Case No: 2601889/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Hawksworth-Burton**

Respondent: **Autism East Midlands**

Heard at: **Nottingham**

On: **19, 20 and 21 June 2017**
21 August 2017

In Chambers: **8 September 2017**

Before: **Employment Judge Faulkner**

Members: **Mrs J Rawlins**
Mrs L Scott

Representation
Claimant: **In Person**
Respondent: **Mrs S Cakali, Solicitor Advocate**

JUDGMENT

1. The unanimous decision of the Tribunal is that the Claimant was not at the relevant times disabled within the meaning of the Equality Act 2010.

2. Her complaint of disability discrimination (failure to make reasonable adjustments) is therefore dismissed.

3. The unanimous decision of the Tribunal is that the Claimant was dismissed within the meaning of Section 95(1)(c) of the Employment Rights Act 1996.

4. The Respondent does not seek to argue that the dismissal was fair. The Claimant was therefore unfairly dismissed and thus her complaint in that respect is well-founded.

5. This matter will now be listed for a further hearing to determine the question of remedy in respect of the complaint of unfair dismissal.

REASONS

Complaints

1. The Claimant brought before the Tribunal complaints of disability discrimination, specifically failure to make reasonable adjustments (Section 21 of the Equality Act 2010 (“the Act”)), and unfair dismissal.

Issues

2. The first issue the Tribunal was required to determine was whether the Claimant was at the relevant times a disabled person within the meaning of the Act. It was not disputed that she had a physical impairment and therefore the issue to be determined was whether the impairment had at the relevant times a substantial adverse effect on her ability to carry out normal day to day activities. If it did, it was not disputed that the effect was long term.

3. Given that we decided that the Claimant was not a disabled person within the meaning of the Act for the reasons set out below, it is not necessary to set out the issues that would otherwise have fallen to be decided in respect of the complaint of failure to make reasonable adjustments.

4. In relation to the complaint of unfair dismissal, given that the Respondent does not contend that any dismissal was fair, the issue to be decided was whether the Claimant was dismissed, requiring consideration of the following:

(a) Was the Respondent in fundamental breach of the Claimant’s contract of employment such as to entitle her to resign without notice?

(b) If so, did the Claimant resign in response to that breach?

(c) Did the Claimant affirm the contract of employment, whether by delay in resigning or otherwise?

5. It was agreed with the parties that this hearing would deal with the question of liability only, any question of remedy to be considered at a separate hearing.

Preliminary Issue

6. We dealt first with the preliminary issue of whether the Claimant was disabled within the meaning of the Act, before going on to consider questions of liability separately. The parties agreed a bundle of documents, additional documents being introduced at various points in the Hearing without objection. Page references in these Reasons are references to the bundle.

Facts

7. The Claimant fractured her right wrist in an accident outside of work in

August 2012 and required two operations as a result. She is right-handed. Although substantially healed, the Claimant has continued to experience pain as a result. In deciding whether this impairment had at the relevant times the required substantial adverse effect, we read a number of documents, namely the Claimant's impact statement at page 42, the report of Michael Edwards (the Claimant's orthopaedic consultant) dated 21 October 2015 at page 106, and the occupational health report produced by Martin Strudley dated 29 January 2016 at pages 141 – 144.

8. We also heard oral evidence from the Claimant on the first day of the Hearing about the impact of the impairment. As Mrs Cakali pointed out, this went considerably beyond what was included in the impact statement. She invited us to disregard it on this basis. It is correct that a standard order was made at a Preliminary Hearing in relation to the preparation of the impact statement, which was clear as to what the Claimant should include. She is not legally trained or legally represented however, and has not been at any stage of these proceedings. We were therefore content to take the entirety of the Claimant's oral evidence into account in reaching our decision on this point.

9. We found the Claimant to be a straightforward witness who did not exaggerate her symptoms, but sought to describe them accurately. She was for example very clear as to the ways in which she had sought to accommodate the problems she experienced with her wrist, as detailed below. The Respondent says that had the symptoms the Claimant refers to been as she described them, she would have referred to them in the meetings with her medical consultant and in the occupational health meeting, and thus the documents resulting from those meetings would have mentioned them. We are satisfied however that these meetings were held for their own specific purposes. The occupational health meeting was to discuss the impact on the Claimant's role and was focussed on concerns about the Claimant using restraint with the Respondent's service users. Whilst it is clear that this was of paramount concern to the Claimant in this context, it does not follow that the impairment did not affect her in other ways as well. As for the consultation with Mr Edwards, that was focussed on future medical treatment. In neither case therefore is it surprising that the impact on day to day activities does not feature in the reports. In short, we accept what the Claimant said as a truthful account of the impact of her impairment.

10. The Claimant had specified at the Preliminary Hearing that her complaint of disability discrimination concerned the Respondent's alleged failure to consider alternative roles for her which did not involve her carrying out physical restraint procedures or providing other physical support and assistance in respect of the Respondent's service users. For the purposes of determining the preliminary issue, it was agreed that the alleged failure to make reasonable adjustments in this way related to the period in 2016 up until the Claimant's employment terminated on 13 June. We therefore asked the Claimant, in giving her evidence, to describe the impact of the impairment to her wrist during this period, and not of course at the present day. The findings of fact below are made accordingly. We have of course concentrated on day-to-day activities.

11. The Claimant said, and we accept, that when picking up her two-year-old child in 2016 she did so by ensuring that the pressure was placed on her forearm, thereby avoiding pressure on her wrist. We also accept that where possible, if she were holding something in her left hand at the time, she would change hands so as to be able to pick up the child with her left hand and arm. We accept too that this is different to the way she handled her other children who were small before she had the injury.

12. In relation to cooking, we accept that before the injury the Claimant could lift very heavy pans in a catering role she had held with a previous employer. We also accept that since the injury, including in the first half of 2016, she has only felt able to lift lighter pans with her right hand and has lifted heavy pans using both hands.

13. In respect of cleaning, the Claimant described using her left hand to hoover and to carry out similar household tasks. She also described needing help with putting a fitted sheet on to a king size mattress, and how she has received a lot of support from her mother in respect of household duties of this nature.

14. As for dressing herself, the Claimant said that some care has been required when she is putting on tighter clothing and gave the specific examples of tight socks and jeans. This would therefore have been an issue for her in the early part of 2016 outside the warmer months.

15. When shopping, she described how she would carry a lighter bag of shopping in her right hand and a heavier bag in her left hand. She also referred to getting assistance from her husband on arriving home in terms of moving the shopping bags from her car to the house.

16. As for writing and typing, the Claimant's evidence was that she was basically okay in respect of both.

17. She says that there was no impact on her in respect of local driving. If however she were to take a journey of 50 miles or more, especially when using the motorway where she would be required to grip onto the steering wheel more tightly, she has had to take her right hand off the steering wheel from time to time to stretch it. She noticed that this was more of a problem in the evenings when her wrist tended to ache more. She said that she occasionally used to drive distances and did so without any problem.

18. In respect of her work for the Respondent, it was restraint of service users which was the issue for the Claimant. She said that this could be painful and could damage her wrist. She therefore did not carry out prolonged restraint, though she could momentarily restrain a service user without difficulty.

19. There is no pin or other device in the Claimant's wrist. She wore a support on and off during the relevant period in 2016 but was advised not to wear it for a prolonged period. The consultant report describes her ongoing symptoms of discomfort, on a pain scale between 1 and 10, as being 2 out of 10. This was in October 2015. The Claimant said that when driving for 50 miles or more she experienced a "dull ache", which she described as being "4 tops", i.e. 4 out of 10 on the pain scale.

The Law

20. Section 6 of the Act provides (so far as relevant) that:

(1) A person (P) has a disability if -

(a) P has a physical or mental impairment, and

(b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

21. A key authority is **Kapadia v London Borough of Lambeth [2000] EWCA Civ B1,** a decision of the Court of Appeal**.** At paragraphs 20 and 21, the Court accepted a submission that it was for the claimant to prove that the impairment had a substantial adverse effect on his/her ability to carry out normal day-to-day activities or to prove that the impairment would have had such an effect but for the fact that measures were being taken to treat or correct the condition. This demonstrates the burden of proof to be on the Claimant to prove such matters**.** Having in mind that burden, the Tribunal's task is to look at the evidence presented to it and decide the question on the balance of probabilities.

22. The case of **Goodwin v Patent Office [1999] ICR 302** is well-established and well-regarded Employment Appeal Tribunal authority for the questions to be asked by Tribunals in determining disability. At page 308 paragraph B, the EAT stated that the legislation requires a tribunal to look at the evidence by reference to four different conditions. The first (the impairment condition) and the fourth (the long-term condition) are conceded in this case. Taking account of amendments to the legislation since the decision, the rest are stated by the EAT as follows: "*(2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities ... and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial?*". The EAT stated that it would be useful for tribunals to consider these questions in sequence, though it remains necessary to make an overall assessment and not "*take one's eye off the whole picture*". The EAT went on to give guidance in respect of each question. In respect of the adverse effect condition, it stated (page 309) that "*the focus of attention ... is on the things that the applicant cannot do or can only do with difficulty, rather than on the things that the person can do*". As to the substantial condition, the EAT confirmed that the word "substantial" means "*more than minor or trivial*", wording which is now enshrined in section 212 of the Act.

23. **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19** was a case principally concerned with how tribunals should utilize the statutory guidance on the question of disability (since updated and referred to below as "the Guidance"). Referring to the earlier decision of **Vicary v British Telecommunications Plc [1999] IRLR 680,** in which the EAT said that the Guidance will only be of assistance in marginal cases and in clear cases should not be used as an extra hurdle for a claimant to surmount, the EAT in **Leonard** affirmed the statement in **Goodwin** that the Tribunal's focus should be on what the Claimant cannot do or can only do with difficulty. The EAT in **J v DLA Piper [2010] UKEAT/0263/09** affirmed that approach as well, though adding that in many cases, "what the claimant is still able to do, in relation to the relevant capacity [as it was under the previous legislation], is simply a part of the exercise of assessing the extent to which that capacity is impaired".

24. A more recent case is **Banaszczyk v Booker Limited [2016] UKEAT 0132**. Referring to the European Court decisions in **Chacon Navas v Eurest Colectividades [2006] IRLR 706** and **Ring v Dansk Almennyttigt Boligselskab [2013] IRLR 571,** the EAT noted that assessments of the question of disability must consider the extent to which a claimant is hindered (even if not completely excluded) from full and effective participation in professional life on an equal basis with others. To the same effect, the EAT quoted from its earlier judgment in **Paterson v Commissioner of Police and the Metropolis [2007] ICR 1522:** "*We must read [the legislative definition of disability] in a way which gives effect to European Community*

law. We think it can be readily done, simply by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life". These comments were made in the context of a case where a warehouse worker's physical impairment adversely affected his ability to lift and move cases of up to 25 kg. The EAT stated that having in mind that this is something which many people in modern working life in the UK would be employed to do, it was a normal day-to-day activity. Broadly speaking, decisions such as **Banaszczyk** enjoin tribunals not to so focus on outside of work activities that they ignore common workplace activities in making the required assessment.

25. In relation to the Guidance, it is helpful to have regard to it, though bearing in mind the warning given in **Leonard.** As far as relevant to this case, the Guidance comments on the meaning of "Substantial" (section B) and "Normal day-to-day activities" (section D). Section B1 reminds tribunals that the "substantial" requirement reflects an understanding that disability goes beyond the normal differences in ability which may exist among people. This paragraph was considered in the **Paterson** case. At paragraph 68, it was held that the correct approach is to consider "how [the Claimant] in fact carries out the activity compared with how [she] would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross section of the population, then the effects are substantial".

26. Section B2 of the Guidance suggests taking into account the time taken to carry out normal day-to-day activities. B3 suggests taking into account how day-to-day activities are carried out, compared with someone who does not have the impairment, whilst B7 states that account should be taken of how far a person can reasonably be expected to modify their behaviour, though recognising that in some cases even with coping or avoidance strategies there is still the required effect.

27. As for normal day-to-day activities, Section D3 states that "*In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing ... getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities ... such as … using a computer, driving ...*". D4 states that account should be taken of how far an activity is carried out by people on a daily or frequent basis, giving "normal" its ordinary, everyday meaning. D5 reminds tribunals that a normal day-to-day activity is not necessarily one that is carried out by a majority of people. D22 reflects what has already been stated above, namely that an impairment may not prevent someone carrying out an activity, but may restrict how they carry it out or make it more than usually fatiguing, i.e. there may be things the person can only do with difficulty.

28. Finally, the Appendix to the Guidance gives an illustrative and non-exhaustive list of factors, which if experienced it would be reasonable to regard as having the required substantial adverse effect, and conversely a list of factors which it would not be reasonable so to regard. In the former category is included: "Difficulty in getting dressed, for example, because of physical restrictions …"; "Difficulty preparing a meal, for example because of restricted ability to do things like open cans or packages …"; and "Difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand". In the latter category, there is included: "Experiencing some discomfort as a result of travelling, for example by car or plane, for a journey lasting more than two hours".

Analysis

29. As noted, the burden is on the Claimant to establish that she was a disabled person. The Respondent concedes that there was a physical impairment and that if a substantial adverse effect of that impairment could be established by the Claimant, it was long-term. Our focus has therefore been on the question of whether there was a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities at the relevant times.

30. We are satisfied that everything that we have assessed and referred to above constitutes a normal day-to-day activity, with the exception of the prolonged restraint of one of the Respondent's service users. That would be a task particular to that role, was not of itself something carried out on anything like a day-to-day basis even in that role, and thus not a workplace activity to be taken into account in our assessment in the way suggested by **Banaszczyk**. We are satisfied that the Claimant could not carry out that kind of restraint, especially not on a sustained basis (see page 40), but that does not establish that she was disabled at the relevant time.

31. We have set out the principal impacts on normal day-to-day activities highlighted by the Claimant, such as holding a heavy pan with two hands instead of one, not carrying a heavy bag of shopping with her right hand and some discomfort after prolonged driving. We are in no doubt that the impairment had some adverse effect on the Claimant in relation to many of the activities we have referred to, in that in some cases she is no longer able to do all of the things that she did before and in other cases she is no longer able to do them in the same way. Again however, that of itself does not establish disability. The question is whether, in accordance with section 212 of the Act, the effect on the Claimant was more than minor or trivial. Our conclusion, without in any way diminishing the impact of the accident on the Claimant in 2012 and the frustrations and at times discomfort that this caused her at the relevant time in 2016, is that the Claimant does not pass this test for the following reasons.

32. First, taking account of section B1 of the Guidance, the difficulties the Claimant described are, in our view, the sorts of difficulties which a person without any physical impairment could also experience. Taking the examples of holding a heavy pan with two hands instead of one, needing assistance putting a fitted sheet on to a king size mattress, taking care when picking up her child, not being able to carry a heavy bag of shopping, or experiencing some discomfort after prolonged driving (though the last of these would not constitute a normal day-to-day activity for the purposes of the legislation), these are all instances of what would be experienced by many people without any physical impairment. Putting the matter in the way it was stated by the EAT in **Paterson**, it is our judgment that how the Claimant carried out these activities compared with how she would have carried them out if not suffering the impairment is no more than the kind of difference one might expect taking a cross section of the population.

33. Secondly, the only aspect of the Claimant's job that she ever expressed concern about was prolonged restraint of service users. The other aspects of her role which equated to daily activities – whether that be assisting service users with a whole range of practical activities or typing up information on a laptop or even mild restraint of service users – she was able to cope with. It is clear that she would have had no difficulty with fulfilling the unadjusted requirements of her job if she did not have to be able to carry out prolonged physical restraint if called upon to do so. Of itself of course this is not determinative either way, but in our view it does tend to support the conclusion that she could therefore carry out

normal daily activities without undue difficulty.

34. Thirdly, we have noted the consultant's report in which the level of discomfort experienced by the Claimant on an ongoing basis in September 2015 is described by her as being two out of ten. Compared to that, we noted that the Claimant described experiencing a level of discomfort of four out of ten after prolonged driving: she described this as a "dull ache". It must follow of course that two out of ten is much less than a dull ache. Both this level of ongoing symptom, and the symptom experienced by the Claimant after one of the day-to-day activities she describes as having been impacted by the impairment, could fairly be said therefore to be no more than minor discomfort.

35. Fourthly, as we have already noted, the Claimant's impact statement does not deal with the effects of her impairment on her day-to-day activities at all. We repeat that we are satisfied that this does not mean her oral evidence was anything other than truthful, but it does tend to confirm our view that the impact on normal day-to-day activities was not substantial.

36. Fifthly, we have also taken into account the Guidance at section B7 which says that account should be taken of how far a person can reasonably be expected to modify their behaviour, for example by the use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. We have heard much evidence from the Claimant about how she coped with her impairment at the relevant times, and we think that the coping strategies that she describes are all within the category of what could reasonably be expected of her. As we have noted, the Claimant herself was very matter of fact in her descriptions and as such did not suggest that her coping strategies in any sense imposed unreasonable expectations or demands on her. We also note that they were effective. She repeatedly said that she has completely adapted to her impairment in a way which confirms our view in this respect. There is no evidence that her coping strategies had at any point broken down.

37. The closest correlation between the examples in the appendix to the Guidance (and we note that they are only examples) and the account given by the Claimant, refer to the difficulty an individual might experience in getting dressed, for example because of physical restrictions, difficulty preparing a meal because of restricted ability to do things like opening a can, and difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand. They are only examples as we have said but it is plain to us that with her reasonable coping strategies the Claimant is able to get dressed, prepare a meal, carry objects of moderate weight in her right hand, and perform all such similar activities. She experiences no more than a minor impact on typical daily activities such as these.

38. For all of these reasons, taking an overall view and looking at the whole picture, we find that the Claimant has not discharged the burden of proving that the effects of her impairment on normal day-to-day activities at the relevant time were substantial. She was not therefore disabled at the relevant time within the meaning of the Act. The occupational health report says that she was disabled but it recognises that this is a legal question to be determined by an Employment Tribunal and having carefully gone through the statutory test, we are satisfied that it is not met in this case. The complaints of disability discrimination are therefore dismissed.

Unfair dismissal

Facts

39. Witness statements were provided for the substantive case setting out the evidence of the Claimant, and for the Respondent, Andrew Cocker (Adult Service Manager), Lisa Downs (Employment Services Manager), Caroline Smyth (Head of Human Resources) and Alyson Bennett (HR Assistant), all of whom also gave oral evidence. The Claimant submitted additional statements from Justine Freeman (Day Support Worker for the Respondent), KB (one of the Respondent's service users), Wanda Dawson (also employed by the Respondent) and Amy Doona (the Claimant's friend) but none gave live evidence. As we made clear, we were not able to attach as much weight to this evidence as would have been the case had the witnesses been present. We also made clear it was for the parties to draw to our attention any documents in the bundle that they wished us to take into account.

Background

40. The Respondent is a charity working with service users with an autism diagnosis. It has around 400 staff, most working directly with service users who are referred to in these Reasons by initials given the sensitivity of the service provided by the Respondent and the vulnerability of some of those individuals. The Claimant commenced employment with the Respondent in 2001. She was employed latterly as a Flexible Support Worker, which entailed supporting service users in various ways, helping them develop life-skills and handling their occasionally challenging behaviour.

41. After the injury to her wrist in 2012, it seems to have been readily accepted by the Respondent that the Claimant could not carry out prolonged restraint of service users. Around February 2015, she was deployed to work on something called the employment project until 31 May 2015. She continued some work on that project until July 2015, when she went back to support work. From the end of November 2015 until shortly before her employment terminated, the Claimant worked two days per week, one of those days dedicated to a particular service user, KB.

42. The Claimant relies for her claim that she was constructively unfairly dismissed on a number of matters, which she says cumulatively amounted to a fundamental breach of her contract of employment by a breach of the implied duty of trust and confidence. Not all those matters are expressly referred to in the Claim Form, but we take all of them into account for the following reasons: first, the Claimant was unrepresented and wholly unfamiliar with dealing with legal matters; secondly it is arguable that some of those matters not explicitly referred to in the Claim Form are at least alluded to; thirdly, Mrs Cakali at no point suggested that there was any bar to the Claimant relying on any of these matters, though of course in a number of respects the Respondent challenges the Claimant's evidence and substantive case; and most importantly, the Respondent was fully able to lead evidence and make submissions in relation to each of the matters relied upon. We now deal with each of these matters in turn, dealing not with every factual matter raised in evidence, but focussing on those which are relevant to the issues to be decided.

Employment project

43. This project was designed to help assist certain service users with securing employment. The Claimant was engaged in the project from around February 2015 until 31 May 2015 when funding came to an end. Ms Downs was the Claimant's line manager at this point and had overall responsibility for the project, which also

involved Mr Cocker. Whilst she recognised the need for the Respondent to secure the requisite business, the Claimant says she was told by Ms Downs that her work in this role would be permanent, but that this turned out not to be the case. In this respect, we prefer Mr Cocker's and Ms Downs' more nuanced evidence that continuation of the project is what the Respondent hoped for but that this depended on funding. This is consistent with page 90, a note of the Claimant's supervision meeting with Ms Downs on 6 May 2015, which says: "Bev asked what her role would be after 31 May once the AIF employment project has finished. I stated to Bev that I was working on a plan to capitalise on the success of the project and continue to have a small team … working on employment outcomes etc".

44. After 31 May 2015, the Claimant continued to be engaged in some work related to the project, contacting third parties regarding taking on service users for example. Her case is that in July 2015, the position suddenly changed when having arranged a meeting with a potential provider, she was told at the last minute that Ms Downs and Mr Cocker would go instead. Ms Downs agrees she had initially said the Claimant was the best person to attend, but on learning that the meeting was concerned with contractual arrangements, she decided Mr Cocker should attend instead, as someone with more relevant expertise and experience, and asked him to inform the Claimant that she was to shadow a colleague working with a challenging service user. Mr Cocker says that Ms Downs gave him no rationale for the change in arrangements and confirms that the Claimant was upset about it.

45. At around this time, the Claimant returned to working on day services. At page 96, there is a note of another supervision meeting with Ms Downs on 7 September 2015, which says, "Once more work for the employment project comes in she would returned [sic] to working on this project. But until this she is back on the timetable". The note adds, in relation to the Claimant's wrist, "in the interim I have ensured Bev is on the timetable with individuals who present less CB [challenging behaviour], until we have assessed her further". We return to this below.

46. The Claimant says that from this point she was placed on "random shifts". The 7 September supervision note refers to the Claimant's concerns about not knowing her timetable, and records Ms Downs' comment that rotas are prepared two weeks in advance. The shifts the Claimant was working were clear, but it was which service users she would be working with and what they were doing which she says was unpredictable in an environment where it was important for support workers and particular service users to get to know each other. Her complaint that changes were made to her work often at the last minute is confirmed by Ms Freeman. The Claimant accepts that flexibility was inherent in the role, but says the changes made to her work were more than experienced by her colleagues. Ms Downs categorically denies this: of course, continuity with service users was ideal, but all or most of the service users were familiar with all of the staff team.

47. The Claimant says in her statement that she was upset about the regular changes to her work – Mr Cocker confirms that she confided in him to this effect. She describes a deterioration in her relationship with Ms Downs from this point, but it is clear Ms Downs made positive comments about the Claimant's work in supervisions (see page 98), which the Claimant accepts as evidence that the relationship between them had not broken down. Further, Ms Downs was at least partly responsible for granting the Claimant's flexible working requests, so that from 30 November 2015 she worked two days per week. The Claimant says it suited Ms Downs to have her around less, but it seems to us that reads too much into the events.

48. The Claimant's supervision with Vicky Swindell, by then her new line manager, on 24 November 2015 (pages 111 – 115) says, "The employment project has started

up again and Bev will be taking the lead on this". This referred to work which the Claimant was to carry out with KB. There is a note of another supervision with Ms Swindell on 2 February 2016 (page 145). The Claimant raised how the employment project was going to progress and Ms Swindell said she would speak to Ms Downs.

49. In summary, the Claimant says the Respondent should have stuck to what it told her was happening, kept her considerably better informed, and should not have required so many changes in her work once the project ended. Ms Downs says whenever she had information that was important for the Claimant to know, she told her.

<u>20 January 2016</u>

50. On 19 January 2016 the Claimant attended, with a number of colleagues, a training session delivered by another of the Respondent's employees, Jenny Yates. In a note at pages 137 - 138, dated 21 January 2016, Ms Yates says the Claimant had said she did not need the training, and that she and two other colleagues had also engaged in a negative discussion about working conditions and problems. The Claimant agrees that she aired complaints, specifically why she was required to attend training on a non-working day. Ms Downs heard about what had happened when speaking to other attendees later that evening.

51. When the Claimant arrived at work the next morning, Ms Downs asked if they could have a chat. She began by telling the Claimant that a colleague had called in sick and so the Claimant was to lead a conservation activity; she was already timetabled to be involved, though not as leader. The activity included service user ML who has a particularly high level of needs and had on one previous occasion harmed another of the Respondent's employees. The Claimant accepts she was aware of certain issues that could trigger difficult behaviour by ML (see page 196) but not how he would tend to react, or the redirection techniques that should be employed to manage his behaviour. Ms Downs says that ML was discussed in team meetings, which seems to be borne out to some extent at least by the Claimant's evidence to a later investigation (page 199 and see further below). We accept the Claimant's case however that she did not see any report or risk assessment, given Ms Downs' comments to the same investigation (at page 186) that the Claimant and a colleague had asked for further information about ML to be told that they had all they needed to know and "were not privy to other information on his file". The Claimant was anxious about having to lead the session. Ms Downs says that whilst the Respondent had no record of a history of anxiety on the Claimant's part, she knew she needed to be fully prepared for things.

52. Ms Downs also says that ML's file was available for staff to consult, and that if the Claimant had needed time to read it, she would have covered the first part of the activity herself. She did not invite the Claimant to do so because ML had been discussed in team meetings and because she felt the Claimant's concerns had been assuaged, given that they then moved on to talking about other matters. Ms Downs also says that the Claimant mentioned ML's "triggers", showing that she knew how to manage him, but in fact page 132 – Ms Downs' contemporaneous statement – suggests it was she who began that particular discussion. Ms Downs says she nevertheless felt confident in the Claimant's experience, not least because the Claimant had been involved in such sessions before.

53. Ms Downs then turned to discuss the Claimant's behaviour on 19 January. The Claimant says that Ms Downs had already been shouting during their exchanges about ML and continued to do so. It is agreed the Claimant asked Ms Downs to stop shouting, though of course that is not conclusive evidence that she was. Ms Downs

says the Claimant was shouting, but that she herself was using a firm, controlled tone and being direct (see pages 132 – 134). Both the Claimant and Mr Cocker had witnessed a previous occasion on which Ms Downs had followed another colleague, Ms J Witts, to the exit from the Respondent's premises, using a raised voice with her, then returning and "having a go" at Mr Cocker for not supporting her, in what Mr Cocker described as a "firm" way. Ms Downs confirms this account, though denies shouting on that occasion also.

54. At some point, the Claimant left the room and went to her car, calling Ms Bennett for HR advice. Ms Downs came to the door of the car (it is not necessary for us to resolve whether she did so once or twice), saying that the Claimant should return to work. Ms Downs agrees that she may also have said that she would be taking things further with HR. We find that she did. The Claimant said that she had spoken to Ms Bennett, was feeling unwell and would be going home. Ms Downs returned to the building, not least because she had to make sure the activity for the service users was covered, and the Claimant had to follow her to ask a colleague to move their car. Several statements from a later investigation refer to the Claimant using the f-word on returning to the building, in front of a service user and/or their relative – see page 139 for example. The Claimant agrees that it looks like she did, though says she wasn't aware of who was present.

55. We find that the Claimant did use the f-word as described. As to the tone of the earlier meeting with Ms Downs, we find that neither party was shouting at full volume but, taking account of how the Claimant was affected by the exchange (see below) and of the previous incident with Ms Witts, we conclude that Ms Downs did significantly raise her voice, including in relation to ML, intending to be firm with the Claimant. We accept that the Claimant felt intimidated as a result, that her anxiety levels were raised and we conclude that she in turn raised her voice above normal conversational levels. It became a heated exchange.

56. The Claimant's complaint about 20 January concerns, in summary, the content of the discussion with Ms Downs regarding ML and the manner in which Ms Downs conducted their exchanges generally.

Lack of support following 20 January 2016

57. It is agreed that during their telephone conversation on 20 January, Ms Bennett informed the Claimant that she would ask Ms Downs what was meant by "further action" if the Claimant left work. After speaking to Ms Smyth for advice, she called the Claimant back to request a statement, and also said the Claimant should go home if she needed to.

58. Later on 20 January, the Claimant emailed Ms Bennett (page 140) asking what any statement would be used for. Ms Bennett replied (page 140) on 25 January to say it was "to allow us to investigate the matters you brought to my attention". The statement sent to Ms Bennett on 26 January is at pages 205 – 206; it referred several times to Ms Downs shouting and how the Claimant had felt unwell. Ms Bennett says that she did not play a part in deciding what would happen next.

59. The Claimant's complaint is that there was no follow up conversation of any description about what had happened on 20 January, to check on her wellbeing and address the concerns she had raised in her statement. That is clearly correct. The Respondent (Ms Smyth in particular) asserts that the Claimant cannot have felt unsupported because she returned to work immediately. It is agreed that her interactions with Ms Downs were much reduced from this point. Ms Swindell became

her line manager, and both for this reason and because she was aware an investigation was taking place, Ms Downs gave the Claimant a "wide berth".

60. When the Claimant saw that her wages had been reduced to reflect the time she took off on 20 January, she emailed Ms Bennett asking for an update about what was being done with her statement but got no response. She also felt there was a lack of reassurance from the Respondent regarding arrangements for working with ML, though as it turns out she did not have to work with him again from that point. She emailed Ms Bennett again on 9 March 2016 (pages 162 – 163) to ask about follow up to her statement. Ms Bennett replied to say she would look into the matter and get back to the Claimant as soon as possible. Ms Bennett was aware no investigation had been arranged, and says that perhaps she should have explained the situation. The Claimant chased Ms Bennett again on 27 March – the email is not in the bundle, but Ms Bennett did not dispute that it was sent. She did not reply.

Capability procedure

61. Page 37 sets out a report of Michael Edwards, the Claimant's consultant orthopaedic surgeon, dated 21 October 2015. It records the Claimant's account of modifications having been made at work so that "she does not have to perform heavy lifting tasks or restrain patients", and that she was "happy to continue at work as long as her duties relating to heavy lifting or restraint are modified". The Respondent had clearly modified the Claimant's role some time before, specifically by assigning her to lower risk service users, although nothing had been documented and there had been no risk assessment.

62. In September 2015, the Claimant had to restrain a service user, SP, and had aggravated her wrist. As appears at page 102, a risk assessment took place on 8 September 2015. It stated, "Lifting or pushing of objects that presents a significant risk of injury must be avoided". Ms Downs said in evidence that the risk assessment said the Claimant should not carry out any one to one work with service users, though actually it does not do so. It appears to have been reviewed by Ms Swindell, though without reference to the Claimant, on 2 February 2016 – it noted that there was no change.

63. The Respondent concluded that the Claimant should no longer work with SP, Ms Downs' evidence being that management decided to modify the Claimant's role so that she had no one-to-one work at all, and would work with the least challenging service users in group activities. Ms Downs is recorded as saying in the supervision of 7 September 2015 (page 96), "I have ensured Bev is on the time table with individuals who present less CB", but there is nothing in the note expressly referring to the Claimant not carrying out one-to-one work. In fact, the Claimant continued to provide one-to-one support to a service user – this was unchallenged evidence – though Ms Downs said she was unaware of this, which we also accept. Shortly after 20 January 2016, Ms Swindell brought a halt to this work, ostensibly because of concerns about the Claimant's wrist. The supervision on 2 February, at pages 145 – 146, records the Claimant as asking "why she is not working with RB, SP and ML on timetable [i.e. on group activities]". Ms Swindell explained that this was due to the Claimant's wrist and her being "unable to perform any type of physical intervention … [and] the risk of injury to her wrist".

64. The Claimant sent Michael Edwards' report to Ms Downs on receipt, and had to re-send it in December 2015. In January 2016, she was referred to occupational health. The resulting report is at pages 38 – 41 and is dated 29 January 2016. It states "She has expressed concern regarding undertaking restraint at work … the only work adjustment that would be likely to be necessary in this case is avoidance of

vigorous restraint at work … it is likely to be the case that very gentle restraint is manageable".

65. Nearly three months later, on 12 April 2016 (pages 167 – 8), the Respondent, in the person of Ms Bennett, wrote to the Claimant in response to the report. Apologising for the delay, the letter explained that a "formal" meeting was to be held to "discuss issues in relation to your capability and ability to undertake the full range of your duties in your role as a Flexible Support Worker. We will be discussing the content of the Occupational Health Report and the temporary adjustments which are applied to your role at present. //Please be advised that the options available as a result of this discussion may be that your health has improved and that you are able to resume the full range of your duties as a Flexible Support Worker within a reasonable time frame. In the event that you are unable to do so we would look for opportunities to continue with the amended duties or seek to redeploy you into a suitable alternative role. In the absence of a return to the full range of your responsibilities or suitable alternatives, your employment may be deemed to be at risk on the grounds that you are unable to fulfil the full range of your duties as a Flexible Support Worker. //Please be reassured that a decision on this will not be made until you have had a full opportunity to put your points forward and the meeting has been concluded".

66. The meeting took place on 20 April 2016. Ms Bennett could not explain the delay from receipt of the report to convening the meeting; she could only think it was down to workload. Ms Smyth says it was due to other things happening within the organisation, by which we take her to refer to a restructuring programme (see below) – though she also said that a former HR colleague Loretta Short should have dealt with the matter in a timelier manner.

67. The notes of the meeting are at pages 169 – 170. Having discussed her wrist injury and its effects, the Claimant referred to the circumstances which led to the risk assessment. There was then a discussion of CALM (Crisis, Aggression, Limitation and Management) techniques, a new form of restraint being introduced by the Respondent at the time. Ms Downs said that they were "very wrist based" and that this may be problematic for the Claimant in terms of both training and implementation. The Claimant was told that there were four potential outcomes from the meeting. The first was that her condition improved so that she could "return to normal duties", i.e. with the existing amendments removed. The second was that the Respondent would continue to offer amended duties – the Respondent would have to consider whether this could be sustained long-term. The third was redeployment to a role without service user contact. The fourth was termination of employment. The meeting concluded with the Claimant saying that she did not want the process to drag on. Ms Bennett replied that the Respondent would move as quickly as possible but needed time to consider the options.

68. As for other roles, Ms Bennett had been in touch with a colleague, Linsey Atkins, about a potential role as a family hub co-ordinator. The Claimant was asked to make enquiries about the role following the meeting, as confirmed by Ms Downs' evidence that whilst she gave the Claimant her brief understanding of the role she made clear it was for the Claimant to liaise with Ms Atkins. Ms Atkins advised the Claimant that there was no actual role at that time; a possible role might emerge, but it would require a considerable pay decrease on the basis of fewer hours, and those hours would also be unsociable. Ms Smyth says that the Claimant could have combined more than one role as family hub co-ordinator but was not able to say that this was made clear to the Claimant. We find that it wasn't.

69. Ms Bennett's evidence was that she was not aware of any other roles which the Claimant could have been considered for between September 2015 and April 2016, though she had not looked for roles before the meeting on 20 April on the basis that the Respondent needed medical evidence of the need for the Claimant to be redeployed. For some time after the meeting she kept a close eye on what roles might be available, but not up until the Claimant's employment terminated on 13 June. Ms Smyth's statement refers to the Claimant being "encouraged" to apply for new roles (paragraph 12), which she explained in oral evidence meant that they were posted on the Respondent's intranet. She added that the options for redeployment even from September 2015 would have been limited, because most opportunities are in frontline services. The Claimant was not aware of a Day Service Manager role that became available around this time. Ms Downs says the role was concerned with engagement and funding streams, and thus completely different to roles previously undertaken by the Claimant, which we accept.

70. The follow up letter to the meeting of 20 April is at pages 171 – 172 and dated 22 April 2016. It stated as follows: "Since January 2015 it had been agreed that you would not work with any 1:1 service users who display challenging behaviours. This arrangement has continued to the present day and is considered to be a temporary arrangement only". Ms Downs' explanation in evidence of why it became necessary to change an arrangement that had been in place for 15 months was that the incident with SP (in September 2015) led to the Respondent wanting to "firm up" on safety. She added that she could not foresee the arrangement being permanent because of the nature of the client group and the need for staff flexibility, but did not think the Claimant was ever made aware the arrangement could not continue; we are clear that she wasn't. Ms Smyth concedes that there was no documentary record to this effect. The letter of 22 April concluded, "You were informed that we would make a decision on how to progress this matter once the CALM health assessment has taken place", and once the Respondent had had time to consider the occupational health report and the discussion at the meeting. "You will of course be contacted to attend a further meeting".

71. The Claimant's view was that she could continue supporting enough less challenging service users to fill her two days per week. From the Respondent's point of view, that would only be possible if she could undertake the CALM training. Ms Downs says that no-one could continue using the previous restraint regime, known as ASPIRE, particularly because having some staff using the previous technique and some using the CALM technique would be problematic and potentially unsafe. Ms Smyth says, and we accept, that the Respondent's CALM licence requires all frontline staff to be trained in the system.

72. The Claimant did her CALM theory training in February 2016. On 3 May 2016 she signed the form at page 190. In answer to the question, "Do you consider yourself to be in good health with no [medical issue] which would be relevant to participating safely in a physical training course involving a number of different repetitive movements?", she ticked "No". She says in her statement, and we accept, that the CALM training provider suggested she sign the form in this way, the Claimant having said that any heavy lifting or pressure caused her pain. By whatever means, the Respondent became aware of how the form had been signed. Ms Smyth says that this was the point at which it became clear that the Claimant's adjusted duties could only be temporary.

73. In summary, the Claimant says the Respondent had not raised with her before the April meeting any long-term implications for her employment of the limitations on her duties arising from her wrist injury; it appeared to her that these discussions were escalated following what happened with Ms Downs on 20 January. She also says

the Respondent had not considered alternative roles for her prior to April 2016, when nothing was available. Nothing further happened in relation to the Claimant's capability to carry out her role up to point she left the Respondent's employment on 13 June.

Meeting 10 May 2016

74. In May 2016, the Respondent embarked on an investigation into the events of 20 January 2016 carried out by a senior employee, Keith Lancaster. He was not a witness at the Tribunal; he left the Respondent's employment in December 2016.

75. Ms Smyth says that the Respondent had already conducted an "initial fact-finding" exercise following the concerns raised by both the Claimant and Ms Downs. This resulted in the email at page 224 sent by Ms Bennett to Ms Smyth and a senior colleague, Mary Stanley, referring to the Claimant's email of 8 March chasing progress (page 225) and stating that Ms Downs had also enquired what investigation was being done. Ms Bennett also referred in this email to various statements she had "already passed up", from the Claimant (pages 205 – 206), Ms Downs (pages 132 – 134), Ms Bennett herself (page 135), Ms Yates (pages 137 – 138) (all prepared in January) and two people who had witnessed some of what happened on 20 January, Michelle McGregor (pages 150 – 151) and Dan Smith (page 139), prepared in mid-February.

76. No explanation was given to the Claimant for the delay. Ms Smyth offers two explanations. First, around the time she joined the Respondent in September 2015, a large restructuring got underway – Ms Smyth was heavily involved in this as HR lead. Secondly, following the initial fact-finding, the senior manager to whom the matter was referred was required to begin completion of the investigation pro-forma at pages 207 – 209, and initiate the formal investigation process. Mary Stanley began to complete the pro-forma and passed it to a senior manager, Karen Barnes, who decided she could not carry out the investigation and so it was passed to Mr Lancaster instead.

77. The bundle includes notes of interviews conducted by Mr Lancaster with a number of staff on 3 and 10 May 2016. The note of the interview with Ms Downs on 3 May 2016 is at pages 183 – 187. Most of the discussion focussed on the events of 20 January, including the background with ML. At page 186, Mr Lancaster is noted as asking whether the Claimant is generally a negative influence and whether she has any "allies". Ms Downs was recorded as replying "everybody hates her". She does not remember saying that but says she did say the Claimant was disliked. We have no reason to doubt that the notes accurately record what was said.

78. Mr Lancaster met with the Claimant on 10 May (pages 195 – 199). The letter of 26 April 2016 (page 223) inviting the Claimant to the meeting stated that it had been "arranged because we are in the process of investigating allegations that have been made relating to your conduct and attitude in the workplace", that the meeting was "entirely a fact-finding exercise" and so not part of the formal disciplinary procedure, and that if thereafter the Respondent "wishes to institute disciplinary proceedings against you, you will be invited to attend a formal disciplinary hearing at a later date". The Respondent's disciplinary procedure (pages 49 – 53) says "at all stages of the procedure, an investigation will be carried out" and that then the Respondent "will notify the employee in writing" of the allegations against them "and will invite the employee to a disciplinary hearing to discuss the matter".

79. Loretta Short emailed the Claimant on 6 May 2016 (page 193), in response to the Claimant asking about the purpose of the meeting (page 194), to say that it was a

"fact finding exercise to explore some concerns that have been brought to our attention". The Claimant asked for the Respondent's disciplinary policy by email on 10 May 2016 – page 191. Ms Short replied saying "The meeting is an initial investigation meeting which at this stage is purely fact-finding, at the point at which all facts are established fully a decision will be made whether or not a more formal procedure will be followed, if so you will be provided with all the relevant policies and procedures". Ms Smyth's evidence was that if the Claimant had been subject to an interview under the disciplinary procedure she would have been given the policy – though she accepts it should have been given in any event. Her statement (paragraph 17) refers to the Claimant having been subject to a "disciplinary investigation"; in oral evidence, she said that this was clumsy wording on her part and it should have said the Claimant was subject to an "investigation".

80. Ms Bennett described what was sent to the Claimant on 26 April as "a standard letter". One type of standard letter is sent to potential witnesses; another type of letter – that sent to the Claimant – goes to the person whose conduct is in question. As to why a similar letter was not sent to Ms Downs, Ms Bennett says that she can only assume it was because of "the other issues". Ms Smyth says that Ms Downs and the Claimant were not treated differently because both were interviewed, and because the investigation was concerned with the events of 20 January generally, including Ms Downs' involvement. Her evidence was that the form at pages 207 – 209 was a single proforma for the whole investigation, as the description of the scope of the investigation includes the statement, "conduct and behaviour which breaches professional boundaries", which could have been applicable to both employees. She accepts that Ms Downs was sent the letter for potential witnesses, but says that if Mr Lancaster thought – having spoken to the Claimant – that he needed to interview Ms Downs about her conduct, he would have done so. The Claimant does not accept that the Respondent should have investigated her conduct on 20 January at all, as she felt she had done nothing wrong. She accepts however that if she had sworn it would have been appropriate to speak with her about that – though she would have expected this to be done sooner.

81. In addition to the events of 20 January, there were a number of other matters that were also raised by Mr Lancaster at his meeting with the Claimant. Concerns about the Claimant's conduct had routinely been raised at supervision meetings – page 96 for example. Ms Smyth accepts that the Claimant would have expected the meeting on 10 May to be just about the events of 20 January, but says that as other issues came out of the other interviews, it would have been Mr Lancaster's decision what to pursue.

82. One such issue was the training event of 19 January 2016. Ms Yates' statement (pages 173 – 174) was essentially the same as her contemporaneous statement in this regard. Ms Smyth agrees that in the absence of relevant documentation in the bundle it appears that Mr Lancaster decided not to interview the other staff who had also been vocal during the training. The Claimant was asked about using her laptop at the training session, which had been discussed at her 2 February 2016 supervision (pages 145 – 147) with Vicky Swindell. Ms Smyth does not accept that this meant the issue had therefore been dealt with.

83. Another issue raised with the Claimant was her private business, Forever Living. Clause 2.4 of the Claimant's employment contract (page 43) said "The employee must not work for another employer nor carry out any other activity, whether for personal gain or not, during the hours when he/she is contracted to work to [the Respondent]". The Respondent also has an outside interest policy which (page 66) says, "During your period of employment, you must not engage in any other work or activity (including self-employed activities ...) outside working hours,

whether paid or unpaid" without permission and that breach of the policy is a disciplinary offence. It is not clear to us whether the policy was in existence at the time, though the Claimant agrees that she knew any secondary work had to be disclosed.

84. Ms Downs knew about Forever Living, not least because she had purchased products from the Claimant and allowed her to display them. Although Forever Living was discussed in her investigatory interview with Mr Lancaster, Ms Downs did not say she had purchased goods nor that she knew about the business. Her evidence to the Tribunal was that staff had reported to her in Summer 2015 that the Claimant was working on the business during the Respondent's time, at which point she spoke to Ms Bennett. She then asked Vicky Swindell to ask the Claimant to "calm it down", i.e. "not do so much of this in working time". She did not chase up whether this was done because "other investigations" were going on, but was clear that it was not an ongoing issue for her after July 2015, even though in an email in March 2016 at page 229 she raised the matter with colleagues again. Ms Smyth says in her statement (paragraph 17) that this was one of two issues that would have gone forward to a disciplinary hearing had the Claimant remained employed.

85. Mr Lancaster also asked the Claimant (page 198) about certain issues with service users DW and LH. The Claimant could not recall the incidents, nor was she told why she was being asked about them.

86. As appears at page 199 the Claimant asked at the end of the meeting if only she was being investigated or whether others were as well. The note records Mr Lancaster's response as, "currently facts were found through meetings on a range of concerns, and all information gathered is being considered going forward before completing the investigation". The Claimant says the meeting left her feeling like there was a witch-hunt. Mr Lancaster completed the proforma, recommending (page 207) that the Claimant be called to a disciplinary hearing. This was not seen by the Claimant at the time. The Respondent says it would not have been a potential dismissal situation; this was not communicated to the Claimant either. There is no mention in the proforma of Ms Downs' conduct on 20 January. Ms Smyth says that ideally Mr Lancaster would have made clear that he was exonerating Ms Downs, but the fact he didn't mention her shows that he did not feel there was an issue with her behaviour. Ms Smyth added that in any event, the senior manager to whom the proforma was submitted could have taken the view that Ms Downs' conduct had to be addressed as well. The Claimant heard nothing further about the matter from 10 May until her employment terminated on 13 June.

<u>Service user KB</u>

87. Funding had been made available to enable the Claimant to work with KB from November or December 2015, on one of her two days per week. The other day was spent working with various service users at the Respondent's premises at Raines Avenue. In May 2016, the Claimant arrived for work one morning to be told that she would no longer be working with KB, as KB wanted to switch her supported hours from Tuesdays, when the Claimant saw her, to Wednesdays.

88. Ms Downs says that the Claimant needed to be available to support the Wednesday timetable with other service users when there were lots of activities going on and new service users coming in. She asked Mr Cocker to assess and cost KB's requirements, so that the Respondent could arrange for someone else to support her on Wednesdays. Mr Cocker was not given a rationale by Ms Downs as to why the Claimant could not continue supporting KB. He suggested in evidence it might have been more cost-effective but couldn't explain why. The Claimant

attended a meeting with KB along with Mr Cocker, which did not go well; KB was very upset about the new arrangement.

89. The Claimant believes she could have continued working with KB on Wednesdays to provide continuity. Ms Downs says that she was not the right person to provide continuity anyway because of her sickness absence record. Page 126 suggests the Claimant had not taken significant absence. Ms Downs says that there could be times the Claimant went home which were not logged on the Respondent's system, but concedes that there were not many such occasions. Ms Downs also mentioned in her interview with Mr Lancaster, at page 185, her suspicion that KB's wish to move to a Wednesday session was influenced by the Claimant for some reason connected with Forever Living, and confirmed in evidence to us that she was mindful of this when deciding the Claimant could no longer work with KB, though it was not the main reason. The Claimant says the decision that she could no longer work with KB was the last straw as far as she was concerned because the Respondent was treating a service user so badly. KB herself says in her statement that the abruptness of the decision caused her extreme anxiety.

90. The Claimant carried on working, two days per week, for a very brief period in May 2016. Thereafter she was on annual leave on 7 and 8 June, and otherwise on sick leave to the effective date of termination. On 13 June she sent an email to the Respondent (a Jane Howson) which was headed, "Perusal (sic) of a constructive dismissal claim", and in part stated, "Following behaviours I have been subjected to in recent months and beyond I feel the working relationship has broken down to the point I can no longer undertake employment within the company. The breach of confidence and trust I have now for the company has had a significant impact on my psychological and emotional wellbeing to the point I have been seriously ill and the basic rights I should expect to receive as an employee of Autism East Midlands has fallen far short of meeting my needs as an employee as well as your commitment to me from an organisational point of view. // … if an agreement cannot be reached I will … pursue a claim for constructive dismissal as I believe this to be the intention of the company for some time now. I have documented evidence which supports my claim as well as the investigation I have been subjected to and still awaiting an outcome, I'm sure you can appreciate as a sufferer of anxiety to be left in limbo after attending a meeting which was very accusatory in the tone of the meeting has not helped my current health. // … the organisation and the behaviours of managers have made my position untenable …".

91. It is unnecessary for us to rehearse the details of the correspondence between the parties that followed that email.

Law

92. Section 95(1)(c) Employment Rights Act 1996 ("ERA") provides that an employee is dismissed for unfair dismissal purposes if "the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". Widely known as "constructive dismissal", the test for establishing dismissal in these circumstances is that given in ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***. It is not necessary to refer to this and subsequent approving authorities in detail. It is sufficient to say that they make clear that in order to establish constructive dismissal there must be a repudiatory breach of contract by the Respondent – in other words, conduct going to the root of the contract or which shows that the Respondent no longer intends to be bound by it; the Claimant must have resigned in response to that breach; and if the Claimant has affirmed the contract of employment after the breach, constructive dismissal will not be made out.

93. As is clear from her resignation email, the Claimant in this case relies not on any express terms having been breached by the Respondent, but on the key implied term of trust and confidence. The existence of this term is of course undisputed by the Respondent. The term is, more precisely, a term implied into every contract of employment to the effect that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (***Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, Malik v BCCI SA (in liquidation) [1997] ICR 606***).

94. The Claimant in this case argues that there was a series of issues, which taken together destroyed her trust and confidence in the Respondent. Any breach of the trust and confidence term is fundamental and repudiatory (***Morrow v Safeway Stores plc [2002] IRLR 9***). Whether there has been a breach of this crucial term has to be judged objectively: in the ***Woods*** case, it was said that Tribunals must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the employee cannot be expected to put up with it". It is not relevant in doing so to consider whether the employer intended any repudiation of the contract – **Woods** as confirmed in **The Leeds Dental Team Ltd v Rose [2014] ICR 94.** A Tribunal's focus must be on what the employer did, assessed cumulatively and overall, and assessed objectively.

95. It is also well-established that the matter which finally results in the employee deciding to resign (usually referred to as "the final straw"), does not have to be of itself a fundamental breach of contract, and in fact does not even have to be blameworthy behaviour by the employer at all. It must nevertheless be an act in a series whose cumulative effect is to breach the implied trust and confidence term, and must contribute something to that breach, however slight, although what it adds may be relatively insignificant. An entirely innocuous act will not be sufficient (***Omilaju v Waltham Forest London BC [2005] ICR 481***).

96. As noted, if a repudiatory breach of contract has been established, it must then be considered whether the Claimant accepted that repudiation by treating the contract of employment as at an end. She must have resigned in response to that breach, though that need not be the only reason for the resignation: it is sufficient that the repudiatory breach played a part in the resignation - **Abbey Cars (West Horndon) Ltd v Ford [2008] UKEAT/0472** and **Wright v North Ayrshire Council [2014] ICR 77**.

97. It must also be considered whether the Claimant has affirmed the contract after any breach, because if she has done so, any right to accept the Respondent's repudiation of the contract by resigning and claiming to have been constructively dismissed is lost in relation to that breach. Affirmation can be express, or it can be implied from the Claimant's conduct, where she acts in a way which is only consistent with the continued existence of the contract. Mrs Cakali referred to the EAT's decision in **J V Strong & Co Ltd v Hamill [2000] EAT/1179/00.** The EAT upheld the Tribunal's finding of unfair constructive dismissal in that case, on the basis that it was entitled to find that a series of acts by the employer viewed cumulatively breached the implied term of trust and confidence. It then went on to consider the relationship between "the principle that there can be a series of incidents, none of which in themselves constitute serious breaches, but which combined together breach the [trust and confidence term] … on the one hand and the principle of waiver, on the other". It went on to say that a Tribunal in that situation "must look and see if the final incident is sufficient of a trigger to revive the earlier ones [by looking at] the quality of the incidents themselves, the length of time both overall and

between the incidents", together with what it called "any balancing factors" which may have been a waiver of earlier breaches. It should also be considered, the EAT said, "Is it a once for all waiver, or do the circumstances give rise to the implication of a conditional waiver, for instance a waiver subject to the condition that there would be no repeat of similar conduct … or that [the employer] would not continue the lack of support".

98. Delay can be evidence of affirmation, but in **W E Cox Toner (International Ltd) v Crook [1981] ICR 823,** the EAT held that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Mrs Cakali referred to another EAT decision in **Fereday v South Staffordshire NHS Primary Care Trust [2011] EAT/0513/10,** in which it was made clear that affirmation is a fact-sensitive matter, and can be implied by prolonged delay and/or if the employee calls on the employer for further performance, which is what had happened in that particular case.

99. As already noted, the Respondent does not contend that if the Claimant was dismissed the dismissal was fair. It is therefore unnecessary for us to say anything about section 98 ERA.

Analysis

100. Our first task is to determine whether there was a repudiatory breach of contract by the Respondent. This requires us to analyse in turn each of the matters the Claimant relies upon as cumulatively amounting to a breach of the duty of trust and confidence, though as noted above, answering the question of whether that term has been breached requires us to look at the Respondent's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the Claimant could not have been expected to put up with it. We must therefore look at the detail, but not lose sight of the overall picture.

101. In relation to the employment project, we have found that there was no promise from the Respondent that it would continue – though it was hoped it would. The supervision notes we have referred to show that clearly. No explanation was offered to the Claimant as to why she was pulled out of the meeting with the potential third party provider, which was not best practice and does seem to have marked the start of a deterioration in her relationship with Ms Downs, but of itself it was not a breach of contract. There was no evidence that the Claimant's duties were changed more than those of her colleagues, though any changes of this nature were bound to be felt more by someone working on timetable only one day per week (her other day being dedicated to particular service users) than, say, someone working full-time.

102. The Claimant was kept reasonably well-informed about what was happening with the employment project, her shift changes were no more than one would expect in a role of this nature, and therefore there was no breach of contract in this regard, nor judged sensibly could these matters be said to contribute to a breach of the duty of trust and confidence.

103. There are two matters for us to consider in relation to 20 January 2016. First, there is the question of how Ms Downs dealt with requiring the Claimant to lead the activity involving ML, and secondly there is the question of the altercation between Ms Downs and the Claimant generally.

104. It is agreed, perhaps with different emphases, that ML was a challenging service user and, whatever the accuracy of the information staff had gleaned about it,

it was well-known that he had been involved in a serious incident with a member of staff before. We are in no doubt that the Claimant was therefore anxious at being told that she would be leading the activity in which ML would be involved. He had been discussed in team meetings, though not in detail, and whilst a file existed, the Claimant had not seen it. The Claimant could have been given time to prepare for the activity, but was not offered that option. Whether or not the discussion had moved on to the training event, and whether or not the Claimant had worked in similar activities before, Ms Downs knew the Claimant needed to be well-prepared for what she was asked to do. Whilst we accept of course that it would not always be possible for the Respondent's employees to be given advance notice of changes to working arrangements, in these circumstances it was in our view a mishandling of the situation not to offer the Claimant clear guidance, further reassurance and in particular the clearly available option of reviewing the file or at least more time to prepare for the activity. The Claimant's trust in Ms Downs, and thus in the Respondent, was clearly affected by the way in which this matter was handled, and objectively assessed we do not find that surprising.

105. As to the altercation generally, we have found that both Ms Downs and the Claimant raised their voices beyond appropriate levels, Ms Downs during the part of the conversation concerning ML and then both thereafter. We do not overlook the Claimant's part in how this meeting developed, but it has to be remembered that Ms Downs was the manager, the senior party, in this exchange. We also note again that, as the Claimant accepted, subsequently swearing in the presence of a third party was manifestly inappropriate, and we are also of the view that there was nothing untoward in Ms Downs informing the Claimant that she would have to take things further if the Claimant left work. Although she had effectively been given permission to do so by Ms Bennett, it was entirely proper that Ms Downs would need to raise the matter with HR. That said, the meeting between the two was not managed at all well and we accept as again entirely unsurprising that the Claimant was intimidated by what happened and that her anxiety levels were raised.

106. There is then the question of how the Respondent dealt with the aftermath of 20 January. Ms Bennett's guidance to the Claimant given by telephone on the day was neutrally supportive as one would expect. This included requesting a statement from the Claimant, and from Ms Downs and others, but there was then no follow up conversation with the Claimant, either when she was next on shift or when she had provided a statement clearly expressing serious concerns about how she had been treated both in relation to being asked to work with ML and more generally. This was a statement which included repeated references to her manager shouting at her and to how she had felt anxious and unwell.

107. Notwithstanding the statement, there was, it is clear, an ill-founded assumption on the Respondent's part that because the Claimant was at work everything was well. We do not say that the Respondent could sensibly have been expected to inform the Claimant that her conduct would not be investigated – it was perfectly proper to do so – but given what the Claimant had said about the events of 20 January and given the Respondent's case that any investigation was to be entirely neutral (at least at the initial stage), it was incumbent on the Respondent to at the very least make clear to the Claimant how the matter would be dealt with and how her serious concerns would be addressed. The very long delay in any substantive follow up, and the complete failure during this period to check on her wellbeing or at the very least explain to her what was going to happen, was in our view objectively likely to undermine the Claimant's trust and confidence in the Respondent as her employer, and it plainly did so. It is a separate question whether the contract was subsequently affirmed; we return to that below.

108. It is also appropriate to note that the Respondent failed to follow up the Claimant's perfectly proper concerns about the risks she felt unprepared to manage on being required to lead a session involving ML. Whether or not as things turned out she did not have to work with ML again, not to address those concerns having asked for them to be put in writing, not least so that there could be an agreed basis on which such problems would not arise again, was also objectively likely to undermine the Claimant's trust in the Respondent's management of her employment.

109. We now turn to consider the capability procedure. It is of course entirely proper for an employer to address issues that might give rise to risk to an employee and/or to their colleagues and service users, and entirely proper to tackle any question about whether an employee is able to perform the duties of their employment. It would be a very rare case where doing so would of itself give rise to a breach of trust and confidence, or contribute thereto. It is the manner in which the Respondent did so that the Claimant calls into question in this case.

110. Adjustments having been made to the Claimant's duties from January 2015, she carried on working with service users on a one-to-one basis even following the incident with SP which led to the risk assessment in September 2015, until her one-to-one work with another service user was brought to an end four months later, in January 2016, by Ms Swindell. The Claimant was by that time working one-to-one with KB, on work that was essentially related to the employment project. The Respondent did not arrange an occupational health assessment until more than four months after it had first been sent Michael Edwards' report, nearly five months after the risk assessment and a year after the Claimant's duties had first been adjusted. Having engaged the Claimant on amended duties for that length of time (albeit from February to May the Claimant was working on the employment project), and having by its own admission never made clear that the adjustments were temporary in nature, the occupational health referral and even more so – following further delay – the "formal meeting" to discuss the matter, clearly signalled a substantial change of approach. We heard of no explanation being offered to the Claimant as to why a situation that had prevailed for a year by the time of the occupational health referral, and fifteen months by the time of the letter convening the meeting in April, was now under review.

111. That is consistent with the Respondent's unclear evidence to the Tribunal on this point. Ms Downs said it was the incident with SP that changed the position, but as we have noted this was more than four months previously and, whether Ms Downs knew about it or not, from the Claimant's point of view she had been allowed to continue working one-to-one with another service user. Ms Smyth on the other hand said that it was the Claimant's statement about the practical CALM training that changed things, but that was not until 3 May. The significant and unexplained change in approach was clearly of concern to the Claimant. So too was the timing. The occupational health referral documents at pages 116 to 126 are undated, but the assessment clearly took place at around the same time as the events of 20 January. It is unsurprising therefore that the Claimant asserts that the management of her condition was escalated because of what had happened between her and Ms Downs. Whether that was the case or not is unclear, and not necessary for us to decide, but an unexplained intervention by the Respondent in respect of a longstanding arrangement would certainly tend, objectively assessed, to foster an understandable lack of trust, creating concerns that go beyond those which one would normally expect to be associated with a referral to occupational health.

112. It was almost a further three months before the Respondent communicated any further with the Claimant. Delay of this nature very much tends to create uncertainty, and a lack of confidence where it is wholly unexplained. In April 2016, the Claimant

was called to a formal meeting and told for the first time that the Respondent may not be able to continue with the adjusted duties. In addition to the natural concerns this created, the way the Respondent dealt with the matter meant the Claimant lost the opportunity to be considered for other roles that may have been available had it made clear that the adjustments were temporary and, if it intended to address the situation as it eventually did, had it done so sooner. We accept that most vacancies involve working directly with service users, but the fact is we simply don't know – the Respondent itself was unable to say – what was available from January 2015 when the "temporary" arrangements were made or even from September 2015 when the risk assessment took place, because as Ms Bennett made clear no search had been made before April. Even then the Respondent largely left to the Claimant the task of pursuing possible alternative roles; apart from Ms Bennett's pre-meeting conversation with Ms Atkins, the Respondent does not appear to have taken a pro-active approach to the consideration of alternative options for the Claimant at all.

113. The matter of the CALM training was legitimately raised by Ms Downs on 20 April (page 170), and it is certainly not for us to suggest what methods of restraint the Respondent should employ. The fact remains however, that the Claimant having by agreement been left to discuss the matter with the CALM trainer, there was no follow up discussion about the implications of her signing the form at page 190 on 3 May 2016 as she did. In fact, there was no follow up at all by the time the Claimant resigned around six weeks later. Whatever the requirements of CALM, the Claimant was once again left in a position of considerable uncertainty, not least because the letter of 22 April made clear that one option that remained open was the continuation of adjusted duties.

114. We have noted Ms Smyth's explanation of the delay in dealing with these matters, and we certainly appreciate the many demands on employers, including HR teams. The fact remains however that not intending to undermine the Claimant's trust and confidence does not assist the Respondent as the case law makes clear, and in any event Ms Smyth accepted that the whole process should have been dealt with sooner and more quickly than it was. Judged overall, and for the reasons we have given, the Respondent's handling of the capability issues can sensibly be said to legitimately have undermined the Claimant's trust in the Respondent's willingness and ability to deal with the matter effectively and fairly.

115. We next turn to Mr Lancaster's investigation. The Claimant's statement was obtained in January 2016. After that, she was left in limbo until she received the letter dated 26 April (page 223) and attended a meeting with Mr Lancaster on 10 May. Even putting to one side the question of how a delay of almost four months would have affected the quality of the evidence, it was certainly likely to diminish the Claimant's trust in the Respondent to be left without explanation of what was happening for such a long time. The Claimant had raised serious concerns and had a legitimate expectation they would be investigated. Twice she enquired of Ms Bennett what was happening; twice Ms Bennett was unable to give a substantive answer. Again, we acknowledge the explanations of the delay given by Ms Smyth, but again we note that the absence on the Respondent's part of any intention to undermine trust and confidence is nothing to the point.

116. It is clear to us that Mr Lancaster's investigation was concerned only with the conduct of the Claimant – the contents of the proforma document at pages 207 – 209 and Ms Smyth's witness statement make that absolutely clear, despite Ms Smyth's attempts to explain it in a different light. Of course, the Claimant did not see the proforma, but the content of the 26 April letter was similarly clear: she was being investigated under the disciplinary procedure, because the letter told her very clearly that her meeting with Mr Lancaster might be followed by a disciplinary hearing – not

a further disciplinary investigation as Mrs Cakali suggested. No, or certainly no clear, explanation was given to the Claimant before or during the meeting with Mr Lancaster of how the situation had transformed from her complaints about what had happened on 20 January to a disciplinary investigation in relation to her conduct. It certainly ought not to be for an employee in those circumstances to guess. The letter convening the meeting told her one thing – it was a disciplinary investigation; Ms Short's emails and the comments made by Mr Lancaster at the end of the meeting (page 199) suggested something else, namely some kind of neutral fact-finding process. We reiterate that we are not saying the Respondent should not have investigated the Claimant's conduct. The point is that the basis on which the meeting was to be held was unsurprisingly unclear to the Claimant, and at no point was she told that the concerns she had raised were also being investigated.

117. Then there is the content of the meeting. Ms Smyth agreed that the Claimant would legitimately have expected the meeting to concern only the events of 20 January. When a number of other conduct issues were also raised with the Claimant it took her completely by surprise. The context in which they were being raised should certainly have been made clear, and it is also of concern that some of the matters had already been discussed in supervisions – for example the use of the laptop during a training session – such that the Claimant could legitimately have expected that they had been dealt with. The same is true of the concerns about Forever Living. Ms Downs' overall evidence in this regard was somewhat unclear, but she very clearly affirmed that this ceased to be an issue after July 2015. It was nevertheless a part of the disciplinary investigation, and on Ms Smyth's evidence a key part.

118. The Claimant was also refused a copy of the Respondent's disciplinary procedure. Of itself this was not the most serious omission but not least given the evident confusion about the purpose of the meeting the Claimant had been called to, it should have been provided – as Ms Smyth conceded. At the end of the meeting on 10 May 2016 the Claimant asked whether she was the only person being investigated; that is consistent with the view she expressed in evidence, and alluded to in her resignation email, that this was "a witch-hunt". We are not surprised that this was how she felt when she left the meeting, given the lack of clarity about its purpose, what objectively assessed clearly had the appearance of an attempt to amass as much of a case against her as possible, and the refusal to take a simple step such as providing the disciplinary procedure.

119. Finally, we turn to the change in arrangements for KB. When exactly this took place is unclear, but it was sometime between 10 and 31 May 2016. We accept Mrs Cakali's point that this is not mentioned in the Claimant's witness statement. It is though hinted at in the Claim Form, at page 14, where the Claimant says (with reference to the period after 10 May), "I continued to be moved from service user to service user quite often with no valid reason and this was distressing … it got to the point that with everything else I had been going through, my anxiety became too great". We also note that the Claimant is not a lawyer nor in any sense professionally trained and has essentially been conducting this litigation single-handedly from the outset. In those circumstances, and also because it is clear how much she enjoyed working with KB and that doing so was getting on for half of her role, we are content to accept her oral evidence, which was insistently that this was a factor in her decision to resign.

120. It appears KB was not told that changing her day would mean she would not be permitted to work with the Claimant. That would have been evident to the Claimant from KB's adverse reaction at the meeting that followed. Ultimately, who should work with particular service users is a business decision for the Respondent, but where no

clear reasons were given to the Claimant as to why the arrangement could not continue, and where there was no exploration with KB or the Claimant as to whether the change was the best for KB in the circumstances or how the existing arrangements might possibly continue, the Claimant could legitimately be concerned about and critical of how the matter was handled. When she was already to some extent limited in which service users she could work with, the Respondent demonstrated a lack of care towards her – as well as KB – in handling the matter as it did. Ms Downs' various motives for making the change were not known to the Claimant at the time of course, but they do make it unsurprising that the basis on which the changes had been made were unclear to the Claimant and thus further eroded her confidence in her employer.

121. For the reasons just given we do not regard how the Respondent handled the KB situation as entirely innocuous. It would therefore be capable of amounting to a last straw. The prior question of course is whether the Respondent's conduct as analysed above, viewed as a whole and taken overall, was such that its effect, judged reasonably and sensibly, was that the Claimant could not be expected to put up with it.

122. In summary, this was an employee who on 20 January had a serious altercation with her manager, during which Ms Downs did not properly address the Claimant's valid and serious concerns about the work she had unexpectedly been asked to do and had raised her voice to inappropriate levels. The Claimant raised her concerns about those events in writing within a few days – as requested – and made clear that they had induced a sense of anxiety. Those concerns were not addressed and the Respondent did not provide any explanation of why this was the case or what, if anything, it intended to do. Around 20 January, and having given no indication to the Claimant that adjustments to her role that had been in place for a year were, in its eyes, temporary, the Respondent without explanation referred the Claimant to occupational health. It did nothing with the resulting report for three months, and then called the Claimant to a formal meeting, telling her for the first time that one possible outcome was the termination of her employment. The Claimant was largely left to enquire about alternative employment herself, in circumstances where she could no longer avail herself of the potential opportunities that may have arisen had the Respondent's position been made clear more than a year before. By agreement she spoke with the CALM trainer, but the implications of that conversation were not explored with her. By that time, she was also due to attend the meeting with Mr Lancaster on 10 May 2016, the basis of which was unclear and confused. That meeting justifiably left the Claimant feeling like she was subject to a very unfair process; and she still had no clear assurance that the concerns she had raised were being taken seriously and investigated.

123. That sequence of events can sensibly and objectively be characterised as evincing poor or a complete lack of communication about concerns which had been validly raised by the Claimant, coupled with long periods of delay and unexplained and thus confusing changes of approach – all of this, it must be remembered, in relation to serious issues including the Claimant's wellbeing, the instigation of capability proceedings, and the initiation of a disciplinary investigation. The failure, by and large, to proactively engage with the possible alternatives to termination of the Claimant's employment on capability grounds stood in contrast to the willingness to consider a whole raft of issues relating to her conduct, some of which had been dealt with already. Assessed overall, we conclude that this was conduct which was likely – even if it wasn't calculated – to seriously damage or destroy trust and confidence, with no reasonable and proper cause. The handling of the KB issue and the Claimant's observation of KB's reaction to this was, as we have said, a last straw – and as another unexplained decision it was of one piece with the way the

Respondent had conducted itself towards her in relation to the other issues. In short, the Respondent was in repudiatory breach of contract.

124. We are clear that the Claimant's reason for leaving her employment was at least in part the Respondent's repudiatory breach, and in fact we find it was the sole reason. She did not leave to spend more time on her own business – as she submitted, that was always something she did in her own time; after all she was only working with the Respondent two days per week. We accept that in part the Claimant left because of concerns about her health, but those concerns were inextricably linked to how she felt she had been treated. Mrs Cakali also suggested the Claimant left because she couldn't face a disciplinary process. In fact, we saw no evidence to suggest the Claimant was called to a disciplinary hearing (or, as the Respondent suggests would have happened, a further investigation meeting) before she left. In any event, the Claimant is a forthright individual who we are satisfied would have been willing to face a disciplinary hearing, were it not for the fact that she had no trust and confidence in the process, legitimately so in our view.

125. Finally, we have to ask whether the Claimant affirmed the contract. We conclude that in respect of events from 20 January onwards she did not. The first of those events was just under five months before she resigned, but the case law makes clear that mere delay is not by itself necessarily affirmation of the contract; it is important to look at the circumstances. The circumstances of this case are first that the Claimant no longer had to work to any material degree with Ms Downs (who gave her a wide berth) and also worked for much of one of her two days per week away from the Respondent's premises altogether (with KB); secondly, she raised her concerns about what happened on 20 January a few days later and chased up what was happening in that regard on two occasions in March, showing very clearly that she was not satisfied that no response had been forthcoming; thirdly, in April she was called to a disciplinary investigation meeting, which took place on 10 May. In a roughly parallel timescale she was referred to occupational health in January, called to a formal meeting about the resulting report in late April and told she would be informed what would happen next.

126. There is a clear connection between the events of late January and those of late April and early May, all of which were concerned with the management of important issues affecting the Claimant's employment. At no point did the Claimant signal an acceptance of the manner in which the Respondent was doing so. Three months is not a long period of continued employment overall, particularly for someone working just two days per week, one of which was largely off-site. In our judgment, the Claimant's continuing in employment for that period did not amount to affirmation of the contract, particularly when she was waiting for responses she had been promised in relation to both 20 January and the occupational health report, and in relation to the former had chased for progress. For these reasons, it is not appropriate in our view to separate the events in January from those in April and May, and the intervening lack of support. Even if we had only taken into account the events of April and May however, we would have found that they would have been sufficient of themselves, in the context of course of what had happened in January, to amount to conduct likely to seriously damage the relationship of trust and confidence, for the reasons we have given in our analysis of those matters.

127. Either way, once the incident with KB had taken place, it is accepted that the Claimant worked for only a handful of days before her resignation, bearing in mind her sickness absence and annual leave and, again, the fact that she worked only two days per week. She left, in our judgment, with appropriate promptness after this incident occurred.

128. In closing, we have therefore found that the Respondent was in repudiatory breach of contract and that the Claimant resigned as a result without affirming the contract by delay or otherwise. She was therefore dismissed. The Respondent concedes that any dismissal was unfair, and thus the complaint of unfair dismissal is well-founded. A further hearing will now be arranged, which if the parties are unable to resolve the matter between themselves will consider the question of remedy.

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Employment Judge Faulkner

Date 29 September 2017

JUDGMENT SENT TO THE PARTIES ON
13/11/17

....
S.Cresswell

....
FOR THE TRIBUNAL OFFICE