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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr E Ebrahimi	**AND**	Citizens Advice Bureau Westminster

Heard at: London Central

On: **2 – 6 July 2018**
(In Chambers 21 August 2018)

Before: Employment Judge Henderson
Members: Mrs H Craik and Ms E Champion

Representation

For the Claimant: In Person (partly Ms R White (Counsel)
For the Respondent: Ms Y Montaz (Consultant – Peninsula)

RESERVED JUDGMENT AND REASONS

1. **It is the unanimous decision of the Tribunal that the Claimant's claims for:**

   - **Failure to Make Reasonable Adjustments;**
   - **Discrimination arising from her disability;**
   - **Harassment on grounds of her disability;**
   - **Detriment related to her use of trade union services;**
   - **Constructive Unfair Dismissal**

   Do not succeed and are all dismissed.

REASONS

Background

1. In an ET1 lodged on 3 July 2017 the claimant brought claims for disability discrimination (failure to make reasonable adjustments (s 20 Equality Act 2010 - EqA); discrimination arising from disability (s.15 EqA) and harassment (s.26 EqA); constructive unfair dismissal and "other payments".

2. The Claimant resigned on 27 March 2017 claiming constructive dismissal after the implementation of a performance improvement plan (PIP); the implementation of the disciplinary process and the respondent's management of its sickness absence procedure.

3. There were three preliminary hearings (PH's) and case management orders:

PH – 8 Sept 2017 (EJ Auerbach)
Ms Gurden of Counsel was representing the Claimant at this hearing. The Claimant said she was a disabled person as a result of anxiety and stress from 8 Nov 2016. The Respondent disputed the Claimant's disability and other directions were made. There was no list of issues agreed at that stage. The case was listed for a Full Merits Hearing (FMH) for 5 days commencing on 16 January 2018.

PH – CMD 16 Jan 2018 EJ Isaacson
This was actually the FMH agreed upon in September 2017. The Claimant attended in person, but she was unable to proceed with the hearing due to her illness. The claimant did not have a medical certificate but was clearly distressed. Her son who is a doctor attended to say that she should not continue with the hearing. The Hearing was re-listed for July 2018. It was ordered that an agreed List of Issues should be sent to the Tribunal by 23 Jan 2018 as the parties had been unable to agree the Issues at the hearing. This was never done.

PH – CMD 10 May 2018 – EJ Segal
The Claimant was assisted at this hearing by Counsel (Mr Ohringer). She produced an Amended Particulars of Claim which added claims of detriment for using Trade Union facilities – s 146 (1) (ba) TULCRA. It was agreed that the breach of contract claims related to the TUPE Regulations were not being pursued and were accordingly dismissed. The Respondent conceded that Claimant had a disability, namely stress/anxiety. Yet again a List of Issues was ordered to be agreed and again, this Order was not complied with.

Conduct of the Hearing -2-6 July 2018

4. This case was listed for 5 days (to include liability and remedy) commencing on 2 July 2018.

5. On the first day the Claimant was represented by Ms Robin White of Counsel (who had been instructed via the Bar Direct Scheme) and the Respondent was represented by Ms Montaz, a consultant with Pensinsula.

6. The parties had an agreed bundle of nearly 1000 pages. There were witness statements from the claimant (45 pages) and witness statements from the Respondent's four witnesses: Diane Morgan (HR Administrator); Frances Kirby (Training Coordinator); Neil Hamilton (Senior Information Risk Officer) and two statements from Shirley Springer (Chief Executive). There was also a partially agreed List of Issues.

7. Ms White explained that she had only been instructed on Friday 29 June and whilst she had had an opportunity to read most of the documents she would appreciate some more time to do so and to take full instructions from the claimant. She said it would be helpful if the Tribunal used the first day to read into the case. Ms White said that she and Ms Montaz had a suggested timetable for the remaining days: Day 2 would be the claimant's evidence; Days 3 and 4 would be the respondent's witnesses, which may stray into Day 5 – but the parties should be able to conclude the evidence and submissions by the end of the fifth Day and the Tribunal would most likely reserve its decision. It was also agreed that the hearing would be on liability only.

8. The Tribunal agreed with the timetable suggested by the parties and asked that they should, if possible, have agreed a List of Issues by the start of Day 2. It was noted that both parties had not complied with previous Tribunal Orders to agree such a List of Issues.

9. At the start of Day 2, Ms White told the Tribunal that she found herself unable to represent the Claimant. She said that in 24 years' experience at the Bar this had only happened to her once before.

10. Ms White explained that she had only been able to partly complete going through the Claimant's comments on the Respondent's witness statements. She had hoped she could have completed it the day before, but the Claimant had then produced some further documents (which were National CAB Policies on several of the relevant matters in this case –such as Performance Improvement Plans; disciplinary procedures etc). These documents were not in the agreed bundle and the Claimant had intended (prior to instructing Ms White) to produce them to the relevant Respondent witnesses in a piecemeal fashion during the hearing. Ms White had explained that this was not the appropriate method of proceeding and did not comply with the Claimant's disclosure obligations.

11. Ms White said in the light of these documents, she would need a further two days to enable her to prepare the case to be heard. She was, therefore, requesting an adjournment of the hearing but with the same Tribunal Panel as it had already read into the documents. Ms White said that if the Tribunal could not agree to postpone the hearing as requested, she could not continue to represent the Claimant.

12. Ms White said that the documents produced by the Claimant late yesterday were "Core Documents" to the case but she was unable to explain why if this was the case, the Claimant had not previously sought to introduce them into the Trial Bundle. The Claimant was also unable to explain why she had not (as clearly set out in the Case- management Order of EJ Issacson in January 2018) requested their inclusion in the Trial Bundle.

13. The Tribunal explored the relevance of the documents recently disclosed by the Claimant. It was explained that these were Policies/Guidance issued at National Level and were not technically binding on the respondent (as each CAB was an independent entity which was overseen by a Trustee Board). Ms Springer confirmed (in response to a Tribunal question) that the National CAB carried out its audit functions against each Bureau's individual policies and not against the National Guidance. (This was by way of clarification and not in evidence).

14. The Tribunal then heard representations from Ms Montaz who opposed the postponement application saying that as the FMH had already been postponed once in January 2018, the Respondent was anxious to proceed. Ms Montaz suggested that the Tribunal could allow a further day (rather than two) for Ms White to prepare. It was hoped that if the case started on Day 3 (Wednesday) it could still be concluded by Friday as scheduled.

15. The Tribunal adjourned to consider the claimant's application.

<u>Tribunal's Decision on Claimant's postponement application.</u>

16. The Tribunal carefully considered the position. It noted that this case had originally been listed for a final hearing for 5 days in January 2018. At the commencement of that hearing, the Claimant had said that she was too unwell to proceed. Ms Champion had been one of the Panel members at that postponed hearing. That Panel had not heard any substantive issues in the case. (This fact had been raised with the parties on Day 1 and it had been agreed that there was no objection to continuing with Ms Champion on the Panel).

17. In January 2018, the Claimant had no independent medical evidence to support her postponement request on the ground of ill-health, but her son (who is a doctor) had attended with her and explained that continuing with the hearing would seriously damage her health. The Tribunal (led by EJ Issacson and including Ms Champion) had reluctantly agreed to postpone the hearing; making relevant directions and also stressing to the parties that there should be no further postponements.

18. It was noted that the Claimant must have been ready to proceed with a final hearing in January and had been prevented only by her ill health. She had not raised at that stage, any issue with regard to the Core Documents which she was now saying were essential to continue. Furthermore, she had had six months from the date of the last adjourned hearing to seek disclosure of such documents.

19. The Tribunal also noted that all three members of the current Panel had experienced many cases where documents were produced at a late stage in the proceedings and felt that with appropriate (short) adjournments, if needed, the case could still proceed without the need for a two-day delay.

20. The Tribunal also considered the Overriding Objective and the need to hear cases fairly but also taking into account matters of cost and delay. This case had already resulted in considerable Tribunal time and resources being wasted, which could have been applied to other litigants. Further, it was in the interest of both parties to proceed with the case and to have the matter resolved.

21. The Tribunal noted Ms White's difficulty in preparing for the case, but felt that it had already accommodated her by giving all of Day 1 to allow her to meet with the claimant and familiarise herself with the case. The Tribunal (whilst sympathetic) could not be guided solely by the time needed by parties' representatives to prepare: experienced representatives would be well-used to preparing at very short notice.

22. The Tribunal refused the postponement application. The Tribunal would allow the Claimant one further day to prepare and the case would proceed on Wednesday (Day 3). The Respondent would supply copies of the "Core" Documents produced by the Claimant for inclusion in the agreed bundle and the Tribunal would deal with those documents as and when they were relevant to the issues raised. Ms White said that in the light of the Tribunal's decision she could not continue to represent the claimant going forward.

23. The Tribunal then spent some time going through the List of Issues with the parties (for which the Claimant did have the benefit of Ms White's assistance) and a final list was agreed. The Tribunal explained to the Claimant that this list contained the questions (legal and factual) which the Tribunal would have to answer in order to deal with her claims. The evidence which would be given by her and the Respondent's witnesses would only be such information as was needed for the Tribunal to answer those questions/deal with those Issues. The Tribunal acknowledged that the Claimant may have many matters about which she would like to question the Respondent's witnesses and vice versa. The Tribunal recognised that these matters were of importance to both parties on a personal level. However, the EJ stressed that the Tribunal would only consider "relevant" matters: namely those which were necessary to determine the Agreed Issues. If matters were not relevant to those Agreed Issues, the parties would not need to raise them. This did not mean that the Tribunal did not recognise the importance of such other matters

to the parties – but its role was to deal with relevant evidence and issues to decide the case.

24. The Claimant then attempted to revisit previous claims for breach of contract/TUPE- related matters, which had been dismissed by EJ Segal in a previous preliminary hearing. It was explained to her again (with Ms White's assistance) that the Tribunal would only hear matters relating to the Agreed List of Issues.

25. The Claimant said she would be unable to find another representative at such short notice. The Tribunal noted that the Claimant could proceed as a litigant in person: The Tribunal was used to hearing cases with unrepresented parties. Further, the Claimant had been intending to proceed on this basis in January 2018, when she had fallen ill – so there was no reason to postpone any further. Ms White very kindly said that she would spend some time with the Claimant to give her some guidance on proceeding with the case. The Claimant had the rest of the day to prepare and the case would commence on Wednesday 4 July (Day 3) at 10am. It was also agreed that it was in both parties' interests to ensure that the hearing concluded on Day 5 and that the case did not go part-heard.

26. At the start Day 3 the EJ explained (for the benefit of the Claimant) the process of giving evidence and confirmed that all parties had the same documents. The "Core" Documents were added to the agreed bundle The EJ checked that the Claimant had the correct bundles. The Tribunal allowed the Claimant to add a document relating to the Respondent's conduct/practice guide. The Claimant also wanted to add further documents to the bundle – the Tribunal asked why these had not been disclosed earlier and in particular, why they had not been disclosed on Day 1 of the hearing. The Claimant said that she had shown the documents to Ms White who had said they were not needed.

27. The Tribunal refused to allow the Claimant to introduce any further documentation. It was important that the parties stopped prolonging the preliminary matters and focused on dealing with the substantive issues in the case. The Tribunal suggested to the Claimant that she prepared her questions for the Respondent's witnesses in advance by going through the Agreed List of Issues and their statements.
28. The Tribunal heard evidence from the Claimant (on Day 3 and on the morning of Day 4) and the Respondent's witnesses (as listed above) on Days 4 and 5. The witnesses' all relied on their written witness statements as their evidence in chief.

29. The Tribunal offered the Claimant regular breaks to accommodate her medical condition. However, she frequently refused these, preferring to continue.

30. On Day 4 the Claimant did break down and the Tribunal insisted that she took a break, (during which she was accompanied by a Tribunal clerk as she had no one with her) which lasted for 25-30 minutes. The Claimant said that she

was on medication from her GP to keep her going through the hearing: she also made references to the fact that the hearing was giving her "flashbacks" and she was having to re- live all the painful incidents which was causing her distress. The Claimant said that Ms Springer had "ruined her life" and career. She also said that she had worked hard at the CAB often working till 3am and could not believe how she had been treated.

31. The Claimant was able to resume her cross examination following this break (and a lunch break) and to cross-examine Mr Hamilton; Ms Morgan and Ms Kirby later that day. Much of the Claimant's cross examination of these witnesses was not on relevant issues and it transpired that despite the numerous references to the Agreed List of Issues, the Claimant had not looked at it nor focussed on its content and did not even appear to have a copy of it. A copy was provided.

32. At the end of Day 4, the Tribunal noted the Claimant's comments about suffering flashbacks etc. and suggested that as the next day was set aside for the cross-examination of Ms Springer, the Claimant may prefer to prepare a list of relevant questions (bearing in mind the Agreed List of Issues) and the questions would be put to Ms Springer by the EJ. This would avoid the Claimant having to question Ms Springer directly, which may make the cross-examination process easier. The Claimant would of course be allowed to ask to supplemental/follow up questions if she wished, depending on Ms Springer's responses. The parties both agreed with this course of action.

33. On Day 5 Ms Springer was cross examined in the manner set out above. Many of the Claimant's written questions were on irrelevant matters and the EJ pointed this out to her and asked only the relevant questions on her list. The EJ also noted that the Claimant had omitted many relevant questions, which the EJ asked on her behalf (this was with the agreement of Ms Montaz). The Claimant did ask many follow up questions of Ms Springer and the EJ and the Tribunal also asked further questions. The EJ explained to the respondent that some of the questions she was asking may appear to be akin to cross examination – but that the Tribunal needed to have answers to the matters raised in the issues and so the questions needed to be asked as the Claimant did not always focus on the Agreed List of Issues.

34. The Claimant's questions kept returning to the matter of her performance and the fact that she should not have been put on a performance improvement plan. The EJ explained that the minutiae of this did not need to be heard in evidence before the Tribunal. The Tribunal understood that the Claimant did not accept the validity of the PIP however, her case for constructive dismissal was based on the manner in which the PIP itself and subsequent disciplinary processes had been carried out by the Respondent and the Tribunal needed to hear evidence on those matters. The Tribunal reminded the Claimant that she was bringing a constructive dismissal claim – the Respondent had not actively dismissed her. The disciplinary process had resulted in a Final Written Warning and the Claimant needed to show (among other things) that this had been a breach of the implied term of trust and confidence contained in the employment contract.

35. The hearing concluded on Day 5 –it was agreed that the parties would provide written submissions to each other and to the Tribunal no later than 14 August 2018. The Tribunal stressed that these should be based on the relevant issues. The Tribunal reserved judgment and noted that it had scheduled 21 August 2018 for its deliberations in Chambers.

36. The Tribunal have taken both parties' submissions into account in reaching its decision. However, it is noted that the Claimant's submissions did not always refer to the Agreed List of Issues as requested by the Tribunal, but added to; embellished and rephrased the issues. The Tribunal will deal only with those submissions which refer to the Agreed List of Issues (which were finalised with the assistance of Claimant's counsel on 3 July 2018). This position had been made clear to both the parties throughout the hearing.

37. Pages references in these Reasons are to the Agreed Bundle (unless otherwise indicated).

List of Issues

38. The List of Issues as agreed on 3 July is attached to this Judgment and Reasons as Schedule 1.

The Claimant

39. The Claimant confirmed in her evidence that she was an experienced Generalist Case Worker. She has two law degrees and is a graduate member of the Chartered Institute of Legal Executives (CILEX). The Claimant was seeking post-graduate Fellowship of CILEX, which process she said had been ruined by the Respondent's conduct of the disciplinary process and the issuing of the final written warning. The Claimant also said in her oral evidence that she had been well- used to advising her clients on legal matters including employment law. The Tribunal notes that the Claimant had the benefit of legal representation on most occasions when she appeared before the Tribunal.

40. Ms Springer acknowledged in her oral evidence (in response to Tribunal questions) that the Claimant had generalist experience; had good relationships with and was dedicated to her clients and that she had worked extremely hard (including working long hours) but that the key problem for the Respondent had been the Claimant's unwillingness to work with their processes and systems and her insistence on continuing with her own pattern of work and working methods (which were part of the reason for her having to work such long hours).

Findings of Fact

41. The Tribunal heard evidence on many matters – but as explained to the parties will only make such findings of facts as are relevant to the issues for determination in this case. The Tribunal notes that there is very little dispute

between the parties on the majority of the facts in this case: the disputes arise over the interpretation of the facts/communications.

Background

42. The Claimant was an Advisor and Caseworker at the Respondent CAB working twenty-four hours per week. The Claimant had originally been employed by Action for Children (AFC) from May 2010 and had transferred over to the Respondent (under the Transfer of Undertakings (Protection of Employment) Regulations) in August /September 2013. There had been subsequent changes to the Claimant's sick pay and holiday entitlement. The Respondent says that these were made after due consultation (and these changes do not form part of the issues for determination in this case). The Claimant signed an amended contract of employment on 19 November 2015. The Claimant had been involved in three selection processes relating to the stream-lining of the AFC team within the Respondent organisation, but the Claimant had not been selected for redundancy.

43. The Claimant was diagnosed with breast cancer in 2014 and had sickness absence relating to this condition for three major operations. However, the Claimant was not referring to this condition as her disability but to stress/anxiety and depression with which she was diagnosed in November 2016.

Case Load

44. The Tribunal refers to the supplementary witness statement of Ms Springer and in particular to paragraph 7 and 8. The Tribunal accepts Ms Springer's evidence that following the Claimant's reduction to three days per week her workload was reduced commensurately.

Generalist Advice Certificate (GAC)

45. The Tribunal refers to paragraphs 7 and 8 of Ms Springer's original witness statement in which she explained that following her transfer from AFC, the Claimant was required to achieve her certification via the Accreditation of Prior Experience Learning (APEL) route. As the Claimant had significant practical experience, she was able to undertake the fast-track towards obtaining her accreditation: this required her to read the end summary and complete the final comprehension exercises rather than go through the whole learning pack and having to complete the full course and exercises. Ms Springer explained that it had been expected that the Claimant would be able to do this relatively quickly.

The Performance Review Process

46. Despite being on the fast track the Claimant made slow progress with her training and partly because of this, the Performance Improvement Plan (PIP) was initiated. However, the Tribunal finds (following questions put to Ms Kirby) that the Respondent had not made clear to the Claimant that she may lose her job if she could not obtain the GAC. The Tribunal accepts that the process which began in April 2016 was with a view to helping the Claimant obtain that

certificate, because the lack of such certificate reflected on her competency and ability generally.

47. On 12 April 2016, the Claimant had a meeting with Miss Kirby to discuss the PIP which partially related to obtaining the GAC but was also related to other performance issues. There was a follow up letter on 19 April 2016 (page 365-366) this attached the PIP with outcomes to be achieved from April to July 2016. It was noted that the Claimant needed to write up cases within 48 hours of seeing a client; to make sure that clients were made aware of relevant time limits; raising various time management of meetings to ensure that they were 45 minutes in length and also the need to obtain the GAC. The Claimant countersigned the PIP.

48. On 5 May 2016 (page 381) Ms Springer asked the Claimant to bring her laptop back to stop her working from home, the Respondent having discovered excessive use of mobile data. The Tribunal finds that this action would have resulted in unnecessary inconvenience and extra travel for the Claimant which given her long working hours and her previous illness was not reasonable. However, the Tribunal do not find that this was bullying or harassment by the Respondent.

49. On 2 June there was a meeting at which the Claimant was told that she did not meet the relevant competency standards and it was felt that she was unlikely to do so by the end of the review period (i.e. July 2016). This further PIP was signed by the Claimant on 8 June 2016 (pages 391-395) without any comments. The Claimant was then on annual leave from 1-18 July 2016.

50. On 21 July 2016 (page 408) the Claimant was invited by Ms Springer to attend a Disciplinary Hearing on 28 July. The letter recorded that the purpose of the hearing was to discuss issues in relation to the Claimant's performance at work and that Frances Kirby would be attending the meeting to present the findings on performance capability. The Claimant was told that she had the right to be accompanied at the meeting by a work colleague or trade union representative. The letter also noted that the possible consequences arising from the hearing might be a final written warning or dismissal. The Claimant said in her evidence that she regarded this whole review and disciplinary process as a sham. She said in her witness statement (paragraphs 76 and 77) that she felt that this was Ms Springer's attempt get rid of her as the last AFC team member. The Claimant repeated these allegations several times in her oral evidence to the Tribunal, but this was not supported by any evidence presented to the Tribunal.

51. The Claimant had asked if her friend, Sue could attend the disciplinary meeting with her (page 413) and was told that it had to be a work colleague or a trade union official. The Claimant had also asked if she could bring a legal representative and the Respondent reiterated that her companion should be a work colleague or trade union representative. The Claimant subsequently asked if she could bring a representative from Unison (page 422). Ms Springer explained that the Respondent had a recognition agreement with the Unite trade union; this meant that the reference to a "trade union official" was to that recognised union. The Tribunal notes that the Respondent's disciplinary policy

(page 658 onwards) does not specifically refer to the attendance of a recognised trade union official: however, the Tribunal notes that this is not an unreasonable requirement. The Tribunal finds that this action did not amount to bullying or harassment of the Claimant and was not an attempt to prevent the claimant from having trade union representation.

52. The scheduled Disciplinary Hearing for 28 July was cancelled due to Ms Kirby's illness. The Claimant was on annual leave from 25 August to 13 September and as a result of these absences, the Respondent decided to extend the review period. On 17 August 2016, Miss Springer halted the disciplinary process formally (page 418). The review period for the PIP was extended to September 2016. The Tribunal notes that the Claimant regarded this as a negative development; however, the Tribunal finds that the intention had been to give the Claimant more time to meet the relevant PIP standards and targets and had been intended by the Respondent as a positive gesture. The Tribunal do not find that this was bullying or harassment of the Claimant.

53. At page 425 on 27 September 2016, the Tribunal notes that the Claimant requested time off from the rota to enable her to catch up on her backlog of work. This was refused by Ms Kirby. Ms Kirby accepted in her oral evidence to the Tribunal (in response to Tribunal questions) that with hindsight, this conduct could be viewed as unreasonable. However, the Tribunal do not find that this conduct was in itself, bullying or harassment of the claimant nor was it a breach of contract.

54. On 27 September 2016, there was a further review meeting between the Claimant and Ms Kirby. The notes of this meeting are at (pages 428-433). The last column of those notes shows the further review comments and discussions. The conclusion reached at that meeting was that the Claimant was not meeting the objectives which had been set for her and was not meeting the competency standards required as an advisor and that there had been no substantial improvement during the review period. Ms Kirby would, therefore, have to report to Ms Springer on the performance review who would then make a decision as to how to proceed. The Tribunal notes that the note of this performance review was signed by the Claimant on 6 October 2016 without any comment or qualification as regards the content of the review meeting. The Tribunal also notes that at (page 430) the Claimant is quoted as stating that she had learnt a lot from Ms Kirby's feedback. This is inconsistent with the Claimant's allegations that she received no support from the Respondent during the performance review process.

55. On 13 October 2016 (page 435-436) the Claimant was invited to attend a Disciplinary Hearing scheduled for 25 October. The letter from was Shirley Springer but was silent as to the make-up of the panel which would hear this Disciplinary Hearing. The letter explained that Frances Kirby would be attending to present the findings of the PIP and Ms Morgan would be present as note-taker. The letter summarised the outcome of the PIP, noted that the Claimant had the right to be accompanied by a work colleague or trade union official and noted that possible consequences following the hearing could be a final written warning or dismissal. The Claimant acknowledged receipt of this letter on 18

October 2016. The Claimant requested a change to the date of the Disciplinary Hearing to allow Andy Murray (the Unite representative) to attend and the date was rescheduled for 1 November 2016. This change of date was confirmed by Ms Springer in a letter dated 18 October 2016 (page 441-442). That letter noted that the disciplinary panel would comprise Ms Springer as Chair and Stephen Grave (the HR Trustee of the Respondent's Board) with Ms Kirby and Ms Morgan attending as mentioned before.

56. The Claimant alleged that Mr Grave's attendance had only been decided upon because she had indicated that Mr Murray would be attending as her trade union representative and viewed this as a detriment for her use of trade union services. Ms Springer said in her oral evidence to the Tribunal that it was standard practice for the Chair of Trustees to attend all disciplinary and grievance hearings. She said that the Chair of Trustees could not attend the rescheduled meeting in November and so Mr Grave was deputising for him, (paragraph 62 of Ms Springer's supplemental witness statement). In response to Tribunal questions, Ms Springer accepted that the presence of the Chair of Trustees was not specified in the Respondent's disciplinary policy which said that a Trustee would attend upon any Appeal Hearing. Ms Springer also accepted that the Claimant would not be aware of the standard practice of the Chair of Trustees attending such disciplinary and grievance hearings.

57. The Tribunal notes the difference between the two letters relating to the Disciplinary Hearing. In the first letter (page 435) there is no mention of the make-up of the disciplinary panel and the letter is signed solely by Ms Springer. However, the second letter (page 441) specifically says that the panel will include Mr Grave as a Trustee. The Tribunal also notes that the initial letter of invitation to the Disciplinary Hearing (page 408) makes no mention of the Chair of Trustees being present at such a meeting. The Tribunal do not accept Ms Springer's evidence that it was standard practice for the Chair of Trustees to attend all disciplinary and grievance hearings. The Tribunal finds that based on the discrepancy of the different invitation letters, on a balance of probabilities, it was likely that Mr Grave had been included in the disciplinary panel in response to the Claimant asking for the Group Regional Trade Union Official (Mr Murray) to be present. However, the Tribunal do not find that this was because the Claimant was exercising her trade union rights, but was rather an indication that the respondent felt that the matter had taken on a greater significance than had been expected and could become more complex and possibly confrontational.

58. The Disciplinary Hearing was, in fact, held on 28 October 2016 (notes at pages 497-501) and is was decided that there would be a further disciplinary meeting to be held on 10 November 2016 which would provide a plan setting out the steps to be taken with regard to the PIP. The Tribunal also notes Mr Grave's observation at the end of the meeting on 28 October, that "the Claimant had a way of working which was often in conflict with CAB guidelines". The Tribunal accepts this as an accurate assessment of the substantive problem with regards to the Claimant's performance in this case.

Breach of Data Protection and Confidentiality

59. At the Disciplinary Hearing on 28 October the Claimant had produced a written statement setting out her position on her performance review. In that written statement the Claimant mentioned the names and details of several clients and their case notes. Following receipt of this statement, Mr Hamilton completed a data breach incident report form (page 469-472); this followed a notification to him from Ms Kirby that the Claimant had taken home paper copies of Petra Enquiry records ("Petra" is the Respondent's case management and records system) in order to prepare this statement for her disciplinary meeting. The Claimant accepted that she had not received any authorisation to take such records home. Mr Hamilton noted that this was a breach of the Respondent's data protection rules. Mr Hamilton met with the Claimant on 27 October 2016 and spoke to her about this breach. The Claimant had confirmed that she had needed the papers in order to prepare her disciplinary hearing statement. She said she had not shown the papers to anyone else. Mr Hamilton reported the breach to Ms Springer. The disciplinary meeting went ahead on 28 October but the Claimant did not return the papers to Mr Hamilton as agreed.

60. Mr Hamilton's next working day was 2 November (he works part time) and Mr Hamilton again emailed the Claimant asking her to return the papers. A second data breach incident report form was completed. The second data breach was that following the Disciplinary Hearing on 28 October, it was discovered that the Claimant had given a copy of her Disciplinary Hearing statement to Mr Murray, her union representative, which was also a data breach. Mr Hamilton noted (having seen the Claimant's statement on 8 November) that her statement also contained confidential data which was a breach of the confidentiality policy and well as the data breach. Mr Hamilton noted that the trade union representative would himself have a duty of confidentiality to the Claimant; however, he felt that it would be advisable to seek return of the information from both the Claimant and from Mr Murray. The Claimant was interviewed by Mr Hamilton on 8 November and he said in his evidence that during that interview she did not seem to understand the significance of having passed on unredacted client information to her union representative. The Claimant was reluctant to obtain the documents from her union representative and return them to the Respondent because she said that she needed the information contained within it. Mr Hamilton advised her that the critical matter was to remove clients' details from the documents and she could either use internal case reference codes or initials that would allow her to identify the file without having to name the clients. The Tribunal notes that in her oral evidence the Claimant adopted a similar approach to that described by Mr Hamilton, namely that she appeared not to appreciate the seriousness of what she had done. The Claimant said that she did not believe she was in breach of the confidentiality obligations as the names of the clients could have been false names and so any third party would not necessarily recognise the clients from the information. However, the Tribunal notes that these were not in fact, false names.

61. On 8 November 2016 Mr Hamilton wrote to the Claimant (pages 492-493). He noted that the Claimant had returned the source client information to the

Respondent on 4 November. However, the Claimant's statement containing the names of fourteen clients; the dates they were seen by the Respondent and details of the enquiries relating to five of them were still extant, in that a copy of this statement had been given to Mr Murray and the Claimant had an electronic copy stored on her email. The Claimant had refused to return the hard copy or the electronic copy as she said she may need it for any future Court case. Mr Hamilton's letter said that failure to comply with the request to return information could result in disciplinary action. The Claimant did not comply with the request set out in Mr Hamilton's letter. The Tribunal recognises that, given the Respondent's responsibilities to its clients and the relevant data protection legislation, it was not unreasonable for the Respondent to act in the way that it did and that these actions did not constitute bullying or harassment of the Claimant, nor were they were a breach of the implied term of trust and confidence.

62. The Claimant was then absent due to stress and anxiety from 10 November until 8 December 2016 (first medical certificate page 509). This certificate referred to "stress at work". The Claimant never actually returned to work.

63. Mr Hamilton wrote to Mr Murray on 24 November (page 518) seeking return of the Claimant's unredacted statement. Mr Murray said that he would return the document to the Claimant (but not the Respondent) for any necessary redaction, but he queried whether communicating relevant information to a trade union representative was a contravention of the Data Protection Act. The information was eventually returned.

64. The Claimant said in her oral evidence that she did not believe that she was breaching the Respondent's confidentiality policy. She believed that she was entitled to take files home to work on her disciplinary statement and that she was entitled to share that information with her trade union representative who was assisting her in the disciplinary process. It was noted the Claimant felt that the use of the client names was not in itself a breach of confidentiality. The Respondent says that the names used were not false names and that the Claimant had taken the information without permission and had made no attempt to redact the document or to anonymise any of the client information before using it or before sharing it with her union representative.

65. The Claimant's argument was that the Citizen Advice BMIS policy allowed the use of client confidential information as part of a performance or quality of advice assessment. She cited the relevant confidentiality policy and this was one of the extra documents produced to the Tribunal by the Claimant on the first day of the hearing. However, as established from Ms Springer's oral evidence (which is accepted by the Tribunal) the reference in that policy is a reference to the National Citizen Advice Bureau carrying out an audit of a local Citizen Advice Bureau. It is not a reference to an individual employee's performance review. This was a misunderstanding by the Claimant. This was also a post-rationalisation by the Claimant as she was unlikely to have been aware of the BMIS Policy at the relevant time.

66. The Tribunal also notes that in the Respondent's quality manual (page 685) it is stated that "Petra records and notes may need to be taken from the Bureau for the purpose of home visits, Tribunals/Court representation, outreach work and any other exceptional circumstances on the authorisation of the Bureau manager". The Claimant had not obtained authorisation from Ms Springer. The Tribunal accepts that in the normal course of events for home visits Tribunals/Court representation/outreach work etc there was probably a general authorisation from the Bureau manager for notes to be taken home in order to carry out this regular and necessary work. However, the Tribunal finds that the Claimant's performance review and her Disciplinary Hearing would not be part of that regular work and would fall within the category of "an exceptional circumstance". This would need the specific authorisation of the Bureau manager, which was neither sought nor obtained by the Claimant in this case. The Tribunal finds that the Claimant was, therefore, in breach of the Respondent's confidentiality policy and Data Protection Policy: the Tribunal does not find that this was a deliberate or malicious breach by the Claimant, but it was nevertheless a breach of those policies. Consequently, the actions taken by the Respondent following the discovery of the breach were not unreasonable and did not constitute bullying or harassment of the Claimant or a breach of contract.

67. As the Claimant was signed off work due to illness from 9 November 2016 onwards, she was unable to attend the second/resumed part of the Disciplinary Hearing on 10 November 2016. The Claimant sent an email to Ms Springer on 10 November (page 510) in which she said, "just wanted to let you know that I am still unwell, won't be able to come to the office, I am happy for the Disciplinary Hearing go ahead this afternoon as Andy [Murray] is attending the Hearing on my behalf". At (page 511) there is an email from Mr Murray to the Claimant copied to Ms Springer referring to the Disciplinary Hearing which reads as follows –

> "I see no real point in the Hearing going ahead this afternoon without Mahshid (the Claimant) in attendance. I summed up Mahshid's case at the end of the last meeting and, therefore, it is for the Chair of the Hearing to inform Mahshid and I in writing of the decision. This I assume will confirm the measures that Westminster in putting in place to support Mahshid to improve her level of performance".

The Claimant interpreted this email as saying that the disciplinary meeting should not proceed without her being present. The Respondent interpreted Mr Murray's email as saying that he was not attending the disciplinary meeting; that there should be no actual meeting, but the Respondent should proceed to reach a final decision, which they should then communicate to Mr Murray and the Claimant. The Respondent wrote to Mr Murray and the Claimant on 10 November stating that they would proceed as Mr Murray had suggested (page 512). The Tribunal finds that given the wording of Mr Murray's email it was not unreasonable for the Respondent to read that as suggesting that they should continue with the disciplinary process even though the Claimant and Mr Murray were not physically attending any meeting on 10 November. The Tribunal do not find that this was bullying or harassment of the Claimant nor was it a breach of contract.

68. On 10 November Mr Grave sent a letter (pages 514-515) to the Claimant recording the outcome of the Disciplinary Hearing. Mr Grave again noted that the Claimant's confidence in her abilities could be perceived as self-destructive when she was not longer prepared to accept management guidance from the Respondent. He noted the Claimant's lack of any conciliatory response to any of the Respondent's concerns. He went on to say that (paraphrasing by the Tribunal) in recognising that the Claimant was prepared to "go the extra mile" in terms of her attitude generally, the Respondent was not proposing to dismiss her on grounds of performance. The letter went on to note the "two serious misconduct incidents where you have breached our data protection and confidentiality rules" Mr Grave cited this as another example of the Claimant being unwilling to work within the Respondent's procedures and processes. Having carefully considered everything that had been said Mr Grave decided that a final written warning would be issued to the Claimant and that the Claimant must meet the required standards as outlined in the PIP: failure to do so may result in more serious action which could lead to dismissal. The Respondent gave the Claimant the right to appeal the final written warning within five working days of the date of the letter. The Claimant did not appeal the final written warning. The Claimant said in her oral evidence that she interpreted the right of appeal as being five working days from when she returned to work and as she never returned to work, she made no such appeal. The Tribunal finds the Claimant's reading of this letter of somewhat disingenuous as with regard to the timing of the appeal.

69. However, the Tribunal notes that Mr Grave's letter is ambiguous, in that it could be read as indicating that the final written warning related to the alleged data protection and confidentiality breaches as well as her performance review. The Tribunal do not find that the final written warning was in any way connected with the Claimant's choice to use a union representative to accompany her to the disciplinary meeting. The Tribunal acknowledges that the Claimant may have understandably been confused by the reference in the letter to the breaches of the data protection and confidentiality policies, which resulted from her sharing her witness statement with her union representative, but this is not the same as that being the Respondent's motivation for the final written warning.

70. The Claimant said that it was this final written warning in relation to breaches of data protection and confidentiality which (in her own words) ruined her career and prevented her from obtaining the CILEX fellowship status. The Tribunal make no finding on the accuracy of the Claimant's evidence on this point; however, the Tribunal does find (based on the oral evidence of Ms Springer, which is accepted) that she was unaware that the final written warning would have any such impact. The Tribunal does not find that the final written warning was bullying, harassment or a breach of contract, despite its ambiguous wording.

71. The Claimant complained about being written to while she was on sick leave on 6 December 2016, which she says was harassment. The Tribunal notes that this was the Claimant being copied in to an email from Ms Springer to Mr Murray confirming that he had agreed to return to the Claimant her evidence prepared for the Disciplinary Hearing for the her to edit and redact accordingly

(page 526). The Tribunal finds that this does not constitute harassment during the Claimant's absence on sick leave.

Sickness Absence

72. The Claimant was off sick from 10 November 2016 with medical certificates covering the period to 31 March 2017. This recorded the reason for the absence as being stress at work and also, later, insomnia.

73. The Tribunal was referred to the Respondent's sickness absence management process (starting at page 648). This policy triggered the long-term sickness absence process after four weeks' absence (page 654). On 26 January 2017 (pages 544-545) Miss Springer wrote to the Claimant setting out the position with regard to her sick pay and also to note that as she had been signed off work until 31 January, the Respondent was expecting her to return on 1 February 2017. Bearing in mind she had continuous absence of four weeks or more, the Claimant was sent a consent form referring her to the Respondent's Occupation Health Specialist (OHS) and was asked to complete that consent form.

74. Ms Morgan who was in charge of administering the sickness absence process said in her witness statement that the Claimant did not respond to that request or to any further emails seeking her consent throughout the Occupation Health process. On 31 January (page 544) Ms Morgan emailed the Claimant noting receipt of further sick notes but placing a deadline for the consent form to be returned by Friday 3 February. The Tribunal does not find that this was an unreasonable deadline as it is important that employees with long term sickness absence are referred to Occupation Health as soon as possible. The Tribunal also notes that during her sickness absence the Claimant was writing to the Respondent asking for emails to be forwarded to Stephen Grave in which she wished to raise concerns relating to the reference in his final written warning to the two serious misconducts relating to data protection and confidentiality. The Tribunal also notes that the Claimant did not choose to appeal the final written warning: if she had believed that the final written warning related to the confidentiality and data protection incidents, she could have achieved the result she wished by implementing such an appeal. The fact that the Claimant was able to raise these matters during her sickness absence suggest that she was not totally incapacitated due to her stress and anxiety and it would not be unreasonable to expect her to be able to complete the consent form.

75. On 9 February 2017 (pages 560-561) Ms Springer wrote to the Claimant noting that as she had not given consent to the Occupation Health assessment process, the Respondent would have to make its own assessment based on information available and, therefore, invited the Claimant to attend a formal sickness absence review meeting on 23 February at Ms Springer's office. The Claimant said in her evidence that she regarded the location of this meeting as oppressive as she felt that Miss Springer was bullying her in choosing the location. However, although this emerged in her oral evidence the Tribunal note that this was not raised as specific issue as bullying and harassment in the list of issues.

76. The letter from Ms Springer noted the Claimant's right to be accompanied by a work colleague or trade union official and also noted that if the Claimant did not respond the Respondent would have to make a decision about her capability in any event, which could result in dismissal. The Tribunal finds that the letter does not say that the Claimant will be dismissed because she has not given her consent to the Occupation Health assessment, which is how it was interpreted by the Claimant, who regarded it as bullying and harassment. Following receipt of this letter the Claimant consented to the Occupation Health assessment on 14 February (page 562).

77. Despite this consent, the Respondent initially indicated that it would nevertheless proceed with the formal sickness absence review meeting scheduled for 23 February. This was because the Claimant had not complied with the deadline of 3 February for providing her consent form. On 16 February 2017 the Claimant sent a further medical certificate: her doctor had signed her off work until 31 March 2017. The Claimant also wrote to Ms Morgan on 16 February commenting that Miss Morgan's letter was "heavy handed" and that she had now provided her consent to the Occupational Health assessment. The Claimant said that she felt discriminated against and harassed due to her illness and could not understand why she could not be referred to Occupation Health in any event.

78. Following this email, the Respondent offered to have the meeting on 23 February at a different location, either at the Claimant's home or in a public place. On 22 February the Claimant asked if she could have the formal sickness absence review meeting on 23 February by telephone. At (page 581) the Claimant says that she is keen to speak to Ms Springer or Ms Morgan on the 'phone and asked for confirmation that arrangements would not be made for any formal review meeting in person or be conducted in her absence. In her oral evidence to the Tribunal the Claimant said that she did not want a face to face meeting as she could not face Ms Springer. She also said that she believed that a telephone meeting would not constitute a formal meeting and so could not result in a formal process or a formal warning being made against her. The Claimant did not suggest in her oral or written evidence that she could not attend a meeting in person because she was to unwell to do so. The Tribunal therefore find that the face to face meeting would not put the Claimant at a substantial disadvantage because of her disability – she chose not to attend such a meeting because she believed that a telephone meeting would avoid the risk of any formal action against her.

79. On 28 February 2017 Miss Springer wrote to the Claimant expressing her "deep disappointment" on the Claimant's unwillingness to comply with the Respondent's sickness absence management policy and her failure to attend the sickness absence meeting scheduled for 23 February. However, the Respondent backed down and no further action was taken with regards to the formal sickness absence review meeting. The Respondent agreed to progress the Occupational Health assessment and in that regard the Claimant had succeeded in her desired result. The Tribunal find that the Claimant was not

penalised because of her failure to comply with the deadline to provide the OH consent form.

80. The Respondent's standard process for Occupational Health assessments was that the first stage would be a telephone assessment (page 589) which was recommended by the Occupational Health team. However, the Claimant did not want a telephone assessment, but a face to face meeting with the Occupational Health team (page 593). The Claimant says that she had only asked if a face to face appointment was possible, she had not refused to attend such a meeting. The Claimant did not say in this email, nor did she say in her oral evidence that she was unable to have a telephone meeting because of her illness or that such a meeting would cause her any distress. The telephone assessment resulted in the Claimant being referred to the next stage of the Occupation Health process which was that an appointment (face to face) had been made for the Claimant on 31 March 2017. The Tribunal do not find that the Claimant suffered any disadvantage from having to conduct the telephone meeting with OH.

81. There was also an Occupational Health report following the telephone assessment dated 17 March 2017 (pages 596-597). The conclusion of that report was that the Claimant was not fit to return to work at present and support measures were recommended. The report also noted that the Equality Act provisions may apply to the Claimant's long-term health issues, as they were ongoing and prolonged. Ms Springer said in her oral evidence that this was the first time she had realised that the Claimant maybe disabled as a result of her mental health condition. However, the Tribunal note that in the agreed list of issues the Respondent had accepted that the Claimant had a disability with the relevant date being 18 November 2016. The Tribunal therefore regards the Claimant as being disabled and the Respondent having knowledge of that disability from that November date.

82. On 23 March 2017 Ms Morgan wrote to the Claimant hoping that she was making progress with her health and noting that the current medical certificate expired on 31 March and asking that any new certificate should be sent to the Respondent by 3 April. The letter also noted the Claimant's appointment on 31 March 2017 with the Occupational Health Specialist.

83. The Tribunal notes that at this stage of events, the Claimant had been through a performance review which had resulted a final written warning (in ambiguous terms) relating to her performance and possibly to data protection and confidentiality breaches. This had been decided upon following the first part of a disciplinary meeting which she attended with her trade union representative and the second part of a meeting without her attendance or that of her union representative. The Claimant had been on long-term sick leave since November 2016; she had not been forced to have a face to face sickness review meeting; she had a telephone meeting with OH (which she had not wanted) but this had resulted in her being asked to attend a face to face meeting with OH, which is what she had wanted. There were no other actions taken by the Respondent in respect of the Claimant's employment or sickness absence.

84. On 27 March 2017 the Respondent's received a letter from solicitors Mishcon de Reya instructed by the Claimant resigning and claiming constructive dismissal on her behalf and setting out the various allegations contained in the proceedings before this Tribunal. The Tribunal notes first, that the Claimant must have instructed her solicitors earlier than 27 March in order for them to be able to produce such a lengthy letter on that date; secondly, the Tribunal notes that there was no apparent trigger for the Claimant's decision to resign. As noted above she had received a final written warning but she had not appealed that final written warning. Further, the Claimant had succeeded in avoiding a face to face meeting with regards to a formal sickness absence review and had been referred to Occupational Health to assess the nature of her illness and the prognosis and steps to arrange her return to work.

85. The Tribunal also notes that following receipt of the resignation letter, the Respondent offered the Claimant a period of time to reconsider her resignation and also offered to treat the allegations raised in her resignation letter as a grievance. Ms Springer said that she had scheduled a Grievance Hearing on 12 April 2017 to address those concerns (pages 612 and 614)

86. The Claimant's response (via her solicitors) declined the Respondent's offer and reiterated the reasons for her resignation. On 10 April 2017 the Respondent accepted the Claimant's resignation (page 616).

87. The Tribunal notes in this regard that the Respondent's conduct in response to the Claimant's resignation does not bear out the Claimant's allegations that Ms Springer had always intended to get rid of her as the last team member of AFC. If this had been the case, Ms Springer could have dismissed the Claimant in November 2016 following the Disciplinary Hearing; she could have dismissed her for not attending the formal sickness absence review and she could have immediately accepted her resignation. In each case, Ms Springer did not take actions to implement the Claimant's dismissal but indeed attempted to put this off and to give the Claimant the opportunity to address the outstanding issues.

Conclusions

88. In reaching its conclusions with regard to the Claimant's discrimination claims, the Tribunal reminds itself of the statutory burden of proof at section 136 of the Equality Act 2010 (EqA): that the Claimant must show facts from which the Tribunal could decide (in the absence of any other explanation) that the Respondent had contravened the relevant provisions of the Act.

Knowledge of Disability

89. The Tribunal have found (as conceded in the Agreed List of Issues) that the Respondent had knowledge of the Claimant's disability from 18 November 2016.

Failure to Make Reasonable Adjustments (sections 20/21 EqA)

90. The Tribunal finds that the Respondent did apply the PCP's listed at paragraphs 2.1.1-2.1.3 of the Agreed List of Issues (set out below). However, the Tribunal do not find that the application of such PCP's put the Claimant at any disadvantage (let alone a substantial one) in comparison to people who were not disabled. The Respondent did not have the face to face sickness absence review meeting and so there was no disadvantage to the Claimant (paragraph 2.2.1). The Claimant alleges that she found it difficult to conduct the telephone meeting with OH but she had requested a telephone meeting with Ms Springer; furthermore, the telephone conversation with OH resulted in her being asked to attend a face to face assessment, which was what she had originally requested and so cannot be seen as putting her at a disadvantage (Paragraph 2.2.3). Finally, the Tribunal have found that the Claimant was not penalised for failing to comply with the deadline to submit her OH consent form. Ms Springer expressed "disappointment" that this had happened, but there were no adverse consequences for the Claimant: she was not forced to attend the sickness absence review meeting and she was referred to OH as she had wanted.

91. The Tribunal also refer to the Findings of Fact above and notes that the Claimant's evidence as to why she objected to the PCP's did not relate to her disability, but rather to tactical reasons as to why she would not give her consent to the OH assessment (she was waiting for Ms Springer to forward her emails to Stephen Grave) or attend a face to face meeting with Ms Springer as regards the sickness absence review process (she believed that a telephone meeting could not result in any formal action or warnings being made against her).

92. Therefore, the claims for Failure to make reasonable adjustments do not succeed as the Claimant has not shown that she was put at a substantial disadvantage by the application of the PCP's.

Discrimination Arising from Disability (section 15 EqA 2010)

93. The Tribunal has found that the events cited by the Claimant as less favourable treatment at paragraphs 3.1.1 and 3.1.2 of the Agreed List of Issues either did not occur or did not constitute less favourable treatment. The Claimant says that there was a face to face meeting in her absence on 23 February 2017. The Tribunal has found (see Findings of Fact above) that no such meeting occurred. The Respondent did not hold such a meeting but allowed the Claimant to go through to the OH assessment in any event.

94. As there was no unfavourable treatment, the claim under section 15 EqA cannot succeed.

Disability Related Harassment (section 26 EqA)

95. The Claimant must show that the Respondent has engaged in unwanted conduct related to her disability, which has the purpose or effect of violating the

Claimant's dignity or of creating an intimidating, hostile, degrading or an offensive environment. The Tribunal must take the Claimant's own perception into account (so her subjective view) but must also consider the other circumstances of the case and whether it is reasonable for such conduct to have that effect (so the objective view) – that is a balancing exercise between the subjective and the objective when considering the effect of such conduct.

96. The conduct cited by the Claimant for this claim is at Paragraphs 4.1.1 to 4.1.6 of the Agreed List of Issues and relate to the sickness absence process conducted by the Respondent. The Tribunal refers to the Finding of Facts (set out above) with regard to this matter. The conduct cited in the List of Issues did occur, though the Tribunal's findings do not always coincide with the Claimant's interpretation of these events, and that conduct is by and large unwanted.

97. However, the Tribunal do not find that such conduct had the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading or an offensive environment. By and large the Tribunal has found that the Claimant obtained what she wanted from the sickness absence process. She was allowed to proceed with the OH assessment, even though she had not complied with the deadline set by the Respondent, and she had not been forced to have a face to face meeting with Ms Springer. The conduct cited does not (even on a subjective interpretation of the Claimant's point of view) create the type of environment required by the statute.

98. The claim of harassment on disability grounds does not succeed.

Detriment for making use of Trade Union services (section 146 (1) (ba) TULRCA 1992)

99. The acts which are alleged to constitute a detriment to the Claimant are set out at Paragraphs 5.1.1 to 5.1.4 of the Agreed List of Issues. The Tribunal refers to the Findings of Fact (set out above) as regards each of those events, which conclude that they do not constitute a detriment and even if they did that the reason for such action/detriment was not because the Claimant sought to make use of any trade union services. This claim does not succeed.

Constructive Dismissal

100. In order to succeed in this, claim the Claimant has to show that the Respondent committed a repudiatory breach of the implied term of mutual trust and confidence in the Claimant's employment contract.

101. The Claimant cited the disability discrimination and trade union related claims (set out above) as cumulative breaches of the implied term (Paragraphs 6.1.1 to 6.1.4 of the Agreed List of Issues). However, the Tribunal have not found in favour of the Claimant on any of those claims and so they cannot form part of the cumulative breach of contract.

102. The Claimant cited additional events from paragraphs 6.1.5 – 6.1.8 which she said formed cumulative and individual breaches of contract. These events

were duplicated in many cases which the matters cited in respect of the disability discrimination and trade union related claims. There were also further matters cited as bullying and harassment of the Claimant by the Respondent (Paragraphs 6.1.7.1 to 6.1.7.14. The Tribunal refers to its Findings of Fact (set out above) as regards each of these matters.

103. The Tribunal found that none of these events was bullying or harassment or a breach of contract individually; nor did the Tribunal find that there a cumulative breach of the implied term of mutual trust and confidence? The Tribunal acknowledge that the Claimant was genuine in her belief that she had been unfairly treated by the Respondent; however, on an objective basis, none of the matters which she cited could be viewed with her perspective.

104. The Tribunal noted the Respondent's assessment that the Claimant wanted to do things her way and did not listen to or attempt to comply with her employer's instructions or processes. The Tribunal found that much of the Claimant's conduct at the hearing confirmed this assessment.

105. The Tribunal could find no apparent "trigger" for the Claimant's resignation. It occurred at a time when she appeared to have obtained what she wanted as regards the sickness absence process and she had not been dismissed or further disciplined since the final written warning, which she had never sought to appeal. She was about to attend the face to face meeting with OH which she had requested on 31 March 2017, and a few days before that meeting she resigned.

106. The Respondent had offered to treat her resignation letter as a grievance and to deal with the various matters listed therein. However, the Claimant refused this offer. She said in her evidence that she believed there was no point in doing so as it had all been decided already. The Tribunal saw no evidence to suggest this was the case. The Respondent did not dismiss the Claimant in November 2016 but issued a final written warning. The Tribunal had set out in the Findings of Fact (see above) why it does not accept the Claimant's evidence that the whole performance review and disciplinary process was a sham and that Ms Springer was looking for ways to remove her as the last AFC member.

107. The claim for constructive dismissal does not succeed.

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Employment Judge Henderson

12 September 2018

Dated: ……..……..

Judgment and Reasons sent to the parties on:

13 September 2018

…….....

For the Tribunal Office

SCHEDULE 1

AGREED LIST OF ISSUES

3rd July 2018

The Complaints

- Discrimination Claims:
  - Failure to make Reasonable Adjustments
  - Discrimination arising from Disability
  - Harassment.
- Constructive Unfair Dismissal (Ordinary)

1. Preliminary matters

Disability

1.1.1. It is admitted that C was disabled for the purposes of the Equality Act 2010 by reason of Depression/Anxiety (from 18th November 2016, when C produced her first medical certificate for this condition)

2. Failure to make Reasonable Adjustments (section 20/21 Equality Act 2010)

2.1. Did R apply the following PCPs?

2.1.1. the requirement that Sickness Absence Review Meetings are conducted face-to-face;

2.1.2. the requirement that a first-stage Occupational Health assessment is conducted by telephone

2.1.3. the requirement that employees meet deadlines in consenting to Occupational Health assessments

2.2. Did the application of any such PCPs put C at a substantial disadvantage in comparison to people were not disabled? C contends that she was placed at the

following substantial disadvantages:

2.2.1. C was unable to attend a face to face meeting which went ahead in her absence and C suffered stress and anxiety as a result;

2.2.2. C found it difficult to speak on the phone about her condition and circumstances for 45 minutes.

2.2.3. C was penalised and reprimanded for complying with the Occupational Health consent deadline late

2.3. If so, did R fail to take such steps as were reasonable to avoid any such substantial disadvantage? C contends that the following steps would have been reasonable:

2.3.1. Not requiring C to attend a face to face meeting and/or not holding the meeting in her absence;

2.3.2. Agreeing and/or permitting C to have a face to face meeting with OH in the first instance;

2.3.3. Permitting C to comply with the deadline for the Occupational Health consent late and/or not reprimanding or penalising C for doing so;

2.4. Did R have actual or constructive knowledge that C was disabled ***and*** was likely to be placed at the relevant substantial disadvantage?

3. Discrimination arising from Disability (section 15 Equality Act 2010)

3.1. Did R subject C to the following unfavourable treatment?

3.1.1. holding a face to face meeting in C's absence on 23 February 2017;

3.1.2. expressing annoyance that C did not attend that face to face meeting;

3.2. If so, was that treatment because of something arising in consequence of C's disability, namely:

3.2.1. Absence from work/inability to attend R's office;

3.2.2. Tiredness/difficulties concentrating;

3.2.3. Inability to deal with matters raised re C's sickness absence

3.2.4. Inability to meet the deadline for consenting to the Occupational Health assessment

3.3. If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim? R relies on the following legitimate aims: to meet with C to offer relevant support to facilitate C's return to work. The use of the Absence Management Policy was a proportionate means.

3.4. If not, did R have actual or constructive knowledge that C was disabled at the material time?

4. <u>Disability Related Harassment (section 26 Equality Act 2010)</u>

4.1. Did R engage in the following unwanted conduct related to C's disability?

4.1.1. On 9 February 2017, emailing C to say that as C had not provided her consent for an OH referral she would have to attend a face to face sickness absence management meeting on 23 February 2017 about her employment;

4.1.2. On 16 February 2017, emailing C to say that C had missed the deadline for submitting her consent to a OH ~~review~~ Assessment and that the face to face absence management meeting on 23 February would therefore be going ahead;

4.1.3. On 21 February 2017, Shirley Springer emailing C insisting that the absence management meeting would go ahead on 23 February 2017 despite C saying she was unable to attend due to sickness.

4.1.4. On 2 March 2017, Shirley Springer emailing C to say, "*I must express our deep disappointment in, what appears to be, your unwillingness to comply with the provision of the Absence Management Policy*" because C had not attended the sickness management meeting on 23 February 2017.

4.1.5. On 8 March 2017, Shirley Springer emailing C telling her to co-operate with the absence management process when C said she wanted to meet OH face-to-face.

4.1.6. On 9 March 2017, Shirley Springer emailing C to suggest that C was not complying with R's policies because C had asked to have a face to face meeting with OH rather than a telephone appointment.

4.2. Did the conduct have the purpose or effect of:

4.2.1. violating C's dignity; or

4.2.2. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

4.3. If so, was it reasonable for the conduct to have this effect, taking into account:

4.3.1. the other circumstances of the case?

4.3.2. objectively, whether it was reasonable for the conduct to have that effect?

5. <u>Detriment for making use of trade union services at an appropriate time (Section 146 (1) (ba) TULRCA)</u>

5.1. Did R subject C to the following detriments?

5.1.1. On 18 October 2016, adding HR Trustee Stephen Grave to the disciplinary panel to chair a disciplinary hearing in November 2016;

5.1.2. On 8 November 2016, Neil Hamilton asking Andy Murray, C's trade union representative, to delete a copy of C's statement for her disciplinary hearing;

5.1.3. On 10 November 2016, Stephen Grave Trustee alleging that "***there have been two serious misconduct incidents where you have breached our data protection and confidentiality rules in taking client records home without management's authority"***.

5.1.4. Issuing C with a Final Written Warning in November 2016.

5.2. If so, was the reason for any such detriment that C sought to make use of trade union services at an appropriate time, namely:

5.2.1. Telling Shirley Springer on 22 August 2016 that Andy Murray, trade union representative, would accompany C to the meeting scheduled for 30 August 2016;

5.2.2. Organising for a Unite representative to attend the disciplinary hearing in October 2016;

5.2.3. Providing Andy Murray with a statement for the purposes of representation in the disciplinary hearing which contained information about C's casework and her responses to R's accusations about her performance.

6. <u>Ordinary Constructive Unfair Dismissal (section 94 Employment Rights Act 1996)</u>

6.1. Did R commit a repudiatory breach of the implied term of mutual trust and confidence in C's contract of employment? C relies on the following treatment as breaches cumulatively of the term of mutual trust and confidence:

6.1.1. A failure to make reasonable adjustments as set out in paragraph 2 above;

6.1.2. Disability discrimination as set out in paragraph 3 above;

6.1.3. Disability related harassment as set out in paragraph 4 above;

6.1.4. Subjecting C to a detriment because she sought to make use of trade union services as set out in paragraph 5 above;

6.1.5 <u>the initiation of disciplinary action:</u>

i. no reduction in caseload from March 2016 although C's days were reduced from 5 days to 3 days
ii. being Performance Managed from 12th April 2016 despite having a good record
iii. not providing C with any mentoring, training or assistance with caseload
iv. initiating a system re C's laptop to increase additional travel time and reduction in hours available to write up notes
v. not providing C with any support during the review period

6.1.6 <u>the alleged failure to deal with the disciplinary process in a speedy and professional manner</u>

vi. 28th July – 3rd August 2016 being left in limbo after the postponement of the disciplinary hearing

vii. on 4th August 2017, increasing C's performance review period to include August 2016 without providing C with any support even though R knew that C was finding the performance review process difficult

viii. on 17th August 2016, cancelling the rescheduled performance review hearing and halting the disciplinary process

6.1.7 Bullying and harassing the Claimant in relation to:

6.1.7.1.1 the disciplinary process

6.1.7.2 on 19th April 2016, warning C that she faced disciplinary action due to her performance

6.1.7.3 on 28th April 2016, questioning an issue re C's mobile data which had already been dealt with in February/March 2016

6.1.7.4 on 2nd June 2016, informing C that she was not competent nor was she expected to be by the end of the review period

6.1.7.5 on 4th August 2017, increasing C's performance review period to include August 2016 without providing C with any support even though R knew that C was finding the performance review process difficult

6.1.7.6 on 12th August 2016, being refused the opportunity to select her own TU rep to accompany her

6.1.7.7 on 17th August 2016, cancelling the rescheduled performance review hearing and halting the disciplinary process and not providing any support to C over this period

6.1.7.8 on 22nd September 2016 during a review meeting, not providing any support nor addressing any of the Claimant's concerns

6.1.7.9 on 18th October 2016, not providing any explanation as to why Mr Grave had been added to the Panel

6.1.7.10 following the Disciplinary Hearing not providing any support to the Claimant instead on 2nd November 2016 notifying her that she was to be placed under an advisor training plan

6.1.7.11 on 8th November 2016, notifying the Claimant that she was also facing disciplinary proceeding re a data breach which was done in preparation of her attendance at the Disciplinary Hearing

6.1.7.12 on 8th November 2016, holding a Disciplinary Hearing in the Claimant's absence following which she was issued with a FWW for the data breach

6.1.7.13 on 6th December, whilst the Claimant was on sick leave, writing to her

6.1.7.14 on 9th February 2017, writing to the Claimant that as she had not consented to an OH referral she faced dismissal

6.1.8 the sickness absence procedure

6.1.8.1 paras 19, 20, 22 & 23

6.1.8.2 on 8th November 2016, notifying the Claimant that she was also facing disciplinary proceeding re a data breach which was done in preparation of her attendance at the Disciplinary Hearing

6.1.8.3 on 8th November 2016, holding a Disciplinary Hearing in the Claimant's absence following which she was issued with a FWW for the data breach

6.1.8.4 on 6th December, whilst the Claimant was on sick leave, writing to her

6.1.8.5 on 9th February 2017, writing to the Claimant that as she had not consented to an OH referral she faced dismissal

6.1.8.6 on 16th February 2017, informing the Claimant that unless she confirmed her attendance at a sickness absence review meeting the same day, she faced dismissal

6.1.8.7 on 23rd February 2017, insisting that the meeting went ahead face to face instead of via the telephone as requested by the Claimant

6.2. Did the breach consist of a one-off act or a continuing course of conduct extending over a period, culminating in the 'last straw' breach?

6.3. Did R's conduct, judged objectively, have the purpose or effect of destroying or seriously damaging mutual trust and confidence?

6.4. Did R have reasonable and proper cause for behaving in the way it did?

6.5. If ~~so,~~ not, did C resign because of the breach?

6.6. If so, did C affirm the contract by delay?

6.7. If so, was there a potentially fair reason for dismissal? R relies on the potentially fair reason of capability

6.8. If so, was C's dismissal within the band of reasonable responses?

6.9. Did R unreasonably fail to comply with the ACAS Code?

6.9.1. Failure to carry out a timely investigation to establish the facts relevant to ***initiation of the disciplinary action*** [see 6.1.5]

6.9.2. Holding the Sickness Review meeting in C's absence

6.9.3. Insufficient notification of the case and/or without sufficient information about the ***data protection breaches [see 6.1.7.11 & page 514]***

7. Remedy

7.1. How much compensation, if any, should C be awarded for:

7.1.1. Financial loss;

7.1.2. Injury to feelings?

7.2. Should any adjustments be made:

7.2.1. according to the principle in *Polkey*;

7.2.2. for contributory fault;

7.2.3. for a failure to follow the ACAS Code as per 6.9 above

3rd July 2018
Yve Montaz for Respondent
Robin White for Claimant