in relation to the withdrawal of the Phillips Scope of Complaint. The Tribunal accepted the respondent had no control over Mr Phillip withdrawing the Phillips Scope of Complaint and the respondent was not required provide the claimant with the explanation given by him.
267. In the Tribunal's view the respondent's HR advisers were responsible for guidance and support about policies. They were familiar with all the policies and had an overview of all the issues that had been raised. As investigating officer in all the complaints Ms Curran also had an overall understanding of the issues.
268. The Phillips Scope of Complaint was intimated to the claimant and Ms Curran on 1 October 2014. By 24 November 2014 Mr Wilson had intimated by email that a significant part did not fall within the Policy. The email did not provide a detailed response to each issue. Ms Curran was aware that several issues that had been raised in the Phillips Scope of Complaint had been investigated as part of the Newlands Scope of Complaint. Ms Curran expressed views about duplication before January 2015. By 13 January

2015 Ms McGuinness considered that some complaints in the Phillips Scope of Complaint related to conduct. Ms McGowan raised this with Mr Phillips on 26 January 2015 but did not advise the claimant and Mr Wilson before the withdrawal of the Phillips Scope of Work.

5 269. The Tribunal accepted that in relation to those matters which were part of the Newlands Scope of Complaint the claimant had had an opportunity to respond. However, she had not had an opportunity to respond to the complaints about absence reporting procedures, flexi-time, requests and use of flexi and completion of timesheets relating to incidents as early as
10 May 2014.

270. The Tribunal also accepted that where there are allegations of misconduct the respondent was entitled to investigate and if appropriate instigate disciplinary proceedings. As line manager Mr Phillips could have raised these issues with the claimant and HR when they occurred. He did not do
15 so. The investigation undertaken by Ms Curran in December 2014 into the Phillips Scope of Complaint did not involve obtaining the claimant's response to the allegations. Despite being aware of the conduct issues the HR advisers did not contemplate whether a disciplinary investigation was appropriate until after Mr Phillips withdrew the Phillips Scope of Complaint.
20 When informing Mr Wilson of developments and the potential disciplinary investigation against the claimant Ms McGowan must have been aware that this would be communicated to the claimant. While the Tribunal appreciated that by the time the claimant was informed of the situation the decision was not to have a disciplinary investigation because a record of discussion were
25 not in place, the fact that having a record of discussion was considered to be a precursor to there being a subsequent disciplinary investigation if there was a recurrence along with the delay and timing of reaching that decision led the Tribunal to conclude that this was not an entirely innocuous act by

the respondent. The Tribunal concluded that this was capable of being a final straw.

5 271. Having reached this conclusion, the Tribunal went on to consider the earlier acts. The Tribunal agreed with the respondent's submission that the final straw principle did not allow the claimant to rely on all the respondent's historical acts in support of her claim. Accordingly, any conduct by the respondent which did not play a part in her decision to resign was in the Tribunal's view not relevant.

10 272. From the evidence the Tribunal was of the view that respondent's conduct which played a part in the claimant's decision to resign started with the Telephone Call. The Tribunal appreciated that before her return to work in February 2014 the claimant was unimpressed by Mr Phillips' management style and the respondent's handling of her absence. However, the claimant was willing to return and move on so far as Mr Phillips' alleged conduct was concerned. She initially felt supported. The Tribunal considered although the claimant raised issues about her workload and training before the Telephone Call she was content for Ms Porter to deal with them informally and she did so.

15 273. The Tribunal considered that given the tragic circumstances and consequent lengthy absence reintegrating the claimant back to work would have been a challenging task for any manager. The Tribunal's impression was that Mr Phillips was out of his depth. It was apparent from the Telephone Call that Mr Phillips had difficulty managing the claimant's absences. Ms Porter's involvement based on the limited evidence available was at best ineffectual.

20 274. The claimant alleged the actions of Mr Phillips and Ms Porter breached the implied duty of trust and confidence.

275. The claimant referred to the Telephone Call, failing to apologise, ignoring the claimant, disclosing medical information (the ear infection), interrupting conversations and micro-managing. The Tribunal considered that these matters were raised in the Newlands Scope of Complaint, they were investigated and considered by the Decision Making Panel. The Tribunal did not consider that it was appropriate to consider each allegation and record what conclusion it would have reached in respect of each allegation. The Tribunal was satisfied that the relationship between the claimant and Mr Phillips had broken-down. The Tribunal considered that the appropriate approach was to consider the respondent's conduct in handling the matter which included Ms Porter's involvement and the way the claimant's complaint and Mr Phillips' complaint was handled.
276. The Telephone Call took place on 30 April 2014. The claimant sent the April Email. Ms Porter spoke to the claimant on 1 and 7 May 2014. She also spoke Mr Phillips. The Tribunal appreciated that the claimant was very upset but objectively the Tribunal considered that Ms Porter had reasonable and proper cause to deal with the matter informally in the first instance.
277. Having done so matters were not resolved but escalated as following the meeting between the claimant and Mr Phillips the claimant sent the May Email. Viewed objectively the Tribunal could understand why Ms McGuinness proposed resolving matters informally at that stage as this was in line with the Policy. The Tribunal noted that the claimant wrote in her email sent on 14 May 2014 that the situation was "*now beyond informal resolution*". Nonetheless Ms Porter and Ms McGowan proceeded to have an informal with the claimant later that day lasting approximately 2.5 hours. The Tribunal's impression from the evidence before it was that following this meeting the claimant still wanted to raise a formal grievance about the Telephone. Despite the claimant's position Ms Porter continued to deal with all matters informally.

278. The Tribunal considered whether Ms Porter had reasonable and proper cause for continuing to deal with all matters informally. The Tribunal considered that while the claimant referred to a “grievance” it was accepted by her that the appropriate policy was the Respect at Work Policy (the Policy). The “grievance” which was already in writing could in the Tribunal’s view have been treated by the respondent as a complaint under the Policy. However, the situation became perplexing when Mr Wilson became involved. The Tribunal was mindful that Mr Wilson was an experienced trade union representative who was familiar with all the respondent’s policies and had regularly liaised with HR for colleagues. It appeared to the Tribunal that through Mr Wilson’s involvement the complaint about the Telephone Call became an investigation by Ms Porter into potential disciplinary action against Mr Phillips and depending on the outcome of that investigation the claimant might then pursue a complaint under the Policy.
279. The Tribunal considered that having been told that Mr Wilson was representing the claimant the respondent had reasonable and proper cause to deal with Mr Wilson and assume that he was acting on the claimant’s instructions and that he was keeping her informed.
280. The Tribunal accepted that it was for the respondent to determine what if any disciplinary action was to be taken against Mr Phillips. It also accepted that the claimant had no right of “appeal” any decision that the respondent made about disciplinary action against Mr Phillips. However, the Tribunal considered that the correspondence sent to the claimant about the outcome of the investigation undertaken by Ms Porter was confusing. The Tribunal appreciated that the claimant was absent from work and Mr Wilson had been on leave. The Tribunal considered that the correspondence sent by HR appeared to suggest that the claimant’s complaints were being dealt with informally and separately following a conduct investigation disciplinary

action was not being taken in relation to the Telephone Call. This certainly appeared to be Mr Wilson's understanding.

- 5 281. Although Mr Wilson and the claimant did not agree with the respondent's decision there was no evidence before the Tribunal to suggest that a disciplinary investigation did not take place. Other than the communication to the claimant there was no evidence before the Tribunal about the nature and extent of that investigation. The Tribunal understood that there was no disciplinary action but did not know if there was a record of discussion.
- 10 282. While the Tribunal accepted that disciplinary action might arise out of other internal processes the Tribunal could understand why the claimant felt the respondent's approach was confusing. However, given Mr Wilson's position the Tribunal could not conclude that the respondent did not have reasonable and proper cause to carry out a disciplinary investigation and treat the claimant's complaint informally pending that outcome.
- 15 283. The consequence was that the claimant sent the July Email raising a formal complaint under the Policy. The July Email referred to the original complaints in the May Email. It also raised complaints about Mr Phillips' conduct in May/June 2014 and some historical complaints. It was not clear to the Tribunal why the Scoping Out Meeting did not take place until 21
20 August 2014. There did not however appear to be an issue about that. The claimant was accompanied at that meeting by Ms MacKenzie. The claimant was provided with notes of that meeting and the subsequent Newlands Scope of Complaint.
- 25 284. The Tribunal considered that the process appeared cumbersome. There were various documents referring to complaints: the July Email, the notes of the Scoping Out Meeting and the Newlands Scope of Complaint. Rather than focusing issues the process appeared to expand them. Also, when additional issues were raised by the claimant in November 2014 these were

included in the investigation albeit they post-dated the Newlands Scope of Complaint. That said the Policy was agreed with the union that Mr Wilson and Ms MacKenzie represented. One or other was involved in representing the claimant during the formal process.

5 285. By 27 August 2014 Mr Phillips had also raised Respect at Work complaints against the claimant and Ms Maltby. He was also represented by a trade union representative, Mr Young who was colleague of Mr Wilson and Ms MacKenzie. The Tribunal understood that Ms MacKenzie was the designated representative for Ms Maltby.

10 286. Unlike the claimant, Mr Phillips was not asked to consider pursuing matters informally. The Tribunal noted that Mr Phillips did not consider that the informal approach would be successful. That was also the claimant's position in May 2014. However, by September 2014 Ms Curran was investigating the Newlands Scope of Complaint. This involved speaking to
15 every member of the team and Ms Porter. It was apparent that the working relationship between the claimant and Mr Phillips had broken down. It was difficult to believe that against this background there could be an informal resolution of Mr Phillips' complaint. Viewed objectively the Tribunal felt that the respondent had reasonable and proper cause to deal with Mr Phillips' complaint against the claimant formally.
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287. The Tribunal then considered how the respondent handled Mr Phillips' complaint. Mr Phillips attended a Scoping Out Meeting following which the Phillips' Scope of Complaint was prepared. Mr Phillips was represented by Mr Young throughout the process. Ms McGowan was involved from HR.
25 She job shared with Ms McGuinness. HR was aware that some of the Phillips Scope of Complaint overlapped with the Newlands Scope of Complaint. Against this background it was decided that Ms Curran should be investigating officer in both cases.

288. The Tribunal did not understand either the claimant or Mr Phillips to have taken issue with that decision. Viewed objectively the Tribunal considered that there was reasonable and proper cause for doing so given that Ms Curran had already interviewed various witnesses. There was no reason to have anticipated that the scope of her original investigation into the Newlands Scope of Complaint would widened following the October Email.
289. In September 2014 no one appears to have raised any issue about any aspect of the Phillips Scope of Complaint being outside the Policy. The Tribunal felt that during the Scoping Out Meeting this might have been considered by Ms McGowan and Mr Young. However, neither of them raised the matter nor did Ms McGuinness. So far as the Tribunal was aware they were familiar with the respondent's policies. The Tribunal therefore felt on being asked to investigate the Phillips Scope of Complaint under the Policy Ms Curran had reasonable and proper cause to do so particularly as there appeared to be an overlap of some issues.
290. The claimant was asked to meet Ms Curran in late November 2014 about the Phillips Scope of Complaint. That meeting did not take place. The Tribunal's understanding from the evidence was that this was due to Mr Wilson being unavailable. The claimant's position was that she was willing to attend with Ms MacKenzie. While the Tribunal accepted the claimant's evidence Mr Wilson's evidence was equivocal. The Tribunal could understand that the claimant was keen to proceed and might be content to be accompanied by Ms MacKenzie who had accompanied her at the Scoping Out Meeting in August 2014. There was no evidence from the respondent why it was necessary for Mr Wilson to be present given that it was for the claimant to choose who accompanied her within the confines of the Policy. The meeting was rescheduled but was then postponed because Ms Curran considered that there were some overlapping complaints which she was already addressing in the Investigation Report.

291. In any event Mr Wilson had responded to the Phillips Scope of Complaint by email sent on 24 November 2014. This was when the point was raised about certain issues being out with the Policy. There was no evidence to suggest that Ms MacKenzie was of the same view in relation to the complaint about Ms Maltby.
292. As indicated above the Tribunal considered that it would have been helpful, for this to have been done at the Scoping Out Meeting in late September 2014. However, the issues of the overlap with the Newlands Scope of Complaint and the points raised by Mr Wilson were addressed by HR. In January 2015 Ms McGowan wanted to deal with the Phillips Scope of Complaint in the most practical way possible by revisiting the Phillips' Scope of Complaint. The Tribunal noted that Mr Wilson challenged whether the Policy allowed for a Scope of Complaint to be revisited in the way that was proposed. That did not appear to have been a concern for Mr Young.
293. The Tribunal did not consider that it was appropriate for it to review the evidence before it and reach its own conclusion of the Newlands Scope of Complaint. The Tribunal considered that Ms Curran carried out an extensive investigation. The Tribunal's impression was that she was impartial and endeavoured to understand and clarify the issues. The Tribunal felt that in so doing she created more issues rather than treating some of the information as examples of the original complaints. She prepared the Investigation Report based on the information that she received. This was discussed with the claimant, Mr Wilson and the Decision Making Panel which considered all that was said. The Decision Making Panel also met with Mr Phillips and Mr Young. The Tribunal's impression was the Decision Making Panel relied upon the Investigation Report. The Tribunal was mindful that this was not a disciplinary procedure; the Policy envisaged that the investigating officer investigated the complaint and the decision was taken by the Decision Making Panel. Certain allegations were founded and

in particular the Telephone Call. Given that conclusion the Tribunal felt that the respondent had reasonable and proper cause not to interview Mr Newlands especially as the respondent had spoken to Mr Breslin who was supportive of Mr Newland's version of the Telephone Call as narrated by the claimant.

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294. The Tribunal considered that the Investigation Report covered issues about which the claimant did not specifically complain. However, when an allegation, which could amount to discrimination because of a protected characteristic is made even if that was not how the claimant characterised it, the respondent had reasonable and proper cause to investigate it.

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295. The Tribunal appreciated that from the claimant's perspective the process was lengthy and stressful. The Tribunal felt that once the formal process was invoked there was no deliberate delay by the respondent and the time taken was not unreasonable given the volume of issues and number of people who had to be interviewed. Ms Curran was still working on her day job in addition to carrying out the investigations as were the Decision Making Panel and Ms Crawford.

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296. The Tribunal also appreciated that the claimant was disappointed with the outcome and she exercised her right of appeal to which she was entitled to do. The claimant resigned before the outcome of her appeal was known. The Tribunal therefore turned to consider the events leading up to the Resignation Letter.

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297. HR revisited the Phillips Scope of Complaint in January 2015. A view was reached that some complaints fell out with the Policy and some were in response to the Newlands Scope of Complaint. The Tribunal considered that viewed objectively and considering Mr Wilson's concern the respondent had reasonable and proper cause to meet Mr Phillips and Mr Young to ascertain what issues were outstanding and under what process they

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should be dealt with. There was a meeting with Mr Phillips and Mr Young following which a revised Phillips Scope of Complaint was prepared for Mr Phillips to agree. It was reasonable that Mr Phillips agreement was sought as in relation to the Respect at Work complaints it was he not the respondent who was raising them.

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298. From the evidence before the Tribunal Mr Phillips decided to withdraw the Phillips Scope of Complaint on 18 February 2015. From his email it appeared to the Tribunal that the revise Phillips Scope of Complaint did not include issues of alleged misconduct by the claimant. These were issued that Mr Phillips acknowledged were more appropriately to be the subject of a conduct investigation. At this stage whether there was to be a conduct investigation was a matter for the respondent not Mr Phillips.

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299. Given that the claimant and Ms Maltby were represented by Mr Wilson and Ms MacKenzie the Tribunal considered that HR had reasonable and proper cause to inform them of developments. The Tribunal did not understand Mr Wilson to consider that the respondent could compel Mr Phillips to continue with the Phillips Scope of Complaint. The Tribunal noted that Mr Wilson angry about the possible conduct investigation. What was not clear to the Tribunal was to what extent if any this was an off the record conversation. The Tribunal thought this was likely given that any decision in relation to a conduct investigation would be taken by a manger (other than Mr Phillips) and not HR. Also the information was not immediately communicated to the claimant or Ms Maltby by HR or their representatives.

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300. In any event what Mr Wilson communicated to the claimant was the February Email. It did not say that a conduct investigation was to take place. It referred to a record of discussion.

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301. The Tribunal felt that given the sensitivities it would have been preferable for the respondent to have met with the claimant to explain what had happened

and why there was to be a record of discussion. That said the Tribunal felt that given Mr Wilson's experience and understanding of the claimant and the processes that the respondent had reasonable and proper cause to communicate through him.

5 302. From the evidence before the Tribunal the issues relating to conduct were about reporting procedures in relation to sick absence and flexi-time. These issues were not addressed when they occurred. There appeared to be a lack of clarity or awareness of certain procedures. Given that any misunderstanding by the claimant had contributed to the tension with Mr
10 Phillips the Tribunal considered that the respondent had reasonable and proper cause to revisit the policies with the claimant to ensure that she had a clear understanding. The Tribunal felt that a record of discussion was one way of dealing with this particularly as it is one to one. Another would be general training. While a record of discussion is on an employees' personnel
15 file only if there is a repeat of the conduct will it be considered. On being properly informed of the process there was no reason to believe that the claimant would not follow it.

303. The Tribunal's reading of the Resignation Letter was that the claimant was angry that Mr Phillips had been "allowed" to withdraw the Phillips Scope of
20 Complaint. While the Tribunal could understand the claimant's frustration it did not consider that the respondent could prevent him from doing so.

304. The claimant also considered that the Phillips' Scope of Complaint was made out of malice. While the Tribunal considered that the timing of the complaint suggested that it was in reaction to the Newlands Scope of
25 Complaint there was no evidence before the Tribunal that it was made maliciously. The Tribunal considered that having made the complaint and being represented by Mr Young the respondent had reasonable and proper cause to investigate it. Ms Curran considered that Mr Phillips genuinely felt aggrieved by what he perceived as inappropriate behaviour by the claimant.

305. The Tribunal looked at the respondent's conduct as a whole in order to determine whether it was such that its effects, judged reasonably and sensibly were such that the claimant could not be expected to put up with it.

5 306. In the Tribunal's view the claimant had been a valued employee who in 2014 had long term absences from work due to a significant life changing event. During her absence the team in which she worked had undergone changes in personnel and work allocation. The claimant had little regard for Mr Phillips who had poor interpersonal skills. Ms Porter appeared out of her depth when dealing with the tension between the claimant and Mr Phillips.

10 The claimant raised a grievance which Ms Porter attempted to resolve informally. The claimant then raised a formal Respect at Work Complaint which the respondent treated seriously and endeavoured to investigate thoroughly. Ms Curran sought to ascertain the facts acknowledging that people had different perceptions of events. She also investigated Mr Phillips' complaint against the claimant. The Decision Making Panel

15 acknowledged that there had been a break down in the relationship between the claimant and Mr Phillips. It also acknowledged that the team could not continue to work together. There was no evidence to suggest that the Decision Making Panel wanted the claimant to leave the respondent. To

20 the contrary the Tribunal's impression was that they recognised that serious issues had come to light in relation not only to the behaviour within the team but also how other employees behaved.

25 307. The Tribunal was satisfied that the respondent's conduct as a whole was not a breach of the implied term of trust and confidence entitling the claimant to resign.

308. Being satisfied that there was no fundamental breach of contract the Tribunal did not require to consider whether the claimant had affirmed the contract following the breach. The claim of unfair constructive dismissal was dismissed.

Sex Discrimination

- 5 309. The Tribunal referred to section 13 of the EqA: A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Sex is a prohibited characteristic.
310. The Tribunal noted that the claim of direct sex discrimination will only succeed if the Tribunal finds that sex was the reason for the claimant's less favourable treatment.
- 10 311. The less favourable treatment on which the claimant relied in the claim form was that from February 2014 neither she nor her female colleague (Ms Maltby) were rotated for covering live deployment within the Team – only her male colleagues within the Team were offered this bi-weekly overtime.
- 15 312. The Tribunal found that the claimant was not involved in live deployments after she returned to work in February 2014. However, to establish why the claimant was treated less favourably the Tribunal had to consider who was the claimant treated less favourably than. The Tribunal noted that when asking whether a man would have been treated less favourably than the claimant that man's situation must resemble the claimant in all material respects.
- 20 313. The Tribunal agreed with the respondent that there was a material difference with Mr Phillips and Mr Graham as they were more senior than the claimant. Mr Breslin and Mr Ramsey were Release Analysts. Ms Maltby was also a Release Analyst. The Tribunal noted that she did not participate in live deployments until after she qualified in August 2014.
- 25 314. The Tribunal focussed on why the claimant was not invited to participate in the live deployments. The Tribunal considered that except for a live deployment in February 2010 the claimant had not been involved in live

deployments. Following that there was no evidence of the claimant volunteering or asking to do so. When she returned in February 2014 there was no evidence of the claimant asking to participate in live deployments. The Tribunal considered that this was understandable given circumstances.

5 However, the Tribunal also felt that in the absence of her volunteering or making a request it was equally understandable that Mr Phillips' did not ask her to do so. In the Tribunal's view, it was significant that the claimant thought that she was not asked because Mr Phillips wanted overtime and did not have faith in her abilities. Neither of these reasons related to the

10 claimant's sex.

315. The Tribunal concluded that the claimant had not established a *prima facie* case of sex discrimination. Accordingly, it was dismissed.

Employment Judge: Shona MacLean
Date of Judgment: 12 June 2017
15 Entered in register: 14 June 2017
and copied to parties