Case Number: 3200057/2017

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Atterbury**

Respondent: **Essex County Council**

Heard at: **East London Hearing Centre**

On: **9 & 10 May & 6 June 2018; and in chambers on 7 June & 16 July 2018**

Before: **Employment Judge C Hyde**
Ms TA Jansen, Member
Mr M Rowe, Member

Representation

Claimant: Ms F Lawson, counsel

Respondent: Mr N Roberts, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that

1. **The holiday pay claim was dismissed on withdrawal.**

2. **The indirect disability discrimination complaints were dismissed on withdrawal.**

3. **The notice pay claim was dismissed on withdrawal.**

4. **The complaints alleging discrimination arising from disability under section 15 of the Equality Act 2010 ("the 2010 Act") and the complaints alleging failure to make reasonable adjustments under section 20 of the 2010 Act were not well founded and were dismissed.**

5. The complaint of constructive unfair dismissal under sections 95(1)(c) and 98 of the Employment Rights Act 1996 ("the 1996 Act") was not well founded and was dismissed.

REASONS

1. Reasons are provided in writing for the reserved Judgment above. These written reasons are set out only to the extent that they are sufficient to explain to the parties why we reached the decisions that we did, and are only set out to the extent that it is proportionate to do so. Further, where the reasons deal with interlocutory decisions in respect of which oral reasons were provided to the parties at the time, the written reasons are set out in accordance with the same principles of sufficiency and proportionality.

Preliminaries

2. Mrs J Atterbury presented a claim to the Tribunal on 22 January 2017. The complaints which the Tribunal eventually had to determine arising from that claim form were allegations of discrimination arising from disability under Section 15 of the Equality Act 2010 ("the 2010 Act"), failure to make reasonable adjustments under Sections 20/21 of the 2010 Act, and a complaint of constructive unfair dismissal under Section 95(1)(c) read with Section 98(4) of the Employment Rights Act 1996 ("the 1996 Act").

3. The Clamant set out the grounds of her complaint in 12 numbered paragraphs running to just over a page (pp14-15). Grounds of resistance were attached to the response which was sent in by the Respondent on 22 February 2017.

4. After some delay while consideration was given to whether the case should be stayed pending the possible institution and conclusion of a personal injury claim by the Claimant against the Respondent, the stay of the case was not renewed in Autumn 2017. The parties were informed of this by a letter dated 20 November 2017 from the Tribunal. A preliminary (case management) hearing was scheduled thereafter for 14 December 2017. That hearing took place before Employment Judge Ferguson who refused an application for a further stay of the proceedings and listed the full merits hearing for 9-11 May 2018. A summary of the proceedings and orders made were sent to the parties on 18 December 2017.

5. A second preliminary hearing took place on 16 March 2018 before Employment Judge Hallen and the parties were represented by the same counsel as appeared at the full hearing. The primary purpose of that hearing was to determine a conflict between the parties as to what were the claims and issues to be determined. As all the relevant documents were not before the Tribunal, it was decided that a further preliminary hearing should be listed so that the parties could make representations.

6. That further (third) preliminary hearing took place before Employment Judge Barrowclough on 12 April 2018. The Claimant was represented by Mr Rees-Phillips of counsel and the Respondent by Mr Roberts of counsel. Employment Judge Barrowclough then effectively refused the Claimant's application to amend her claim form. His decision

led to the narrowed list of issues which the parties produced for the Tribunal. In essence, the scope of the dispute was to be limited to matters which had occurred from the time of the Claimant's sickness absence in February 2016. There were many historical matters which the Claimant had attempted to bring into the dispute but these were ruled not to be matters that the Tribunal would determine.

7. Thus, at the beginning of the substantive hearing on 9 May 2018, the parties again confirmed through their legal representatives that what was in dispute was the Respondent's management of the Claimant's long-term sickness absence from 2 February 2016. The Claimant's witness statement in particular, dealt with a lot of detail about mattes which had occurred earlier. It was agreed however, these were not directly relevant to the substantive case.

The Issues

8. At the outset of the hearing, the parties confirmed that the Claimant's claim in the claim form for holiday pay had been resolved. The Tribunal therefore dismissed that claim on withdrawal. Further, when the Claimant through her counsel confirmed that she was not pursuing indirect discrimination claim on 6 June, the Respondent asked also for that claim to be dismissed on withdrawal. The Claimant did not object to that course being followed. We accordingly made that order.

9. During the course of the first day, the Respondent accepted that they had constructive knowledge of the Claimant's disability. This concession was set out at paragraph 2 on the revised list of issues. There were other alterations to the previous agreed list of issues, such as including dates on which events occurred.

10. The Claimant also claimed notice pay in her claim form in Section 8.1. There was no reference to this claim in either of the agreed Lists of Issues. The Tribunal therefore treated the claim for notice pay as dismissed on withdrawal. That course of action did not prejudice the claim for loss of earnings to which the Claimant would be entitled if she succeeded in her constructive unfair dismissal claim. However, as neither party addressed the case on the basis of it being a notice pay/wrongful dismissal claim, we considered it was the appropriate course to treat that claim also as dismissed on withdrawal.

11. As a result of the further discussions about the issues, a revised list of issues [R7] was sent to the Tribunal on the morning of 10 May 2018 and marked [R7]. A copy of the revised agreed list of issues which was sent to the Tribunal on 10 May 2018 has been cut and pasted below. Although, as set out above, the Claimant was not pursuing the indirect disability discrimination claim, the matters relied on in that claim were relied upon in respect of the unfair dismissal complaint. They are therefore retained in the List below. Finally, there was a typing error at paragraph 14A, which should read "2016" rather than "2017" right at the end of that sentence.

12. Further, the numbering of the paragraphs in the List has been retained.

"Disability

1. The Respondent accepts that from January 2016 the Claimant had a disability, as defined by section 6(1) of the Equality Act 2010, and paragraph 2(1) of Schedule 1 of the Equality Act 2010, in the form of work-related stress and anxiety.

2. The Respondent accepts constructive knowledge of the Claimant's disability from 2 February 2016.

"Arising from" discrimination

3. Did some or all of the Claimant's sickness absences from January 2016 until 17th October 2016 arise in consequence of her disability?

4. If so, in the period of 29th January 2016 to 17th October 2016, did the Respondent treat the Claimant as follows:

    a. Failing to consider, at each 1:1 meeting between itself and the Claimant during the period 2nd February 2016 and 17th October 2016, whether or to acknowledge that the Claimant's absences were due to her disability;

    b. Applying its Sickness Absence Policy to the Claimant without taking into account her disability and/or disability-related absences;

    c. Requiring the Claimant to improve her level of absence within an indicative timeframe as part of the improvement notice dated 13th July 2016;

    d. Requiring the Claimant return to work before it had implemented the recommendations of Occupational Health;

    e. Failing to implement the adjustments advised by Occupational Health on 29 January 2016 and 20 April 2016;

    f. Moving to the 'formal stage' of the sickness policy with the attendant prospect of disciplinary action before implementing the OH recommendations and/or taking sufficient steps to facilitate the Claimant's return;

    g. Threatening the Claimant with a warning;

    h. Subsequently issuing the Claimant with a written warning because of her sickness absence under the Sickness Absence Policy on the 14 September 2016;

    i. Informing the Claimant of the likelihood of a final written warning or dismissal or moving the Claimant to the Redeployment Scheme if her absence did not improve and /or she did not return to work by 12 October 2016;

    j. Refusing to overturn on appeal the decision to issue the Claimant with a written warning (14th October 2016).

5. If such treatment occurred, did it constitute unfavourable treatment?

6. Was such treatment because of the Claimant's sickness absence?

7. Was the treatment a proportionate means of achieving a legitimate aim, namely fair and proper absence management; proper administration of the Respondent's operations; and/or stability within the Claimant's team?

Indirect discrimination

8. Did the Respondent apply a PCP, namely the Essex County Council Sickness Absence Policy, to the Claimant?

9. If so, did the application of that policy to the Claimant put her at a particular disadvantage in comparison to persons who did not share her protected characteristic/disability? Specifically:

    a) Did the Claimant's disability in the circumstances prevent her from returning to work unless certain steps were taken by the Respondent?

    b) Did the application of the Respondent's policy fail to take any or adequate account of this?

    c) Was the Claimant thereby disadvantaged in a way that someone without her disability would not have been?

10. Was the PCP a proportionate means of achieving a legitimate aim, namely fair and proper absence management; proper administration of the Respondent's operations; and/or stability within the Claimant's team.

Reasonable adjustments

11. Did the Respondent apply the above PCP to the Claimant?

12. Did the PCP place the Claimant at a substantial disadvantage in comparison with persons who are not disabled? If so, did or should the Respondent have known about such disadvantage?

13. If so, did it fail to make reasonable adjustments? Specifically, would it have been reasonable for the Respondent to have adjusted the application of its Sickness Absence policy so that:

    a) The Claimant was not threatened with disciplinary action, a warning or a final warning for her long-term sickness absence;

b) The Claimant was not told that she was headed for dismissal or redeployment if she did not imminently return to work;

c) The Claimant was not issued with a written warning which was then upheld on appeal.

Constructive dismissal

14. Did the Respondent breach the implied term of mutual trust and confidence by:

a) Failing to implement the recommendations of the Occupational Health Practitioners (in particular to carry out an "individual Stress Risk Assessment" between 29th Jan 2016 to 17th Oct 2017);

b) Failing to take appropriate steps to facilitate the Claimant's return to work between 2nd Feb 2016 and 17th October 2016;

c) Discriminating against the Claimant under the Equality Act 2010 as stated above;

d) Deciding on 14 October 2016 not to overturn its decision to issue the Claimant with a written warning because of her disability related absence (final straw).

15. Did the Claimant resign because of such conduct on 17 October 2017?

16. Was she entitled to treat the matters at 14(a)-(d) above, either individually or cumulatively, as a fundamental breach of contract? Alternatively, was she entitled to treat the matter at 14(d) as the final straw in a series of breaches of contract that entitled her to treat the contract as at an end?

17. Had she previously waived any or all of the above breaches by her continued employment?

18. Was the dismissal for a potentially fair reason, namely the legitimate aims identified above, constituting reasons of 'capability' or 'some other substantial reason'.

19. Was the dismissal fair in all the circumstances?

Limitation

20. Are any of the claims outside the primary limitation period (i.e. before 17 August 2016

21. If so, is it in the interests of justice that the time limit be extended?"

Evidence Adduced

13. The Claimant provided an opening with a reading list attached which was marked [C1] and she gave evidence on her own behalf. As is the norm her evidence in chief was

by way of a witness statement, which we marked [C2]. On behalf of the Claimant, the Tribunal heard evidence from Mr Ian Phillipson who was a former work colleague of the Claimant's although he also worked as a manager during her sickness absence. His witness statement was marked [C3]. Finally, in support of the Claimant's case, the Tribunal heard evidence from Ms Garthwaite, the Claimant's mother. Her witness statement, which stood as her evidence in chief, was marked [C4]. She was not cross examined.

14. On behalf of the Claimant, Ms Lawson presented closing submissions in two documents [C5] and [C6]. The former set out her legal submissions and the latter document set out her submissions as to the evidence and the conclusions that she wishes the Tribunal to reach. She then supplemented these documents with oral submissions which lasted something in excess of one hour.

15. The Respondent had prepared the consolidated joint bundle of documents for the hearing which was marked [R1]. It was composed of in excess of 400 pages. Thankfully in this case, apart from some supplementary documents which it was agreed that the Tribunal should add to the bundle on the first day, there was not a flurry of further documents added to the bundle.

16. Also, at the commencement of the hearing, the Respondent had prepared a reading list marked [R2] and a cast list which was then agreed [R3].

17. The witnesses on behalf of the Respondent are listed in the order in which they gave evidence. The first was Mrs Stephanie Gurry, referred to during the time the Tribunal was concerned with as Ms Fitzpatrick. Her witness statement was marked [R5]. She was employed, during the time we were concerned with, as HR Business Partner for the part of the service that the Claimant was working in. The next witness called on behalf of the Respondent was Mr Ian Hollingworth, who at the relevant time was working for the Respondent as Head of Delivery Assurance. His witness statement was marked [R6]. He dealt with the appeal that the Claimant lodged against a written warning which was imposed on 14 September 2016 under the sickness absence policy. The Claimant relied on this action and on the outcome of the appeal i.e. Mr Hollingworth's decision as constituting the last straw for the purposes of her constructive dismissal claim. Finally, the Respondent called the Claimant's former line manager, Mrs Claire MacArthur. Her witness statement was marked [R4].

18. Mr Roberts presented his written closing submissions in a document which the Tribunal marked [R8]. In accordance with the process agreed at the hearing, he then supplemented those written submissions orally.

19. As part of their closing submissions, both representatives referred to various cases. However, in addition, on behalf of the Claimant, Ms Lawson handed up to the Tribunal copies of a transcript of the judgment in the case of *Waltons & Morse v Mrs Gill Dorrington*, a decision of the Employment Appeal Tribunal [EAT/69/97]. The second report handed up was in the case of *Buchanan v Commissioner of Police of the Metropolis*, another judgment of the Employment Appeal Tribunal reported at [2017] ICR 184. Finally, the Claimant referred to the case of *Gallop v Newport City Council* [2013] EWCA Civ 1583. The Tribunal confirmed that we would look up that report and did not need a copy to be handed up.

20. The additional issue apart from the submissions which were made during the course of the hearing was that Ms Lawson submitted that there were various matters which the Claimant relied on in support of her constructive dismissal claim, but about which she was not aware at the time. The Judge asked for clarification as to whether there was relevant law on the issue of whether the Claimant could rely on such matters in a constructive dismissal claim. The Claimant relied on for example, a series of emails which had been exchanged between the Claimant's former line manager Mrs MacArthur and the HRBP as to how the sickness absence policy should be applied in the Claimant's case. As this matter was raised during the course of closing submissions, Ms Lawson asked if she could have an opportunity to find the relevant authority and submit it to the Tribunal during our in chambers consideration. The Tribunal directed that as long as there was an agreed statement about the law which applied to this, agreed between counsel, then we were prepared to consider such a statement after 2:00pm on 7 June 2018.

21. By an email sent to the Tribunal by Ms Lawson on 7 June 2018, and copied to Mr Roberts, Ms Lawson stated her position about the email, and also referred the Tribunal to text in para 440 of Harvey. The Tribunal was grateful for this clarification, both of the context of the submission, which was said to be a small part of the narrative underlying the constructive dismissal complaint, and that the Claimant relied primarily on other matters; and as to the applicable law, and the difficulty for a Claimant in such circumstances of establishing causation.

Relevant Law

22. Ms Lawson very helpfully prepared a detailed written submission about the applicable law [C5]. The submission included relevant references to the EHRC Statutory Code of Practice (2011) which she quite rightly submitted that the Tribunal had to take into account. In the event, none of the references in her submission was controversial. As this statement of the applicable law was not the subject of dispute, the Tribunal did not consider it proportionate to set repeat the contents here.

23. As set out above, Mr Roberts also referred in his written closing submissions to the relevant case law and statute. Reference is made below and in context to the limited controversy between the parties as to the applicable law.

Interlocutory Decision

24. The Tribunal set out its unanimous decision and the reasons for it in relation to the application which was made on the morning of the second day on behalf of the Claimant, for the Claimant to be allowed to give further answers, in writing, to cross examination which had been concluded at the end of the previous sitting day. The reasons were announced on 10 May after the application was made. The Tribunal was not satisfied that the appropriate course was to grant the Claimant's application.

25. Claimant's counsel, Ms Lawson, applied for the first time, on the morning of the second day of the hearing, for the Claimant to have been treated as a vulnerable witness and referred generally to the Equal Treatment Bench Book ("the Bench Book"). The Tribunal adjourned promptly thereafter, after a brief discussion to understand what was being sought, for both counsel and indeed the Tribunal, to review the Bench Book and for representations to be made by both counsel about what aspects had not been dealt with

and if so, how they could be remedied now. This application was made, after we had reached the conclusion of cross examination of the Claimant at the end of the Tribunal day the previous afternoon, and the Claimant was about to be re-examined.

26. The basis of the Claimant's concern as expressed by her counsel, was that her case had been prejudiced by her answers in cross examination by reason of her disability. Claimant's counsel referred to suggested adjustments, in particular as set out in Appendix B41 of the Bench Book. The specific course that Claimant's counsel asked for was that certain of the questions which had been put to the Claimant in cross examination, be put again to the Claimant by the Respondent's counsel, but this time in writing, so that she could have time to consider them outside of the Tribunal and then to give her written responses.

27. The Bench Book suggests as an adjustment, written questions and answers as a possible course to be considered in what it describes as 'severe circumstances' in cases involving mental disability. The particular scenario which was being proposed in this case, was not specifically mentioned in the Bench Book namely revisiting cross examination in a civil case, after it had finished. It seemed that the suggestion in the Bench Book of written questions and answers, was put forward as an initial course to be followed.

28. The Claimant relied on her general practitioner's report (p310), a report which was compiled in February 2017 and especially the last paragraph on page 301, in support of her application. This text was referred to in answer to the Tribunal's questions about whether there was any relevant evidence in the bundle before us which would support the application, and which would give us some guidance about how the Claimant's disability affected her and her ability to give evidence. The other evidence that we had in this case was a psychiatric report which had been prepared for a personal injury case being brought by the Claimant against the Respondent and it was acknowledged that there was nothing in that that would be of assistance to us.

29. We also noted that the Claimant had provided a witness statement for this case running to some 187 paragraphs which set out the details of the case that she wished to put forward. The Claimant's counsel had also helpfully provided an opening submission, setting out the Claimant's case over some 12 pages, including 3 pages of references to the documents in support of her points in the bundle. There had also in this case, been 3 closed preliminary hearings, one of which was on the telephone and the only request for an adjustment in advance of the Claimant's evidence was the request for additional breaks made at the outset of this Hearing.

30. Tribunals are accustomed to making adjustments for witnesses and parties, not least as a consequence of our disability discrimination jurisdiction. We had readily agreed to the request for additional breaks and indeed, during the Claimant's evidence, we took two breaks and offered a further break to the Claimant, which was declined. We understood, obviously, that the Claimant was keen to get her evidence over and done with, which was the explanation that she gave.

31. There was always a balance to be struck in the administration of justice between the interests of the respective parties and the Tribunal acknowledged that it was very difficult and burdensome for the parties to await the resolution of the proceedings.

32. This claim was presented in January 2017. Within the claim, we noted also that among other matters, the Claimant described her difficulty with awaiting the outcome of an internal grievance, so we took all those matters into consideration.

33. We considered that the course proposed by the Claimant would inevitably delay the conclusion of her own evidence and potentially delay the giving of evidence by the Respondent's witnesses. Also, the Tribunal was concerned that the course proposed by the Claimant would end up being unduly oppressive for her, requiring her to provide written answers after she had already provided detailed oral and written evidence and the written representations referred to above. Following that course would effectively be extending her cross examination and then delaying the re-examination.

34. Further, there were potential difficulties in terms of the Respondent's witnesses responding, unless we awaited the conclusion of this extended process before the Respondent's witnesses gave their evidence – this was likely to lead to even greater delay and to place the witnesses under undue and unexpected pressure.

35. Mr Roberts on behalf of the Respondent suggested that the Tribunal should delay the decision about this application as he did not want to be drawn into a discussion about the quality of the Claimant's evidence at this stage.

36. In all the circumstances, we considered that the right course was to proceed with re-examination of the Claimant which is questioning by her own counsel. The purpose of re-examination which was explained at the outset, and which is well established, is to revisit areas of cross-examination which arose during cross examination, where the answers were not clear or where it is felt that the witness had not done themselves justice in answering the questions. The Tribunal considered that it was appropriate to give a degree of latitude to Claimant's counsel, but we would ultimately decide which questions were or were not permissible.

37. Taking into account the points made in these submissions, we expressly recorded that we made no finding about whether the Claimant's answers in cross examination were prejudicial to her case. Indeed, the Claimant's counsel very fairly expressly stated that she did not criticise anyone for the situation that she believed had arisen in relation to the Claimant's evidence. Further, we noted that in her submissions, she described the cross examination as being 'high quality' and that indeed, her initial inclination had been not to re-examine the Claimant. At the end of cross-examination, the day before, she had indicated that she had about a quarter of an hour of re-examination and we considered that was a good benchmark in principle in terms of timing, to allow for re-examination.

Findings of Fact, Determination of Issues, and Conclusions

38. It was not disputed that the Claimant started her employment with Essex County Council on 5 September 2005 in the post of Performance Manager (p84). On 22 September 2014, Mrs MacArthur became the Claimant's line manager. At that point, the Claimant was contractually employed to work for 34 hours per week. Her post by then was 'Performance and Business Intelligence Business Partner – Place', within a service called 'Performance and Business Intelligence' ("P&BI"). She managed a team of Performance Officers responsible for producing reports containing data on how the

Respondent's services were performing against organisational targets. It appears, (although there was no specific reference to this), that was broadly the Claimant's job from the start of her employment.

39. There was further no dispute that the Respondent underwent a restructure in the service from the tail end of 2014 until April 2015 which affected the service in which the Claimant was working. The PB&I service merged with the Insight and Analysis service to create a single new service to be known as Organisational Intelligence ("OI"). The new service offered a very different service to the Respondent than before. The Respondent's corporate management board had expressed a desire to receive less backward-looking management information reports and instead, they wanted a more pro-active business analytics consultancy to be developed, providing them with scenario modelling, predictive analytics and modern research techniques to be able to inform better decision making. This was a significant change from the service offered before, which was predominantly a performance reporting service. For this reason, the Respondent put in place an individually tailored programme of professional development for all staff to help increase their skills so that they were in a position to deliver this new offer. In particular, the management team, including the Claimant, was given intensive 1:1 coaching from external performance coaches, Alexander Consulting, to support them through the change. It was agreed by the Claimant in her evidence that she received intensive coaching from the outside consultancy until 1 November 2015.

40. The new service consisted of 7 teams, each headed by an intelligence manager, who in turn was responsible for a particular area of the business. During this restructure, 10 managers were placed into a ring fence to apply for 7 managerial roles; and in March 2015, the Claimant had an interview for the Place and Customer Intelligence Manager role, for which she had expressed a preference. The Claimant was successful in demonstrating that she met the criteria for this role and that she understood the expectations of it. She was subsequently appointed to that post and took it up on 1 April 2015. In her new role she was responsible for a team of 7 members of staff, consisting of a senior analyst, 4 analysts and 2 information officers, providing intelligence services to the Council's 'Place' and 'Customer Services' departments.

41. In this leadership role, the Claimant was required to operate at a senior level with multiple stakeholders including elected members, executive directors, directors and heads of service, to ensure that they had the insight that they needed to be able to take key business decisions.

42. In her first performance review in that post, dated 20 May 2015 (p103), the Claimant was classified as "achieving".

43. Up to that point in the preceding 10 years of employment, up to February 2015, the Claimant had had a total of 30 instances of sickness absence, the majority being for 1 or 2 days at a time (para 10 of R4). In the 12-month period from 26 February 2015 to 2 February 2016 the Claimant had 5 episodes of sickness as follows:

26 February 2015 (1 calendar day) – migraine

31 March - 10 April 2015 (11 calendar days) – asthma

30 September – 21 October 2015 (23 calendar days) – stress

11 January – 14 January 2016 (4 calendar days) – asthma

2 February – 7 October 2016 (244 calendar days up to date of resignation) – stress

The Respondent referred the Claimant to the Occupational Health service ("OH") on 22 December 2015 following a period of approximately 3 weeks' sickness absence in October 2015 (p124). The OH report was prepared on 29 January 2016 and was the first such report in our bundle (p151). The next referral to OH took place on 6 April 2016, the Claimant having commenced her period of continuous absence which ultimately culminated in the termination of the employment, on 2 February 2016. The second OH report was dated 20 April 2016 (pp181 and 185).

44. The formal sickness attendance process commenced by way of a sickness meeting with the Claimant's manager on 14 September 2016 at which Mrs MacArthur issued a formal written warning (pp238 and 244). The Claimant was also referred to the OH service for a third time on the same date (p240).

45. By a letter dated 28 September 2016 (p261), the Claimant submitted an appeal against the written warning in respect of her attendance.

46. The third OH report was dated 5 October 2016 (p269).

47. On the same date, the Claimant was sent an invitation to a meeting about her appeal against the written warning. That appeal meeting took place on 12 October 2016 before Mr Hollingworth. Mr Hollingworth did not uphold the appeal (p288). He notified the Claimant of this subsequently in a letter of 14 October 2016 (pp279 and 292) in which he also set out his reasoning on the various points of the appeal.

48. By a letter attached to an email sent at 16:58 on Monday 17 October 2016 and addressed to Mrs MacArthur, the Claimant notified the Respondent that she was resigning with immediate effect from her position. She indicated that she believed that the Respondent had discriminated against her and that they were in fundamental breach of contract and that she considered that she had been constructively dismissed (pp295-297). Mrs MacArthur, Head of Organisational Intelligence, wrote to the Claimant acknowledging receipt of her letter of resignation, accepting the resignation and expressing regret at the decision by a letter dated 21 October 2016 (pp306-307).

49. The Claimant commenced the early conciliation process by notifying ACAS on 16 November 2016 and a certificate was issued on 30 December 2016 (p1).

50. Central to the Tribunal's considerations was the sickness absence policy, the terms of which it was agreed were applicable to the Claimant's employment. The notable provisions were as follows: -

"Introduction

Sickness absence happens when employees are not well enough to work. It is only natural for employees to become ill from time to time, or on occasions to be ill for longer periods.

This policy sets out:

- *What we expect to happen every time an employee is not well enough to work;*
- *What we expect to happen when an employee's sickness absence becomes a concern*

Repeated and prolonged sickness absence cannot be supported indefinitely. When an employee's attendance is unsatisfactory or they are not able to return to work, their line manager will start the formal procedure.

All cases will be dealt with in a non-discriminatory and consistent way and in accordance with the organisation's diversity and equality employment policy..."

51. The policy then dealt with a number of issues such as the procedures and the frequency with which sickness absence should be reported and monitored; how employees and line managers should remain in touch; and about fitness for work and welcome back meetings.

52. The next section dealt with managing sickness absence. Among other matters, this provided that line managers were expected to know how much sickness absence there was in their team and the impact this had on the business and their team (p347). The policy set out an expectation that employees would share the reasons for their sickness absence with their line manager and do everything they could to improve their attendance or help their return to work (p348). It also repeated the statement quoted above as to the fact that repeated and prolonged sickness absence could not be supported indefinitely. It continued that when an employee's attendance was unsatisfactory or they were not able to return to work, their line manager would start the formal procedure. It then stated that one possible outcome of the formal procedure was dismissal (p348).

53. The policy set out various triggers for the formal procedure. In respect of short term sickness, under the managing short term sickness procedures, the latest point at which the line manager was expected to start the formal procedure was when an employee had been off sick five times in the last 12 months.

54. In relation to managing long term sickness, which was agreed as being a period of sickness absence of 4 continuous weeks or more, the line manager would receive notification from the Respondents 'People and Pay' department (p349). When the line manager received this email, they were expected to

33.1 Review the information they had about the employee;

33.2 Gather more information and explore options;

33.3 Decide what stage of the process they wanted to move to in order to manage the sickness absence.

55. The policy further stated that at this stage employees were expected to

34.1 Share the reason for their sickness absence with their line manager;

34.2 Share the short and long-term diagnosis with their line manager;

34.3 Attend appointments with the occupational health service; and have regular conversations with their line manager.

56. The policy expressly stated as follows;

"When an employee is not able to return to work, the line manager will start the formal procedure. The formal procedure can be started at anytime. However, the latest point the line manager is expected to start the formal procedure is when an employee has been off sick for three months when there is not an anticipated return to work date".

57. Under paragraph 1 of the issues the Tribunal had to decide to what extent the provisions of the sickness absence monitoring policy relied on applied to somebody who genuinely could not return to work. The Tribunal noted that in a section headed 'moving on' in the general guidance at page 350, it was expressly stated "*It is important for line managers to keep an eye on all sickness absence so any concerns are identified early and resolved. There will be occasions when the employee either can't or won't return to work. If the employee's situation has not improved, or there isn't an anticipated return to work date, the line manager will start the formal procedure to consider what is best for the employee and their future with the organisation."* The Tribunal considered that this procedure anticipated applying to employees who were genuinely sick, and in circumstances where there was no anticipated return to work date.

58. The formal procedure was then set out from pp351-353. It was clear that the first relevant stage was that the line manager would contact HR advice and support to let them know that they had started the formal procedure. As far as the employee was concerned however, the first manifestation of the formal procedure would be the formal sickness absence meeting between the line manager and the employee. The policy provided that during the meeting, the line manager was expected to:

37.1 Share what needs to improve with the employee;

37.2 Provide examples to support their concerns;

37.3 Try to find out the reasons for the employee's poor attendance;

37.4 Check if there is any further action that could be taken by the employee or the organisation to give the employee the opportunity to improve their attendance;

37.5 Discuss how the improvement can be made with the employee;

37.6 Set time scales for the improvement to happen;

37.7 Be clear about the likely consequences;

37.8 Keep a record of what has been discussed."

59. The policy continued that the employees on their part were expected to:

38.1 Share the reasons for their poor attendance with their line manager

38.2 Discuss practical solutions with their line manager;

38.3 Check their understanding on what improvement was expected and by when;

38.4 Be aware of the likely consequences of repeated or prolonged poor attendance;

38.5 Do everything they could to improve their attendance.

60. The policy described that the discussion of these issues at the formal sickness absence meeting, was with a view to developing and agreeing an improvement plan for the employee and reviews of their sickness record. It further anticipated that at the end of the period of the improvement plan, there would be a hearing (p351). The policy expressly provided that the improvement plan was not a sanction but that following the sickness absence meeting, the line manager would write to the employee detailing the concerns, the agreed improvement plan and the possible consequences. This would be kept active on the employee's file for 12 months from the start date of the improvement plan and would be revisited during this time if the required standard of attendance was not maintained.

61. One of the Claimant's arguments was that in a case such as hers, where she was doing everything that she could to improve her attendance, (and it was not disputed that this was the case); and that there was no likely prospect of a return to work, the process appeared to be one that was punitive.

62. The policy provided that the length of the plan would ideally be 10 weeks for long term sickness absence and for no more than 6 months for short term sickness absence. Progress would be discussed at the reviews and the line manager would let the employee know if their progress was meeting expectations or discuss what improvement was needed to reach the required standards. At the end of the improvement plan, there would be a hearing at which the line manager would write to the employee giving one week's notice of the hearing and setting out the detail of the support given and progress made. The employee would be entitled to be accompanied by a trade union representative or a work colleague (p352).

63. The scheme of the formal procedure was that the next stage would be the hearing and that the outcome of the hearing, which would be confirmed in writing to the employee, was a written warning or final written warning if the required standard of attendance had not been reached. This confirmed that the written warning would remain on the employee's file for 6 months, but it would be disregarded for sickness absence purposes after that, providing the required standards of attendance had been reached.

64. The policy continued under the heading "Hearing Outcomes", that if the required standards of attendance were not reached and maintained during the warning period, the line manager would arrange an independent hearing.

65. The Tribunal reminded itself that this stage of the Respondent's formal process was not reached. The Claimant resigned after the line manager hearing, at a relatively early stage in the application of the sickness absence policy.

66. It was anticipated that the independent hearing would be before a tier 4 manager and once again, there would be a further review of the absence, the reasons for it and what, if any, assistance could be given to the employee to facilitate their return to work; and what, if any, further action the employee needed to take to bring this about.

67. The outcomes of an independent hearing were not stipulated but were expressly stated to "include" the making of a written warning to remain on the employee's file for 6 months; a final written warning to remain on the employee's file for 12 moths; or dismissal with notice.

68. Finally, the policy provided that after any hearing, the employee could appeal against a decision made by the line manager or the independent reviewer.

69. There was documentation which was both a policy and guidance in relation to the diversity and equality in employment. The Tribunal was taken to the part of the policy which addressed making reasonable adjustments (p359). As part of the guidance for managers (p363), examples of reasonable adjustments for individuals were given. The first example of reasonable adjustments for individuals which was given by the Claimant was

> 47.1 "taking steps to help an employee who is absent due to disability-related sickness, return to work, including reduced hours, flexible working and reviewing work targets and objectives if needed;
>
> 47.2 Discounting disability-related sickness absence from an employee's records where this is reasonable (see definition below)".

70. The policy then set out in lay terms, some of the principles which had evolved under case law to help define and decide what is reasonable (p364). As this is covered in the Tribunal's consideration of the law, they are not repeated in these reasons at this stage.

71. Attached to the policy was a separate document which gave guidance to employees about reasonable adjustments (pp366-370). There was a further guide which

was for both employees and managers about making meetings accessible. No disputed issue arose in relation to this aspect and it was not in dispute that the various meetings which were held with the Claimant under the information and keeping in touch processes at the outset, were held at different locations to take into account the Claimant's sensitivities and abilities at that stage.

72. Further, there was guidance for employees and managers jointly in a document headed "disability equality - communication, language and assistance" (p374). This had a section within it headed "learning disability and mental health" (p375). The first bullet point stated

- "If you are talking to an adult, treat them like an adult;
- If someone is experiencing distress or confusion, be patient and give the person time to speak. If their distress continues, ask them if they would like to take a short break – be guided by them.
- If someone has difficulties with concentration or mental health issues affected by added stress, it may help to arrange the meeting or interview in a less formal setting, or to allow them to arrive early at the venue in order to familiarise themselves with the environment. Be guided by them.
- Where mental health issues or learning disabilities are a barrier, permitting an independent advocate to be present can facilitate effective communication".

73. It was relevant, that various meetings were arranged in informal locations of the Claimant's choosing and also that the manager agreed to the Claimant's mother attending at least one meeting.

74. During the Claimant's employment, her first absence which was attributed to stress was in the period 30 September to 21 October 2015. She explained at the time that they were both related to stress at home, to do with a teenage daughter as well as stress in work. There was no suggestion by either party that the Claimant was a disabled person at this stage or was to have been treated as a disabled person at this stage. However, apparently in line with the Respondent's usual processes, Mrs MacArthur and the Claimant discussed a number of measures of support and adjustments that they could implement together to support her. These involved a phased return to work on a full time pay basis by way of reduced hours without an end date so that the Claimant could ease herself back into work; continued regular one to one's during which a range of leadership development opportunities were discussed (p129). The Claimant expressed an interest in NLP Coaching and Mrs MacArthur agreed to fund the sessions with a coach the Claimant had identified. The Claimant attended three coaching sessions which the Respondent funded at a cost of £1000.00.

75. Mrs MacArthur also provided support to the Claimant in this timeframe in terms of getting to grips with the team's workload, by conversations during 1:1s as well as the provision of additional support from the external consultant company Alexander Consulting, referred to above. Further, additional capacity was arranged by way of a

temporary member of staff, Mr Phillipson (who gave evidence to the Tribunal on the Claimant's behalf), who was brought into the Claimant's team to support her and the team with their capacity issues, as well as the creation of the new senior analyst post in the team. Finally, during this timeframe, the Claimant shared with Mrs MacArthur her difficulty with managing the demand for work from her team by the client i.e. an executive director.

76. This was relevant because the OH reports which are referred to shortly, referred to the Claimant having an on-going concern about work place issues. In short, these related to her concerns that the team did not have the appropriate capacity to deal with the work that was being expected of them and also certain management issues that she had to deal with in terms of performance of staff within her team. As to the former point of capacity, there was a dispute between the Claimant and Mrs MacArthur as to whether the team did indeed have the capacity. It appeared that this really reflected the different ways in which those parties were using the word 'capacity'. The Claimant meant it in the sense of not having enough people to do the work and Mrs MacArthur believed that there were sufficient members of the team but that the Claimant was not taking sufficient control of the work which was coming in by way of negotiations with the clients and, among other matters, was not making it clear enough to her team what was expected of them. The Tribunal did not consider that it was necessary for us to resolve this dispute but it was relevant to look at how this was handled during the course of the Claimant's absence because she continued to complain about this issue.

77. The next point was that, as stated above, the Claimant had not at any point suggested that she was a disabled person at the tail end of 2015, yet as outlined above, the Respondent engaged with her during that time frame to bring about whatever adjustments were agreed upon to facilitate her good health and successful return to work. The Tribunal considered that this was also relevant in terms of an issue which was the source of controversy throughout the hearing. One of the Claimant's concerns, as set out in the issues, was that in fact she was not acknowledged as a disabled person. It appeared to the Tribunal that it was in line with authorities that whether or not a member of staff was labelled by the employer at the time as disabled and whether or not this was accurate at the time, was almost irrelevant. The issue was whether the adjustments that were shown to be effective in preventing the disadvantage that the disabled person was labouring under, and which otherwise met the other criteria to be reasonable, were in fact made. If they were made at a time when the employer was disputing the employee was a disabled person, it mattered not that the employee's status was the subject of dispute at the time. Conversely, if an employer acknowledged someone as a disabled person but then failed to make reasonable adjustments which addressed the disadvantage that the employee was suffering when this could reasonably have been done, then that employer regardless of having attached that label, will not have made reasonable adjustments under the statute.

78. The Tribunal considered that it was relevant to set out or to deal with the "four stressors" which were identified on the Claimant's behalf in Ms Lawson's written opening submission [C1]. These are relevant because in the Tribunals view, they cast some light on the big picture in relation to this case in terms of the causes of concern for the Claimant and the time frames in which they operated.

79. At paragraph 4(c), it was said that the first stressor was the grievance taken out against the Claimant in April 2015 by a team member. The complaint was that the

Claimant had to wait a year until receiving the outcome of that grievance and having it "hang over her" was a constant source of stress. However, by the time of the hearing, it was not in dispute that this issue had been dealt with by the Respondent by way of rejecting the grievance.

80. The member of staff "Zoe" had complained about Mrs MacArthur as well at the same time. The grievance was eventually resolved in March 2016 as recorded by Mrs MacArthur in her letter of 21 October 2016 responding to the Claimant's resignation and there was apparently a subsequent appeal also referred to in that letter (p306). There was no contemporaneous documentary evidence which confirmed the date on which the Claimant was told about the grievance outcome before that record at page 306. However, it was accepted by the Claimant in evidence that the outcome had been made known to her orally at a meeting at which her mother was present. The first such potential meeting was the one on 5 April 2016. The notes of that meeting do not make any reference to the Claimant being informed of the outcome. There was at least one subsequent meeting that her mother attended. The Claimant's mother in her witness statement at paragraph 13, confirmed that she and the Claimant had been informed of the outcome of the grievance referred to.

81. Further, we had a contemporaneous note that in the one to one with the Claimant on 4 January 2016, Mrs MacArthur discussed under the heading "ZB latest" that Zoe was not likely to be in to work until the end of January, using up annual leave. It appears that this was because a decision had been made within the Respondent, that despite the fact that the grievance had not been finally resolved, Zoe would return to work. Mrs MacArthur noted that temporary line management arrangements had been discussed with Zoe working under Mrs MacArthur but working closely with Mr Phillips. In the event, as the Tribunal has noted above, Zoe did not actually return to work in the team. The likely date on which Zoe was due to attend would be at the away day, which the Claimant had planned for her team on 25 January (p128).

82. In the first occupational health report (p151) dated 29 January 2016, in respect of which the Claimant had been referred some weeks earlier, the occupational health professional stated that "*until the continuing grievance against Mrs Atterbury has been fully resolved, she will continue to experience symptoms of stress which may risk her recovery thus far and her underlying health conditions which are currently stable".* It was agreed by the Claimant that the reference to underlying health conditions was a reference to her asthma.

83. The significance of this is that these matters had already occurred prior to the time frame that we were considering. Further criticism of the Respondent in relation to the handling of the grievance by the Claimant's team member was not a subject of this claim.

84. The second stressor was said by Ms Lawson, to be that the Claimant had to deal with "several under-performing staff".

85. When the Claimant took over management of the member of staff who brought the grievance against her, she was informed that there were certain sensitivities around this employee's attendance. She had a lot of sickness which needed to be managed. The Claimant referred to this later during the meetings that she had with Mrs MacArthur in relation to her own sickness.

86. It was also not in dispute that at some point after the member of staff had made the complaint against the Claimant and Mrs MacArthur, she was removed from the Claimant's team. Thereafter, her return to the team was contemplated on one occasion, for a day, when there was reference to this in a meeting between the Claimant and Mrs MacArthur at the end of January 2016 (p96). No-one suggested that the member of staff actually returned to work thereafter.

87. The other staff member in respect of whom the Claimant had particular challenges was a member of staff "Ian C" who also had a lot of sickness absence. In the event however, there was no dispute and the Claimant herself confirmed this in her oral evidence, that he left the team in July 2015. This issue therefore was not a live one during the instant time frame. When Ian C left, Mrs MacArthur very soon attempted to replace him by setting in train the recruitment of a senior analyst. That person was to take up a post which was more senior than the substantive one which Ian C had occupied. He had been an analyst. The Senior Analyst started in January 2016.

88. Then in late June/July 2015, the Respondent through Mrs MacArthur, also brought in additional resources into the Claimant's team by the way first of all of Mr Phillipson coming in to cover the vacant analyst position. Mr Phillipson was one of the people who subsequently acted as a locum cover for the Claimant during her 2016 sickness absence and there was no dispute that he was a very effective analyst. He stayed in the team until summer 2016.

89. The other staff challenge for the Claimant from April 2015, was the management of another team member who was a senior analyst referred to as "Janice". There was contemporaneous evidence of this issue being discussed between the Claimant and Mrs MacArthur during a one to one in early December 2015 (p118). Again, there was a dispute between Mrs MacArthur and the Claimant as to whether the Respondent had given the Claimant enough support in relation to this matter. Mrs MacArthur's position was that it was part of the Claimant's role to address this issue herself with Janice and that she had encouraged the Claimant to address with Janice, the performance issues which she presented. Certainly, there was also contemporaneous evidence before the Tribunal that at about the time the Claimant went off sick, at the end of January/beginning of February 2016, the work of this senior analyst had also generated some criticism from the client of this service (p132). The Tribunal also accepted that once the Claimant was off sick and her role was covered by Mr Phillipson, he did indeed address the issues with Janice and they were resolved.

90. In summary, it appears that at the time the Claimant went off sick, the live issues in terms of her department were management of the senior analyst who was in post and also the possibility of the return to the department of the analyst who had made a complaint against the Claimant.

91. In the event, the Respondent also recruited a further member of staff. Once again, there was some contention during the hearing as to whose initiative this was. Clearly the Claimant had intended to see through certain plans for her team but her absence on sick leave interrupted the implementation. Mr Phillipson subsequently saw them through, supported by Mrs MacArthur, and this led to the recruitment of another member of staff and also some other progressions in terms of the department. There was contemporaneous confirmation that Mrs MacArthur noted the Claimant's proposals in

respect of the team at a meeting with the Claimant on 26 January 2016. Mrs MacArthur noted that she welcomed the fact that the Claimant was taking steps to address these issues. This contemporaneous note also recorded that there was discussion about various difficulties which the Claimant was experiencing in working with and managing her team. Mrs MacArthur noted this, but then set out her position that over the previous nine months, she had tried to give the Claimant a lot of support and autonomy, but that the Respondent still was not seeing the new ways of working from the team. Her impression was that it did not feel as if things were improving.

92. It was part of the Respondent's case that they did what they could to keep the Claimant updated about improvements at work, which meant that her working environment would be less stressed, if and when she returned to work. The Claimant did not dispute that she had been given these updates at the meetings by Mrs MacArthur. Her contention was that because of the state of stress that she was in, she did not necessarily absorb this information at the time; and in closing, Ms Lawson argued that Mrs MacArthur should have sent notifications to the Claimant of the various developments in writing. It was also apparently not in dispute that the Claimant was given if not all, but many of the notes of the meetings at which these matters were discussed. It was also right that at every single meeting that took place between the Claimant and Mrs MacArthur after the Claimant had gone off sick on 2 February, the Claimant was accompanied by someone else, either her mother or the IAPT allocated worker.

93. It was also not in dispute that prior to the start of the prolonged sickness absence on 2 February 2016, among the support provided by Mrs MacArthur, she had also suggested that the Claimant should contact the human resources business partner directly, Ms Gurry, to see if she could provide any assistance for her. The subject of the communication from the Claimant to Ms Gurry on 22 December 2015 copied to Ms MacArthur was "coaching-meeting up". They planned to set up a meeting in the New Year. In the event the meeting with Ms Gurry happened on 1 February 2016. The Claimant sent an email to Ms Gurry afterwards, thanking her for taking the time to meet with her and welcoming the support that Ms Gurry had offered and confirming a date for a follow up meeting with her. The Tribunal considered that it was likely that the Claimant had found the meeting helpful at the time in the light of the contents of this email and also, the fact that she was happy to share with Ms Gurry following that meeting, the details of the occupational health report which Ms Gurry otherwise did not have access to. She confirmed in the email that she had sent to Ms Gurry and provided details of the password.

94. In the Claimant's opening submission, Ms Lawson identified a third stressor as the team lacking resources, as the Claimant's team was down by two members between July 2015 and January 2016. As set out above, the Respondent had taken steps to address this by, inter alia, the recruitment of Mr Phillipson in that time frame.

95. The fourth and final stressor which Ms Lawson identified, was said to be that between April 2015 and January 2016, over half of the Claimant's team, 4 out of the 7 that she managed, were absent for a period of time with work related stress. We did not have detail about this but it appeared that these matters were largely resolved, even in the way the case was put, by the beginning of February 2016. Thus, the issue of staff absence was not relevant to the timeframe that we were concerned with.

96. The first occupational health report was dated 29 January 2016 following an appointment with the OH advisor, Mrs Margaret Sen on that date (pp151-152). This OH referral followed the Claimant's period of sickness absence at the end of 2015. Also, the OH report was received before the Claimant started her long-term period of sickness. The report mentioned that the Claimant had reported that she was experiencing sustained workplace stress that continued to affect her emotional well being. She also reported that she had engaged with and benefited from the support afforded her and continued to do everything she could to boost her resilience. The occupational health advisor expressed the opinion that although the Claimant had returned to work, her residual symptoms may initially reduce her performance. She then gave the advice set out above about her belief that the continuing grievance would continue to cause stress for the Claimant.

97. The suggested adjustments included the conducting of an individual stress risk assessment to identify specific sources of workplace stress and also to develop an action plan to address them. She attached a form for Mrs MacArthur's use. The second adjustment suggested was regular one to one meetings to discuss the manager's expectations and any further concerns.

98. Under the heading "Status Under Equality Act 2010" was a paragraph which was the source of debate and was one of the grounds of appeal to Mr Hollingworth against the imposition of the written warning. The report stated in terms which were repeated in the report in April and subsequently in October 2016:

"It is ultimately a legal matter as to whether an individual actually meets the criteria as having a disability under the Act. While it is likely that the Equality Act may apply in this case, it is purely an occupational health opinion and cannot be considered as legally binding".

Subsequently, Mr Hollingworth took the view that this was not a statement by occupational health that they believed that the Claimant was a disabled person. Much criticism was levelled at the Respondent for reaching this view.

99. The report continued "*Regardless of the status under the Act, you as the employer have a duty of care to consider reasonable adjustments to allow the employee to continue working. While we may provide advice on adjustments, it is for you to decide on the reasonableness of these adjustments, balanced against the needs of the business".* Despite the ambiguity of the words in the previous paragraph about whether occupational health considered that the Claimant was a disabled person, the Tribunal considered that the approach expressed in the text just quoted above, was the appropriate approach to take to an employee. Even if occupational health attached a label of disability, a Tribunal might subsequently find that was not correct. The opposite was equally true. In those circumstances therefore, the correct approach by an employer was to have a proper consideration of and discussion with the employee about any adjustments which were needed to address the specific disadvantage which the disability put the employee under and then, to consider whether it was reasonable to make those adjustments.

100. The individual stress risk assessment pro forma (pp153-159) set out a number of categories of potential stress for an employee which could then be discussed and identified as such, and then a discussion about what supports could be put in place and

what supports were already put in place and providing a time frame for those supports to be decided.

101. 29 January was a Friday and therefore the next working day was 1 February, the day on which the Claimant had the meeting with Ms Gurry. In the event, 1 February 2016 was the Claimant's last day at work. She called in sick on the morning of 2 February and sent an email to Mrs MacArthur at 11:12 on that date (p163a). She described that she had had *"a massive panic and asthma attack this morning. I have been to see the doctor again and have been signed off for three weeks suffering from work related stress."* She invited Mrs MacArthur to call her if she needed to speak to her on her home number and that she would arrange for a fit note to be sent in. Mrs MacArthur acknowledged the notification and said that she would keep in touch and hoped that the Claimant was feeling better soon.

102. Then, the Claimant apparently of her own volition, telephoned Mrs MacArthur on 5 February 2016 (p164) because she wanted to let Mrs MacArthur know what had happened on 2 February that had caused her to ring in sick. She reiterated that she had a "massive" panic attack in the morning and an asthma attack. She also indicated that she felt she had not fully recovered since returning to work after the last period of sickness absence since before Christmas. This was a matter that the occupational health report had also expressed. She also told Mrs MacArthur that she wanted her to know that she had not gone off sick because of the 'difficult' performance meeting that Mrs MacArthur had had with her the previous week. Mrs MacArthur appropriately advised the Claimant to try and rest and recover properly. The Claimant said that once she was ready, she wanted to meet with Mrs MacArthur for a coffee off site and talk to her about 'everything'. She repeated that she loved her job. She said that she could not switch off and that she had seen the external coach again which had helped.

103. Importantly, Mrs MacArthur noted that she let the Claimant know that Ian Phillipson had been elevated to an acting up position to lead the team in her absence, which the Claimant expressed relief at. She offered to be contacted if it was necessary but Mrs MacArthur indicated that they would not be bothering her while she was off and that she hoped that the Claimant was able to get some rest. She confirmed that she would be happy to meet the Claimant for a coffee when she was ready.

104. It was also not in dispute that the Claimant and Mrs MacArthur had had a very good personal relationship as well as being colleagues at work. For example, Mrs MacArthur had invited the Claimant to her wedding.

105. It is convenient to set out the dates of all the sick notes which were sent in during the period that we were concerned with, and the periods of sickness they certified.

2 February 2016	-	3 weeks
24 February 2016	-	3 weeks
16 March 2016	-	3 weeks
6 April 2016	-	1 month

6 May 2016	-	4 weeks
3 June 2016	-	1 month
4 June 2016	-	1 month
3 August 2016	-	6 weeks
13 September 2016	-	1 month

106. That last sick note expired on 13 October 2016. 13 October 2016 was the day after the hearing of the appeal before Mr Hollingworth but prior to receipt of the notification of the outcome.

107. All the sick notes from 2 February 2016 signed the Claimant off in relation to 'stress'. Some of these episodes were said to be work related.

108. It was very striking during the Claimant's evidence in chief, that she reiterated that she had no criticism of the way Mrs MacArthur had handled the management of her sickness absence and that she also could not suggest any further steps that the Respondent could have taken during that time frame. In the Tribunal's view this evidence was consistent with the contemporaneous documentation.

109. The Tribunal also considered that the written communications between the Claimant and Mrs MacArthur reflected the good relationship between them which had existed prior to the commencement of the Claimant's absence.

110. The Claimant made a point which the Tribunal believed to be primarily relevant to the constructive dismissal claim, that Mrs MacArthur was 'quick off the mark' in considering and asking for advice about whether she should start the formal sickness monitoring procedure after the Claimant went off sick on 2 February 2016. Under the Respondent's procedure, the manager was to consider starting the formal process after 4 weeks of sickness absence. It was not in dispute that there was an email of 14 March 2016 from Mrs MacArthur to a senior HR consultant and to Mrs MacArthur's line manager, Ms Branchett discussing whether to start the formal process. Ms Branchett was Director of Organisational Intelligence and Commissioning Delivery at the time.

111. In the email (p177) Mrs MacArthur indicated that she had received a text from the Claimant on the previous Friday (11 March 2016) to say that she was going to be signed off for another 3 weeks, after her current sick note had expired. By this time, the Respondent had received the first sick note in relation to 2 February and a second sick note which was also for 3 weeks dated 24 February 2016. That was the context in which Mrs MacArthur raised the question of the initiation of the formal process. She anticipated that the Claimant's absence, if she was right about the sick note, would cover further absence up to 6 April 2016. That was in the event the case. In fact, Mrs MacArthur was advised that it was fairer to delay entering the formal process and to have initial informal meetings before, if it was appropriate, moving onto the formal process. One of the benefits of this approach it was explained to her, would be to ensure that the issue of any adjustments and other support could be thoroughly investigated with the Claimant. Mrs

MacArthur took the advice and indeed sought further advice as to the means by which she should communicate with the Claimant such as sending an email or a letter and was concerned about the degree of formality and whether this might be detrimental.

112. It was also clear that Mrs MacArthur consulted the policy and her obligations under that policy as a line manager (p176) at this stage. The other issue that she sought HR advice about was about the Claimant's request to be accompanied at the meeting by her mother. There was no provision under the Respondent's policies for this but in the event, the Respondent allowed the Claimant to be accompanied by her mother. Indeed, Mrs MacArthur had received some very clear advice from the head of human resources delivery that it was only when there were "really exceptional circumstances" that accompaniment by an Essex County Council employee or union rep should be granted. The Tribunal also considered that this right of accompaniment applied only in relation to formal meetings. Ms Chambers the head of HR delivery advised Mrs MacArthur that it should be an informal meeting without the Claimant's mother. Mrs MacArthur indicated that the Claimant had explained that she needed someone there to support her. In the event, as the notes of the meeting on 5 April, which was the first of the formal sickness meetings record, Mrs Garthwaite, the Claimant's mother attended the meeting "for support" (p178).

113. The Claimant was described as being "very fragile" during the whole meeting on 5 April 2016 and expressing the view that she was still not well enough to come back to work. She asked about how the team was and Mrs MacArthur gave her general news updates. The note records that Mrs MacArthur tried to gently probe what it was that had made the Claimant go off sick again in February. The Claimant said it had been the performance discussion with herself the week before that she had not been expecting, and then the meeting with Ms Gurry in the coffee bar, which had left her feeling shell shocked and that she could not tell Mrs MacArthur that she was not managing. The Tribunal noted that this was different from what the Claimant had said shortly after she went off sick. The Claimant reported getting a lot of support from her family and friends and that she would be seeing her GP again the following day. Mrs MacArthur asked her if the GP might suggest specialist counselling and the Claimant said she did not know. Mrs MacArthur also said that it was obviously too early just yet to talk about the Claimant returning to work but that when she did, she thought it might be helpful to do another referral to occupational health, to which the Claimant agreed. There was also some discussion about the phased return to work. Mrs MacArthur tried to reassure the Claimant that while she had been off, the workload was now more manageable and that the number of reports that the team needed to do each month had been reduced and that new starters were being recruited also.

114. This was but one example of Mrs MacArthur trying to keep the Claimant up to date and to inform her of things which had changed at work which might reduce the stress on her and therefore facilitate her return to work. Similar conversations were recorded as having taken place at the other meetings.

115. The Claimant also indicated that she felt that she was on a long journey to recovery and that "the thought of returning to work makes her feel sick. She daren't even look at the laptop". Some other matters were discussed which need not be set out here. The meeting ended after about 45 minutes and Mrs MacArthur gave the Claimant a hard copy of the sickness absence policy.

116. The Claimant confirmed in her oral evidence as indeed the evidence supported, that there was no breach of the sickness absence procedure by Mrs MacArthur or the Respondent.

117. In an email exchange between the Claimant and Mrs MacArthur to do with the occupational health referral, Mrs MacArthur confirmed to the Claimant in writing on 8 April 2016 (p179) that things were, as she described it, "looking up". She referred back to the fact that she had told the Claimant during the meeting that the workload of the team had improved "massively now" and that they would have two new people starting soon hopefully. She concluded what was in the Tribunal's view an email which was written in friendly terms, by saying that she hoped that the Claimant was okay and that she urged her not to worry about work and to focus on getting better.

118. Certainly, in relation to the referrals to occupational health which were made in April and subsequently in September 2016, the Claimant was sent a copy of the draft referral form for her to add any issues that she believed needed to be considered by occupational health. The referral was made immediately after the meeting on 5 April (p181-184). The appointment was for 20 April and the report also bore that date (pp185-186).

119. The effects of the Claimant's condition at that point were noted as debilitating symptoms including panic attacks, sleep disturbance, loss of concentration as well as difficulty going out on her own. The occupational health advisor advised that the Claimant remained unfit to return to work at that point. She was also unable to accurately predict a return to work date but indicated that in her opinion, this was unlikely to be in the short to medium term. Mrs MacArthur understood medium term to be a matter of months.

120. The occupational health report anticipated a potential return to work after the Claimant had received appropriate treatment including counselling and had recovered sufficiently and indicated that in those circumstances, that the Claimant would be able to provide a regular and effective service. However, it was her opinion that "*until the workplace issues are resolved, Justine's emotional well being is likely to continue to be affected".*

121. The Tribunal considered that at this stage the Claimant's presentation as captured by Mrs MacArthur in her notes of the meeting of 5 April and also as recorded by the occupational health advisor in the comments and descriptions set out above, indicated that it would not have been appropriate or in the Claimant's interests for the Respondent to have entered into any sort of detailed discussion with the Claimant about resolution of the workplace issues. Against that however, the Respondent was informing the Claimant of developments which had happened at work which would hopefully reassure the Claimant certainly about the staffing issues that she had been concerned about and the resources issue.

122. The next section of the report addressed potential reasonable adjustments to assist the return to work. With the proviso that these were applicable "*once Justine is fit to return to work*", the OH advisor suggested a gradual phased return to work, regular one to one meetings, individual stress risk assessment; and support with the team's workload.

123. This report also contained the two paragraphs referred to above which had been set out in January 2016 report as well about the occupational health adviser's opinion as to the status of the employee under the Equality Act. It appeared to the Tribunal to be a template formula in those two paragraphs.

124. The next informal sickness meeting between the Claimant and Mrs MacArthur was held on 6 May 2016 (pp190-191). Once again, the Claimant's mother attended and the meeting was held at a restaurant in Chelmsford. The notes record that the Claimant was still suffering from the effects of what had been 'a nervous breakdown' although her doctor had not used that terminology but had called it 'burnout'. She recorded the treatment the Claimant was undergoing including medication and there was reference to the NLP. Mrs MacArthur's impression was that the Claimant seemed "slightly better" than the last time they had met. She recorded amongst other matters, that she updated the Claimant on the organisation and the changes in her team including reduction in workload by speaking to customers about low value ad reporting. Mrs MacArthur broached with the Claimant the prospect of a formal sickness meeting because of the terms of the Respondent's policy and because the Claimant's absence had now lasted longer than three months with no clear return date in sight.

125. The option of a further referral to occupational health about adjustments for the meeting and support for the meeting was deemed unnecessary by the Claimant. She indicated that all she wanted was to bring her mother with her for support. She indicated that she found occupational health "*a distressing experience and would rather not have to tell her story all over again*". Mrs MacArthur also raised with the Claimant the possibility of whether the Respondent could consider offering her a non-managerial role, which the Claimant said she would consider. The meeting included a discussion between the Claimant and Mrs MacArthur about their "personal news". This also indicated that the relationship between the two women appeared to remain cordial up to this point.

126. The Claimant was given in writing, notice of the dates of expiry of her occupational sick pay, as a consequence of the beginning of the Claimant's sick absence on 2 February 2016, as the letter refers to that date. It confirmed that her occupational sick pay at full pay, would expire on 19 May 2016 and that the expiry of occupational sick pay at half pay would occur on 19 October 2016 (p203).

127. The first formal sickness meeting under the SAP took place on 5 July 2016. The Claimant attended supported by Alison Whittle from IAPT. Her line manager Mrs MacArthur was also present. The last fit note delivered at this stage was on 4 July 2016 certifying that the Claimant would still not be fit for work for a further month. The Claimant did not challenge the accuracy of the notes of this meeting. The meeting took place at the Essex Records Office.

128. The Claimant was recorded as explaining that she felt that she was on an upward curve (p215), although she was still experiencing good and bad days. Her picture of her abilities however at this stage, still indicated to the Tribunal that she was suffering to a substantial degree. She confirmed that a return date was still uncertain. It was also accepted by the Claimant that she was sent a copy of these minutes after the meeting.

129. The Claimant and Mrs MacArthur discussed in some detail the reasons for the Claimant feeling unwell and her concerns about the work pressure and also issues

relating to her own personal and physical health. There was also some discussion about the whole issue of the analytical capacity in the team to cope with the workload. The Claimant asked Mrs MacArthur about the team and Mrs MacArthur explained they were in a good place right now and that the new appointments were going well. There was a discussion about what support and treatment the Claimant was receiving at that point and she was asked if there was anything further that the Respondent could put in place to assist her recovery. Mrs MacArthur also raised the possibility when the Claimant was ready to return to work, of looking at adjustments in relation to her working patterns or even looking at a different role (p217). She also raised the possibility of a non-managerial position. She recorded that the Claimant's response was that she was open to suggestions but that at the moment, she was "not in any fit state to make decisions".

130. As anticipated by the policy, Mrs MacArthur explained that they would have to review the Claimant's progress against the improvement plan that would be set out in a letter which Mrs MacArthur would send to the Claimant after the meeting. She told the Claimant that the time frame for review would be ten weeks and that if she was not back in work, there may be a written warning issued and that this may progress to an independent hearing at which her employment with the Respondent could be at risk. She also confirmed to the Claimant that she did not in any way want to cause her further anxiety, but that she was obliged to let her know the possible consequences under the sickness policy (p217). The letter confirming what was discussed at the sickness absence meeting was sent to the Claimant dated 13 July 2016 (pp220-222). It confirmed the matters identified above and which were set out in the notes of the meetings.

131. There was an error in the letter which referred to the sickness absence meeting having taken place on 1 July, when it was agreed that it had taken place on 5 July 2016 (p220). Further, as Mrs MacArthur had indicated, for the first time she set out the improvement plan in the letter (p221).

132. There was contemporaneous correspondence which confirmed that after the formal meeting at the beginning of July, a further informal catch up meeting took place, attended by the Claimant, her mother and Mrs MacArthur at a restaurant in Chelmsford on 9 August 2016 (p234A). The overall picture was the same, which was that the Claimant definitely still did not feel ready to return to work and Mrs MacArthur's perception of her was that she continued to manifest signs of fragility. There was a tentative suggestion about redeployment opportunities but the Claimant was noted as saying that she did not feel ready to even think about such or applying for anything else.

133. It appeared to the Tribunal from the evidence, that the notes of the formal meetings were sent to the Claimant but the notes of the informal meetings were effectively Mrs MacArthur's aide-memoirs. They were not shared with the Claimant at the time. The Tribunal found that they were nonetheless reliable records of the discussions.

134. The notes recorded, and this was not disputed, that at the end of the meeting, the Claimant's mother suggested that the three of them should walk back to county hall for the Claimant to confront her fear of coming into the building, by walking through the front entrance and out the back doors onto the street. As a result of this suggestion, the Claimant apparently got very upset, tearful and so they did not do this. Mrs MacArthur noted that she was a bit shocked at how badly the Claimant had reacted to the suggestion of coming into county hall. This indicated to us just how far the Claimant was from being

able to return to work, but also from being able to have a meaningful discussion about the stressors.

135. The Claimant was then given notice of the formal line manager hearing by a letter dated 17 August 2016 (pp234b and 234c). This meeting was to take place on 14 September 2016.

136. The meeting took place as scheduled on 14 September 2016 and the Claimant attended. As with the previous meeting, notes of the meeting were sent to the Claimant shortly after the meeting and she did not challenge in this case, the accuracy of the notes (pp238-239). Mrs MacArthur was accompanied by Vicky James who would be covering for her role while she was on maternity leave. In the event, Mrs MacArthur went off on maternity leave at the end of September/beginning of October. The Claimant was also accompanied by a Miss Bell, her support worker from IAPT.

137. There was once again a review of the reason why the hearing had been called and the concerns about the Claimant's attendance, the support in place, the steps the Claimant was taking to aid her recovery and the Claimant's current presentation. At the date of this meeting, the Claimant had been signed off for another four weeks, which was due to expire on 13 October 2016, i.e. that fit note had been signed on 13 September 2016.

138. Under the section 'next steps', Mrs MacArthur indicated that she would extend the return to work plan by another four weeks. During that time, it was proposed that the Respondent would refer the Claimant again to occupational health, the last report having been prepared some six months previously. She indicated they would include questions about suitability for redeployment and whether this would aid the Claimant's return to work.

139. Mrs MacArthur indicated that in any event after the meeting, she would add the Claimant to the priority application scheme in case any redeployment opportunities became available and that she would send the Claimant details on how to access this. The Claimant expressed some concerns about whether her current ill health would weigh unduly against the prospects of getting another job. Mrs MacArthur also indicated that she would try to ensure that the same occupational health advisor or consultant was assigned to see the Claimant on the next occasion to minimise the possibility of the Claimant having to repeat her story again, as she had expressed an understandable concern about this. The Claimant said that she did not mind either of the two ladies that she had seen at the previous occupational health appointments.

140. The outcome of this meeting was that a formal written warning was to be issued which would stay on the Claimant's file for six months. Following the extended four-week period, the Claimant may be invited to an independent sickness hearing unless there was a change in attendance, in accordance with the sickness absence policy.

141. The Claimant was noted as saying that she felt it was crazy that work had caused her to be in this position and that she was now being penalised for it, but that she did understand the rules of the policy and understood the position that Mrs MacArthur was in, as they had both been through the same process with one of the Claimant's own employees the previous year.

142. The occupational health referral was completed that day (pp239a-239d). An amended version was sent (pp240-243). The occupational health report which was completed as a result of that referral was dated 5 October 2016.

143. As the notes of the hearing on 14 September reflected, the Respondent asked further questions of occupational health, Thus page 242 records that as well as asking whether the Claimant was medically fit for the post and if not, when she was likely to be so, and also what adjustments the Respondent needed to consider to keep the employee at work or to assist with her return to work, they asked at questions 6 and 7 about whether the Claimant was permanently incapable of performing her job due to ill health or incapacity; and whether redeployment on medical grounds was recommended.

144. In the report which was sent to the Respondent (p270), the answer to the question about permanent incapacity was that the occupational health advisor, Nicola King, said; "*I do not deem this employee permanently incapable of performing their job at this current time. She is still receiving treatment and if the workplace issues that are troubling Justine can be resolved, there is a much greater likelihood of achieving a full recovery and a successful return to work".*

145. The advisor continued in relation to the question about redeployment on medical grounds: *"I have discussed this with Justine as an option for supporting a return to work however, she is currently not fit enough to contemplate this".*

146. Following the hearing on 13 September 2016, Mrs MacArthur wrote a letter of the same date to the Claimant setting out the outcome of the hearing (pp244-245). The letter once again summarised the discussions at the hearing and also confirmed what the further plan would be. In particular, at page 245 she recorded that in line with the council's sickness absence policy, Mrs MacArthur was issuing a written warning which would remain on the Claimant's personal file for six months provided the improvements in terms of her attendance were achieved and maintained throughout that time. The reason for the decision was stated that it had now been seven months since the Claimant had been off sick with no imminent return to work date likely. The Claimant was informed that she had the right to appeal against the decision and was told how to do this.

147. In describing to the Claimant how she could lodge an appeal, Mrs MacArthur told her that the form for the grounds of appeal was available on the council's intranet. There was no evidence before us that the Claimant did not have access to the intranet throughout this sickness absence period. As set out above in the short chronology, she indeed lodged an appeal, the details of which were set out in a document dated 28 September 2016 (pp261-262).

148. By a letter dated 5 October 2016, the Claimant was invited (p268) by Mr Hollingworth, who was Head of Delivery Assurance, to the sickness absence appeal meeting which was scheduled to take place on 12 October 2016.

149. The grounds of the Claimant's appeal were set out in 3 bullet points as follows (p261):

121.1 That she had been treated less favourably on the grounds of her disability;

121.2 That although Essex County Council was aware that she was a disabled person within the meaning of the Equality Act from 29 January 2016, the occupational health reports dated 29 January 2016 and 20 April 2016 had never been taken into consideration at any meeting, including the meetings on 2 February 2016, 1 July 2016 and 14 September 2016 or any correspondence including the letter dated 14 September 2016.

121.3 That Mrs MacArthur had stated in the written warning letter: "*We discussed the concerns about your sickness absences and the lack of progress against the improvement plan and the standards of attendance expected of you"*, however Essex County Council had ignored the specific and clear advice from occupational health and did not carry out an individual stress risk assessment to identify specific sources of work place stress and/or Essex County Council had not developed an extra plan to address them, as advised by occupational health on 29 January 2016 and on 20 April 2016.

150. She concluded this part of the letter by stating that the reason that she was still off work was that the Respondent had failed to address the matters advised by occupational health. In essence, she argued that she had not been treated as somebody who was disabled by reason of her depression and asthma. She made the point that she believed that all her sickness absence had been disability related.

151. The occupational health report dated 5 October 2016 (pp269-270) addressed the specific questions which had been referred to the service. The Tribunal has already cited above the responses in relation to the permanent incapacity of the Claimant and whether redeployment on medical grounds was recommended, so that is not repeated here.

152. Two further substantive questions were addressed in the report. The first was whether the Claimant was medically fit for the post and if not, when she was likely to be fit for the post. The advice came back once again that the Claimant was not fit for work. The position which was not disputed was confirmed that the Claimant had been doing everything that was required of her and that anyone had suggested that could assist her to secure her return to good health. The occupational health advisor indicated that she could not predict a time frame for when the Claimant would be fit to work. She noted that the Claimant had seen her GP recently and it was very likely that she would require further time off. As of 5 October 2016, there was a further week to run on the latest fit note.

153. The occupational health advisor, Ms King, was asked the further question, namely what reasonable adjustments did the Respondent need to consider in order to keep the Claimant at work or to assist her return to work. Ms King advised that there were no adjustments that she could recommend at this time, as the Claimant remained unfit. She continued that the Claimant perceived that the work-related stressors prior to and leading up to her becoming unwell, had not been addressed by management. She had been off work since February 2016 and despite interventions and counselling, the Claimant did not feel any further forward in being able to anticipate a return to the work place. She then expressed a view that the true barriers to a return to work in this case were more related

to the Claimant's workplace concerns than a primary medical problem. She stated that clinical interventions alone were unlikely to alleviate these difficulties and unless management interventions could address the underlying issues, her sickness absence was likely to persist. She recommended that the Respondent discuss this information with human resources in order to agree a way forward.

154. The Claimant was due to meet with Mrs MacArthur shortly after the date on which the appeal took place and shortly after receipt of notification of the outcome. Thus, in an email exchange (p 271) the Claimant was offering availability for herself and her mother on 18 October 2016 at 2:00pm. In the event, that meeting did not take place because the Claimant resigned by letter dated 17 October 2016.

155. Having received the invitation letter to the appeal meeting, the Clamant responded by email dated 10 October 2016 (p290-291) to the senior HR consultant, Victoria Dorrington, to explain that she considered that attending the hearing would further exacerbate her stress and anxiety. She continued that she had set out the grounds of her appeal in a letter dated 28 September 2016 (pp261 -2) and that she was happy for the appeal to be dealt with in her absence and for the Respondent to communicate through correspondence.

156. The response from the Claimant was copied to Mr Hollingworth and to her IAPT supporter, Penny Bell. By further email sent on 11 October 2016 at 10:12am, Mr Hollingworth responded to the Claimant acknowledging receipt of it. As Ms Dorrington was on leave, he said that he was replying in her absence. He stated that he was very sorry to read that she was still unwell and felt unable to attend the appeal hearing on the next day. He pointed out that the OH report outlined that the Claimant was unfit for work but did not make any reference to the Claimant being unable to attend a meeting of this nature. He stated;

"As you know, the hearing is an opportunity for you to verbally present your case to me and for us to have a full discussion with respect to your grounds of appeal. I would very much like to meet with you to discuss further.

I will of course try to minimise stress for you by having breaks or running the meeting at your pace. I also understand that you are currently being supported by a worker from Essex Mind, and they of course are able to attend. I would be grateful if you could confirm if you require any other adjustments to be made in order to attend the hearing by close of business today, Tuesday 11 October.

If you still feel that you are unable to attend this hearing due to ill health, then I will proceed in your absence".

157. The Claimant responded by email within a short period of time, acknowledging receipt of Mr Hollingworth's email. She stated that she had reasonably requested Mr Hollingworth to make reasonable adjustments to the appeal hearing i.e. not to require her to have a face to face meeting and for the appeal to be dealt with by correspondence. She stated: "*I am therefore happy for you to proceed on this basis" (p289).*

158. Mr Hollingworth responded again to inform that Claimant that he had been provided with some information to help with the appeal but that he had a few questions. He quoted from the occupational health reports of 20 April and 5 October which referred to work place issues which needed to be resolved and which were affecting the Claimant's emotional well being which had led up to her becoming unwell, not having been addressed and that unless management interventions could address the underlying issues, sickness absence was likely to persist. He asked the Claimant if she could please provide detail of what the "workplace issues" currently were and what "management interventions" she would expect to resolve the issues which she said had not taken place. (p289).

159. By an email sent on 12 October 2016 at 12:07 from the Claimant to Mr Hollingworth and copied to Ms Dorrington and Penny Bell, the Claimant indicated that she was somewhat surprised by the questions that Mr Hollingworth had raised. She referred back to the grounds of appeal in her letter of 28 September and stated that these were clearly set out there. She indicated that the workplace issues "*have all been documented in formal notes by Claire* [MacArthur]*. I had hoped that Claire would be able to provide you with these, so not to cause me further stress".* She then continued that the questions that Mr Hollingworth raised, suggests that they had not been taken into account before Mrs MacArthur issued her with a formal written warning and that only Mrs MacArthur could answer this. She indicated that the fact that Mr Hollingworth had not been provided with this caused her concern. She then concluded the letter by stating that it had now been two weeks since she had made the appeal and that she would appreciate a quick resolution on this by the end of the week. The letter was sent on Wednesday 12 October 2016.

160. In his email in reply which was sent on 13 October 2016, (p288), Mr Hollingworth thanked the Claimant for her reply and confirmed that Mrs MacArthur had provided him with copies of the formal notes that the Claimant referred to and that these mentioned the causes of stress. He went on that his enquiry had been into the Claimant's view on whether these causes were still current, i.e. as of 13 October. He stated that he had taken from her response that she felt that they were. He then continued that given the appeal was her chance to have her case heard independently, he was giving her the opportunity to make representations and that he thought that she might want to be specific on these matters. He then apologised if this had caused her any upset. He indicated that he was aiming to provide her with the outcome of the hearing by the following day at the latest.

161. The Claimant replied later on 13 October by thanking Mr Hollingworth for the clarification.

162. In the run up to the appeal hearing, Mr Hollingworth was also in correspondence with Mrs MacArthur (pp265-266). His first communication was on 3 October 2016 in an email in which the subject was 'Confidential JA – Appeal Questions'. He indicated to Mrs MacArthur that he had started to look through Mrs Atterbury's case. He asked her to 'confirm' that informal conversations that had taken place essentially were identifying areas of stress anyway. He stated that this was relevant to the Claimant's assertion in her appeal that an individual stress risk assessment was not completed. He continued that having looked at the assessment form, it was nothing more than a capture sheet for identifying risk areas and support required to deal with it. He continued "*I would have thought that the causes and support were being discussed as a matter of course and*

purely the fact that the template was not competed did not seem to be a valid reason to appeal". Mrs MacArthur responded later that day and confirmed that at almost every one to one meeting, they had talked about why the Claimant was feeling stressed and she summarised what the Claimant had said abut this. These included both issues relating to the work and the team and the performance of various members, but also problems with the Claimant's teenage daughter at home etc. Mrs MacArthur informed Mr Hollingworth that she had supported the Claimant as much as she reasonably could, providing her with temporary staffing capacity, supporting her to performance manage her staff, talking through strategies to manage demand etc. Specifically, in relation to the risk assessment form, she indicated that she did not think they had actually filled out the form but a lot of their one to ones and return to work conversations effectively did exactly what the form asks you to do, namely identify stress factors and work together on a plan of support. She also referred to the Claimant having reasonable adjustments in place including reduced working hours and support from an external coach (p266).

163. The Tribunal accepted this summary as accurate because it was consistent with the contemporaneous evidence as outlined above.

164. Mr Hollingworth then asked further questions in relation to the timeline by an email of 4 October 2016. Mrs MacArthur responded by outlining the Claimant's sickness record from 30 September 2015. She explained that the reduced hours regime for the Claimant on the return to work was first implemented after that episode.

165. She told Mr Hollingworth that within a short pace of time, she noticed that the Claimant was not keeping to the reduced hours and that in the run up to the Christmas period, she was again concerned about the Claimant's performance and signs of stress. She referred to the occupational health referral which she made on 22 December 2015, which also mentions reasonable adjustments that had been put in place. She explained that the Claimant was off work again from 11 to 14 January 2016 following an asthma attack which may or may not have been stress related and that again, the Respondent implemented a phased return to work when she came back from this episode of sickness. She also referred to the two other occupational health referrals made on 6 April and 15 September 2016 which also listed reasonable adjustments that had been made to support the Claimant's return to work.

166. After the meeting between the Claimant and Mrs MacArthur at which Mrs MacArthur issued the written warning, Mrs MacArthur then liaised with the Claimant about sending off the OH referral form and also about how the Claimant could access the intranet in relation to the redeployment scheme details on her laptop (p273). That was on 15 September 2016. By email dated 27 September 2016, Mrs Atterbury told Mrs MacArthur that she had given the issue a lot of consideration and that she wished to appeal against the formal warning. She stated that she would have the basis of her appeal sent to Mrs MacArthur by the end of the week.

167. Mrs MacArthur responded by email dated 28 September 2016 asking the Claimant to send the appeal in by the end of that week, as the Claimant was slightly outside of the appeal time scale but that they would consider it despite that. She also asked whether the Claimant had received the occupational health appointment letter.

168. There was some further correspondence which does not add anything of substance to the chronology. It was confirmed by Mrs MacArthur to the Claimant by an email of 6 October 2016, that she would be going on maternity leave in a few weeks and she was therefore keen to put in place the next informal catch up. The date of 18 October was proposed. As the Tribunal set out above, that date was eventually agreed by emails of 7 October 2016 from Mrs MacArthur and Mrs Atterbury respectively (p271).

169. Although it was not listed in the appeal outcome letter, the documents which Mr Hollingworth was given to consider the appeal were listed in his notes (p282). The Tribunal considered it important to itemise these as the outcome of the appeal was relied upon by the Claimant as the final straw in relation to her constructive unfair dismissal complaint. Mr Hollingworth was provided with the following documents:

- Emails from Mrs MacArthur describing one to one meeting and contents;
- OH referral form 22 December 2015;
- Notes of CM-JA meeting 26 Jan 2016;
- Notes of CM-JA phone call 2 Feb;
- OH report 29 Jan;
- OH report 20 April;
- Notes of formal sickness meeting 5 July;
- Outcome letter form formal sickness meeting 13 July;
- Notes of formal line manager hearing 14 September;
- Outcome letter from line manager hearing 14 September;
- Appeal letter 28 September;
- ECC Sickness Absence Policy;
- Individual Stress Risk Assessment Template;
- OH assessment 5 October;
- Email correspondence IH-JA responding to IH question to support hearing.

170. Mr Hollingworth then wrote to the Claimant by letter dated 14 October 2016 (pp292-294). He went through what he saw as each of the points of appeal and set out his findings in the letter. He rejected the first point in relation to the Claimant feeling she had been treated less favourably on the grounds of her disability largely because he did not consider that the Claimant had been declared disabled. The Claimant had relied, in her appeal letter, on the Respondent being aware that she was a disabled person from 29 January 2016. Mr Hollingworth deduced from that that the Claimant suggested that the occupational health report of that date declared the Claimant to be disabled. He indicated that this was not the case. The discussion during the hearing before the Tribunal was about the statement at the end of the report that the opinion was that it was likely that the employee may be considered disabled. The Tribunal did not consider that this was a positive assertion by occupational health that the Claimant was disabled. The double use of 'likely' and 'may' tended to suggest that there was less than a likelihood.

171. In his letter, he referred to the January 2016 occupational health report certifying that the Claimant was likely fit to work with adjustments. The Tribunal took into account that at the time the report was provided, the Claimant was indeed back at work and that the Tribunal was not concerned with the period of 29 January 2016, but from 2 February 2016 when she started her long term sickness.

172. Having found that the occupational health report or any other source of evidence did not declare the Claimant to be a disabled person, Mr Hollingworth then proceeded to consider whether there was any evidence of less favourable treatment than anyone suffering from work related stress within the organisation. He found that support had been provided through various means and he characterised it as "of an extremely attentive nature". He went into detail about the matters which had already been outlined previously in these reasons. He expressed the view that this appeared to him to be "very robust" and that a great deal of support had been offered to the Clamant in order to aid her return to work and health conditions. Among the matters that he identified were for example, moving the member of staff out of the team to avoid any conflicts and third-party coaching. They were all matters of support, or changes, or assistance which were in place before that occupational health report. He therefore found that the first appeal point was not substantiated.

173. Mr Hollingworth then proceeded to address the second point of appeal as to occupational health reports never having been taken into consideration at any meeting or any correspondence. He stated that he believed that this was a reference to the reasons for the sickness absence and the need for this to be taken into account. He concluded that there was clear evidence that the reasons for absence were known and the occupational health reports were therefore taken into account when looking at support for the Claimant and when looking at the next steps in terms of process. He stated however, that this would not affect the implementation of the Respondent's sickness absence policy, as this needed to be applied fairly and consistently to ensure that all employees were treated the same. He continued that the Claimant had also stated on 14 September, that she understood the rules of the policy and the position that Mrs MacArthur was in. He thus concluded that he had no reason to believe that this point required further investigation and he rejected this appeal point.

174. The third point he addressed was the appeal point that the Respondent ignored the advice of occupational health and did not carry out any individual stress risk

assessment to identify sources of workplace stress. His conclusion was that having reviewed the template for the individual stress risk assessment and the guidance on how to complete it, it simply appeared to be a means of capturing the outcome of the conversations regarding the causes of stress and ways to address them. He saw the question for him, to be whether there had been any conversations and actions to address causes of stress? He concluded that from the evidence he had been furnished with, there had been numerous conversations and evidence of actions that were put in place to manage the Claimant's stress. He therefore felt that the advice of occupational health was in fact being implemented as a matter of good practice months before it was suggested and that the types of questions and actions plans were clearly being progressed. He rejected this appeal point.

175. Finally, he addressed the fourth point in which the Claimant stated that the reason for her absence was the failure to address the matters advised by occupational health and the failure of the Respondent to make adjustments to the sickness absence policy as a result. He found that occupational health advised on 29 January that until the continuing grievance against the Claimant had been fully resolved, she would continue to experience symptoms of stress. He stated that he understood that this grievance was resolved in March 2016 and that the Claimant was made aware of this by Claire MacArthur, so he believed that this particular area of concern had been resolved.

176. He then referred to the January occupational health report stating that sustained work place stress affected the Claimant's emotional well being. He found that there was evidence of many attempts by Mrs MacArthur to help reduce the work place stress and he referred to his earlier summary of all the support that had been put in place. He then referred to the 20 April occupational health report which also documented that the Claimant was receiving medical treatment for her condition that should help her to recover sufficiently and again stated that until the work place issues are resolved, Justine's emotional well being is likely to be affected.

177. He then turned to the report of 5 October 2016 and its further reference to work related stressors in text which has been cited above. He then stated that he was unclear if the work place issues referred to in the April and October 2016 reports were the same as the issues raised in December 2015 and January 2016 and why the Claimant believed they had not yet been resolved. He recorded that he had sought clarification from the Claimant on this matter and the Claimant's reference to Mrs MacArthur's records of these discussions. He therefore referred to the notes for his investigations.

178. He then set out that his understanding was that since the eight month absence started in February, seconded managers had resolved the workload demands and the pressures that the Claimant had made reference to in the meetings that she had had with Mrs MacArthur before going off sick. It was therefore his opinion that the work place issues were now historic and had been addressed. The status of the teams was also addressed in Mrs Atterbury's meeting with Mrs MacArthur on 5 July when she asked how the team were doing and that Mrs MacArthur had confirmed that they were "in a good place". He indicated that he saw this as a clear indication to the Claimant that there was an improvement in the work situation at this point.

179. He then stated that he saw no reason or mitigating circumstances for why the Respondent should be required to change its policy on sickness absence due to the

Claimant's health conditions as specific circumstance. He noted the danger of unfavourable treatment of others if the policy and processes were not followed in relation to the Claimant. He concluded in relation to the fourth appeal point that this was not substantiated.

180. He therefore upheld the written warning which Mrs MacArthur had issued. He stated: "*I believe that your line manager has done all she could to alleviate the stress that was evident at the end of last year and in doing so conformed with the advice suggested by occupational health. I see no evidence of unfair treatment, and you yourself make reference in previous discussions to the support and understanding that has been provided.*

I feel there is obvious evidence that the work situation currently within the team managed by you has improved in the time that you have been absent and that this would intimate that the work related issues have been thoroughly and effectively dealt with."

181. He concluded the letter by confirming to the Claimant that the appeal process was now at an end. The position therefore as set out by that letter, was that the ground of appeal in relation to the written warning had not been upheld, but that the process still continued. The Claimant responded by email to Mrs MacArthur dated 17 October 2016 stating that she was devastated that it had come to this and that the attached letter was self explanatory (p295).

182. In the attached letter, she stated that she was resigning with immediate effect (pp296-297). She referred to her 11 years of service with the Respondent, 10 of which she described as having an unremarkable sickness record and delivering high levels of performance. She made it plain that she considered that the way in which she had been "discriminated against for the past year" was a fundamental breach of her contract. She considered that the response to her appeal against a formal written warning received on 14 October 2016 was the final straw. She indicated that she could not continue and was resigning with immediate effect on the basis of being constructively dismissed. She then cited the paragraph in which Mr Hollingworth had indicated that he saw no reason or mitigating reasons why the Respondent should be required to change its policy on sickness absence due to the Claimant's health condition and specific circumstances. She argued that her appeal was based on the EHRC Code 5.3 relating to disability related absence and that there was no reference to this in the response and it clearly had not been taken into account. She referred to the occupational health nurse having commented at the end of January 2016 that the Respondent had a duty of care to support her and that she felt that this support had not been given and that the further actions (the meeting with Mrs Gurry from HR on 1 February 2016 after the occupational health report was released) was the tipping point which led to her breakdown.

183. She referred to the fact that she was unable to meet face to face at the appeal hearing but that the response had not acknowledged that this was due to her stress and anxiety in dealing with "anything related to Essex County Council".

184. She complained that the notes of the formal sickness review meeting on 5 July 2016 clearly outlined the stressors that caused her breakdown in February 2016 and that these had never been addressed. She complained specifically about the non completion of the stress risk assessment either through a formal template or informally. She further

made the point that the "additional resources" referred to in Mr Hollingworth's appeal outcome letter were not additional resources but were to help cover the two vacancies that the Respondent had in the team and that in a team of seven, this was unsustainable. She noted that further resources were found after she had the breakdown in February 2016. She complained that the adjustments after her return to work at the end of 2015 had not been adequate.

185. The Tribunal reminded itself that this timeframe was not within the ambit of our judgment.

186. She referred further to the improvement plan which followed the meeting of 5 July 2016. She stated correctly the Tribunal found and there was no dispute about this, that she had done everything she could and made use of all the resources available, to help herself to get better. She had complied by attending meetings as requested.

187. In essence, the Claimant made a point that she expanded upon during the hearing that she believed she had been punished in a situation in which she had no control over her medical condition which left her incapable of work.

188. She specifically complained that no "response" was given to the occupational health report on 29 January or 20 April 2016. She also complained that there had been no response to the further occupational health report dated 5 October 2015 but which was received she stated, on 10 October 2016. The Tribunal reminded itself that the undisputed evidence was that there were various meetings as set out above between the Claimant and her line manager, after both the reports of 29 January and 20 April. A meeting with the Claimant's line manager was proposed to take place on 18 October 2016, but that did not happen because the Claimant resigned with immediate effect.

189. She then referred to the final straw being the last paragraph of Mr Hollingworth's outcome letter in which he "insinuated" that it was her fault that the team had not been performing as the work situation had improved following her absence. The Tribunal considers that the Respondent was acting properly by informing the Claimant about various matters which had occurred since the Claimant was absent which were likely to alleviate her stress should she return to that situation. The Tribunal considered that the Respondent really had no other option 1) because they perceived this to be the case; and 2) because the Claimant was saying that her continued ill health was because of the work place issues. Reporting back to the Claimant about the work place issues must have been the appropriate thing to do.

190. The Tribunal also noted a point made in closing submissions on behalf of the Claimant and which was put in cross examination of Mrs MacArthur. It was explored with her whether she should have written to the Claimant to set out some of the improvements which she said had taken place because it would have been easier for the Claimant to accept this if she had seen this in writing. The Claimant's reaction to Mr Hollingworth's letter on these issues does not support that contention.

191. The Claimant concluded her letter by cancelling the meeting which had been scheduled with Mrs MacArthur for 18 October 2016.

192. In response to the Claimant's letter of resignation, Mrs MacArthur wrote to the Claimant acknowledging receipt of it and expressing her regret at the decision. She also addressed the issues which the Claimant had complained about in her letter of resignation (pp306-307). She concluded her response to the Claimant by expressing the view that she was really disappointed that the Claimant had decided to resign and that she felt that she had not received adequate support to return to work. She wished the Claimant the best in her recovery and future employment and expressed the view that both Mrs MacArthur and her colleagues would miss the Claimant.

193. A position was advertised by the Boreham Parish Council for an administrative assistant and project support officer involving flexible working of between 7 and 12 hours per week, initially on a one year contract (p338). The closing date was said to be 23 September 2016. The Claimant applied for this position and was successful and by letter dated 24 October 2016, the parish clerk wrote to Ms MacArthur seeking a reference (p343). Ms James, Head of Organisational Intelligence on behalf of the Respondent, responded to that reference request by providing the information requested, namely the dates of employment of the Claimant with the Respondent and confirmation that they considered her to be a reliable and trustworthy person (p344).

194. By a letter addressed "*To Whom It May Concern – Justine Atterbury*" Counsellor John Galley, chair of the Boreham Parish Council wrote to confirm amongst other matters that the start date for the Claimant was pushed back from October to January 2017 with the Claimant's agreement because of the state of her health. As of January 2018, after a year of working on the contract the parish council had offered the Claimant a permanent 12 hour per week contract. She had apparently been making good progress and her health had not been adversely affected.

195. The Claimant relied on the notification of the outcome of her appeal before Mr Hollingworth which was dated 14 October 2016 (p292) as the final straw in relation to her constructive dismissal complaint.

196. Her medical records indicated that on 6 September 2016 the Claimant saw her GP and among other matters, it was noted that she was "*anxious but excited about the future, considering other part time jobs*". Further the psychiatric report in which this extract from the Claimant's GP records was presented to the Tribunal noted (p319) that at a further visit to her GP on 4 October 2016, the Claimant reported among other matters that she was doing more at home including some gardening and "*had started looking for a job*".

197. Whether or not we concluded that the appeal outcome was a breach of the Claimant's contract by the Respondent, it was certainly the case that the Claimant had already commenced the process of looking for alternative employment before that. The Tribunal did not wish to criticise her for this but it tended to suggest that the Claimant considered at about this time that she was unlikely to return to her previous job with the Respondent. The Tribunal also noted that the job that the Claimant applied for was at a far lower level than the job that she was doing for the Respondent and involved about a quarter of the time commitment per week.

198. The Tribunal took into account the Respondent's submission that the appeal outcome was therefore irrelevant to the Claimant's decision to resign and that the Claimant had intended to resign in any event. We considered that it was correct that the

Claimant's appeal was very brief with a lot of legal language but very few substantive allegations (p262). Further the Claimant did not engage with the appeal process and did not respond to Mr Hollingworth's reasonable questions (pp285-287). Further, the Claimant pressed Mr Hollingworth for a quick decision (p287). This was set out in an email from the Claimant to the Respondent prior to the appeal hearing. Finally, the Tribunal accepted that Mr Hollingworth had confirmed to the Claimant that the workload issues had been resolved and that this should have been encouraging news for the Claimant (p294). Mr Hollingworth confirmed this to the Claimant in his appeal outcome letter.

199. Also on 19 October 2016, the Claimant's entitlement to sick pay at half pay expired (p203).

200. Against the findings of fact set out above, the Tribunal then addressed the issues in order to reach our conclusions.

Disability

201. The Respondent accepted that from January 2016 the Claimant had a disability in the form of work-related stress and anxiety as defined in Section 6(1) of the Equality Act 2010, and paragraph 2(1) of Schedule 1 to the Equality Act 2010. The Respondent further accepted that they had constructive knowledge of the Claimant's disability from 2 February 2016.

Section 15 Equality Act 2010

"Arising From" Disability

202. The Respondent further accepted that the Claimant's long-term sickness absence from 2 February 2016 arose in consequence of her disability. This was issue 3.

Issues 4(a) and 4(b)

203. As these issues were very closely related, they are dealt with together. The first contentious issue was *issue 4(a)* namely whether the Respondent failed to consider at each one-one meeting between itself and the Claimant during the period 2 February 2016 and 17 October 2016, whether or not to acknowledge that the Claimant's absences were due to her disability. This was a complaint under section 15 of the 2010 Act.

204. The allegation in relation to *issue 4(b)* was that in the same time frame as applied in relation to issue 4(a), the Respondent applied its sickness absence policy to the Claimant without taking into account her disability and/or disability-related absences.

205. The nature of the complaint by the Claimant in this respect was that the Respondent did not expressly refer to the Claimant being a disabled person or to any of her absences being disability related and that therefore she was not treated as a disabled person in compliance with the law.

206. It was further contended in support of this complaint (para 2 of Ms Lawson's closing submissions), that the Respondent had failed to make reference to the disability and equality policy in their consideration of the application of the sickness absence procedure to the Claimant. This submission was based on the statement in the Respondent's sickness absence policy (p346) as follows: "all cases will be dealt with in a non-discriminatory and consistent way and in accordance with the organisation's diversity and equality in employment policy". The Tribunal was taken to the part of the diversity and equality policy (p359) in which there was a reference to the need to consider making reasonable potential adjustments. The Tribunal has already referred above to the standard phrase which the Respondent's occupational health advisor included in every report as to the status of the employee under the Equality Act 2010.

207. It appeared to the Tribunal that it was most material to consider whether in fact the Respondent had taken appropriate steps in terms of assessing the Claimant's need, not whether they had ostensibly applied the label of "disabled" to her. That, on its own, was not a detriment.

208. The focus in the evidence in relation to this matter was the decision of Mr Hollingworth to reject the Claimant's appeal that occupational health had said she was a disabled person and that the Respondent had failed to take that on board. Mr Hollingworth reached the conclusion that that was not what occupational health had said. The Tribunal refers back to the direct quotation from the text in the occupational health reports about the Claimant's status. We agreed that this only conveyed a possibility that the employee may be disabled. Mr Hollingworth was not himself reaching a view about whether the Claimant was a disabled person. He was not in a position to do so. He was simply expressing his view about what the occupational health advice was.

209. Finally, in relation to issue 4(a), there was no other clarification as to what action or inaction on the part of the Respondent was being complained about.

210. The relevant one to ones were all conducted by Mrs MacArthur. The Tribunal has set out above the various adjustments which were made by Mrs MacArthur in which she took into consideration the Claimant's condition and her needs in setting up the meetings relating to monitoring the Claimant's sickness absence whether formally or informally. One example was her agreement that Mrs Atterbury's mother could attend and another was in relation to discussion about the venue for meetings. No specific point was put forward on the Claimant's behalf to substantiate this allegation in closing. Further, it was not agreed at the time that the Claimant was a disabled person. The Tribunal therefore looked at the actions of the manager against the context of whether she should have dealt with the Claimant any differently if she had acknowledged that the Claimant was disabled person.

211. We concluded that it was correct that the Respondent did not acknowledge that the Claimant's absences were due to her disability as a matter of fact in the one to one meetings. However, this did not constitute unfavourable treatment as in issue 5, given the Tribunal's findings above about the various accommodations that were made for the Claimant.

212. Our conclusion in relation to *issue 4(b)* was that regardless of whether or not the Respondent characterised the Claimant's absences as "disability related" or characterised

the Claimant herself as "disabled" at the time, the question was whether or not they made the relevant adjustments.

213. In relation to *issue 4(b),* the Tribunal noted that under the Respondent's guide to managers in the Diversity and Equality in Employment Policy, they could disregard the disability related sickness as a reasonable adjustment. However, clearly if, as a matter of fact, the Respondent did not regard the Claimant at the time as being a disabled person, then this would not have been done. The Respondent addressed this issue in closing submissions in the context of considering the failure to make reasonable adjustments argument (*Issue 13)*. This was set out in paragraphs 58-63 of Mr Roberts' written submission. In short, the Respondent relied on, among other matters, the fact that the triggering for the formal process was delayed for a substantial period from February 2016 to July 2016. The fact that this happened as a result of Mrs MacArthur following Human Resources advice as opposed to Mrs MacArthur doing it specifically as an adjustment and/or of her own volition did not appear to the Tribunal to negate its worth. The net effect was that the triggering of the formal process was considerably delayed in any event. The Tribunal considered that by doing this, even though it was not expressly intended by the Respondent at the time it was done to be complying with the Equality Act 2010, there was no reason why this could not be considered in that context and the Tribunal considered that this adjustment was more than reasonable.

214. Therefore, we concluded that albeit the Respondent did not take into account at the time of applying the sickness absence policy that the Claimant was 'disabled' under the Act or that her absences were disability related absences, they had not breached the law as alleged.

215. Having concluded that the Claimant had established the primary facts in *issue 4(b)*, the Tribunal then considered whether it constituted unfavourable treatment (*issue 5*). We were satisfied that it did not constitute unfavourable treatment because of the various adjustments and accommodations which have been referred to above in terms of the way in which the sickness absence policy was delayed for example and all the other adjustments which were made and which will be set out in more detail in relation to the failures to make reasonable adjustments, but which are set out above in the findings of fact. There was thus no unfavourable treatment of the Claimant because of her sickness absence. *Issue 4(b)* was therefore not well founded and was dismissed.

Issue 4(c)

216. This was a complaint that in the period of 29 January 2016 to 17 October 2016, the Respondent required the Claimant to improve her level of absence within an indicative timeframe as part of the improvement notice dated 13 July 2016.

217. The Respondent in their closing submissions admitted the facts alleged namely requiring the Claimant to improve her level of absence etc and also admitted causation, which is that the treatment was because of the Claimant's sickness absence (issue 6). The next issues were whether unfavourable treatment and detriment were admitted (issue 5) and the Respondent's Counsel confirmed (para 14 of R8) that this was the case.

218. The remaining issue therefore for the Tribunal to consider in relation to *issue 4(c)* was whether the treatment of the Claimant was a proportionate means of achieving a

legitimate aim namely fair and proper absence management; proper administration of the Respondent's operation; and/or stability within the Claimant's team? (*issue 7*).

219. It was not in dispute that the burden was on the Respondent to justify any unfavourable treatment of the Claimant. This was addressed in Ms Lawson's submissions at paragraph 5 on page 5 of C6. Both counsel referred in this context to the case of *Buchanan* v *Commissioner of Police of the Metropolis* [2017] ICR 184 and the Respondent relied on the cases of *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704 SC and *Aster Communities Limited (formerly Flourish Homes Limited) v Akerman-Livingstone* [2015] AC1399, SC. Mr Roberts summarised the applicable law as follows. The questions for the Tribunal in determining the issue of justification were

(a) Has the Respondent identified a sufficiently important aim or aims?

(b) Were the means appropriate in achieving those aims?

(c) Were the means reasonably necessary?

(d) Do the means strike a fair balance between

(i) their need to accomplish their objective; and

(ii) the disadvantages caused to the Claimant?

220. The Claimant contended that the aims specified by the Respondent did not justify the SAP being applied to her without any consideration of her disability or the fact of her absence stemming from her disability. She characterised the process followed under the SAP as "punitive". Ms Lawson further submitted that the Respondent had failed to consider ill health retirement and/or termination by mutual agreement on the basis of "robust medical evidence" about the prospects for the Claimant's return to work. She also drew the Tribunal's attention to the fact that the Claimant was not at fault in being absent.

221. The Tribunal considered that there was indeed some merit to the Claimant's submissions in terms of the way matters looked from the Claimant's perspective given the circumstances of her condition. It was right that did not have the means to comply with the return to work dates under the improvement plan given to her by the Respondent.

222. In considering the question of justification we also took into account the various submissions put forward by the Respondent. It follows from the facts in the circumstances, that this was a public body and that putting a hold on the Claimant's role was disruptive to their operations. This was not challenged by the Claimant. There was also evidence which the Tribunal accepted that it was disruptive to the team not to have a permanent manager. We accepted the Respondent's contentions that Mrs MacArthur was having to cover a lot of the Claimant's work which meant that she could not perform her own responsibilities as head of a large local government department to the extent that she would normally have been able to and that there were also significant costs attached to funding Mr Phillipson who acted in the Claimant's role for much of her absence.

223. The Tribunal considered that it was important to have regard to the overall context also. The imposition of the improvement notice was at an early stage of the formal process. The process provided ample opportunity for further consideration of the Claimant's position.

224. The Tribunal considered that the imposition of improvement notice at this stage was reasonably necessary and struck the right balance between the competing interests.

225. The Tribunal considered that the submissions made by the Respondent in relation to the various adjustments which had been made for the Claimant reduced on the one hand the effect on the Claimant of the disadvantage. Added to that, the Tribunal took into account the justifications put forward by the Respondent. There was no suggestion that these were not perfectly proper aims.

226. The Tribunal also took into account that the policy itself was addressing situations in which inevitably some at least of the members of staff covered would be disabled because it was designed to address long term sickness absence.

227. Also in relation to the stage at which the improvement notice was served namely 1 July 2016, the Claimant had declared that she was on an "upward curve" (p215) and had been signed off work at that stage for a month most recently (p171). The Claimant's evidence in cross examination was that her reaction to the timeframe of 10 weeks, was at that point "*I don't know if [10 weeks] will work*", given the fluctuating nature of her condition. The Tribunal considered that the Respondent was entitled to set some basic expectations and give the Claimant an opportunity to return to work or to engage in discussions about returning to work and that the 10 weeks included time for the Claimant to consider possible redeployment. Further, the Claimant did not challenge the improvement plan and her mental health worker who accompanied her to the meeting expressed the view that the Respondent had been "*very understanding*" (p218). The timeframe may have been perceived by the Claimant as punitive but the Tribunal considered that it was imposing some structure in terms of timeframes for reviewing progress and putting the Claimant on notice as to when the next stages of the absence management process might have to be undertaken.

Issues 4(d) and (e)

228. These were complaints that the Respondent required the Claimant to return to work before it had implemented the recommendations of occupational health; and that the Respondent failed to implement the adjustments advised by occupational health on 29 January and 20 April 2016.

229. The allegation under 4(d) was not specific as to date. There was reference to the individual stress risk assessment ("ISRA"). This was referred to at page 153 in the 29 January occupational health. However, it was also addressed in the report on 20 April 2016 at page 151. In the January report it was said that the Respondent "*may wish to consider*" having an ISRA.

230. The 29 January 2016 OH report was produced before the 'breakdown' in the Claimant's health on 2 February 2016, at the beginning of the relevant time frame for this

Tribunal. It recorded that the Claimant had "*residual symptoms*" of stress; that she had "*benefited from the support offered to her*"; and that her underlying health conditions were "*currently stable*". That was the context against which they recommended that the Respondent "*may wish to consider*" conducting the assessment.

231. The next working day (1 February 2016), the Claimant met with Ms Gurry to discuss how she could be supported. Following the meeting, Ms Gurry was going to discuss the occupational health report with Ms MacArthur and meet with the Claimant again that Friday to "*start putting changes in place that will support you*" (p162). However, the Claimant experienced a serious breakdown the following morning. After giving the Claimant a period to rest (p164) which the Claimant agreed in cross examination was the right course of action, her sick leave became long term.

232. The Tribunal agreed with the Respondent's submission that this breakdown in February was a major change in circumstances and that the recommendations of the 29 January 2016 report, conditional as they were in relation to the ISRA, became irrelevant thereafter.

233. Indeed, at the first sickness meeting with the Claimant following her breakdown, in April 2016, Ms MacArthur obtained new occupational health advice which confirmed (p185) that her return to work was unlikely to be in the short to medium term. Importantly, it specifically stated "*once Justine is fit to return to work, I suggest the following:……..individual stress risk assessment*."

234. That event did not arise during the timeframe that we were concerned with. There was therefore not a failure to follow this recommendation by the Respondent. We were not satisfied therefore that the Claimant had established that there was a breach as alleged in issue 4(d) because the second ie April 2016 occupational health report recommended that the ISRA should be done only once the Claimant had returned to work. As to the allegation in issue 4(e), this appeared to be repetition of the complaint at 4(d). there were certainly no specific submissions in Ms Lawson's written submissions addressing issue 4(e) separately.

235. Although on its face it appeared that issue 4(d) was addressing a wider timeframe and other matters other than the occupational health reports of 29 January and 20 April, this was not the drift of the evidence but more importantly in Ms Lawson's closing submissions, she made her submissions about those occupational health reports only.

236. Those allegations were not well founded and were dismissed.

Issue 4(f)

237. The Claimant complained that the Respondent had moved to the 'formal stage' of the sickness policy with the attendant prospect of disciplinary action before implementing the OH recommendations and/or taking sufficient steps to facilitate the Claimant's return. There was a degree of overlap with issues 4(d) and (e). The Respondent accepted that they moved to the formal stage of the sickness absence policy on 5 July 2016. However, they did not accept that there was an attendant prospect of disciplinary action, although

they accepted that the Claimant was informed of the formal process and the possible outcomes.

238. The Claimant attached considerable weight in her cross examination and closing submissions to the characterisation of the possible consequences of the implementation of the SAP as "disciplinary action".

239. It appeared to the Tribunal that the complaint about failure to implement occupational health recommendations before moving to the formal stage of the sickness policy was again a reference to the occupational health reports in January and April 2016.

240. The first formal stage of the sickness policy was implemented in July 2016. The Tribunal therefore referred to its findings and conclusions above in relation to the occupational health report and also its findings about justification.

241. The second element of *issue 4(f)* was that the Respondent had failed to take sufficient steps to facilitate the Claimant's return. The Tribunal's findings of fact have addressed these matters in more detail but in summary, the Tribunal accepted the bullet point list which appeared at the end of paragraph 54 of Mrs MacArthur's witness statement describing the support which was given to the Claimant to support her return to work after periods of absence. The Tribunal considered that the support outlined both under the heading of workplace challenges and support to return to work after period of sickness absence constituted more than sufficient steps to facilitate the Claimant's return.

242. The Tribunal therefore found that the allegations in issue 4(f) were not well founded and were dismissed.

Issue 4(g)

243. The next complaint under Section 15 was that the Respondent threatened the Claimant with a warning - *Issue 4(g)*.

244. The background facts were not in dispute. The characterisation of the Respondent's action as a threat was disputed. The Tribunal did not consider that there was a threat issued to the Claimant. She was advised of the potential consequences of the procedure. The Tribunal considered that this complaint was very similar to the complaint above about the imposition of the improvement notice under *issue 4(c)* above to the extent that it was alleged that the Respondent informing her on 5 July 2016 that a written warning may be issued, constituted disadvantageous treatment and that it was done to the Claimant because of her sickness absence. Causation was admitted. The Tribunal considered however that the same position applied in relation to justification (issue 7) as has been set out above in relation to the improvement notice complaint.

245. This complaint was not well founded and was dismissed.

Issue 4(h)

246. This was a complaint that the act of issuing the Claimant with a written warning on 14 September 2016 was disability discrimination under Section 15 of the 2010 Act. As

with *Issue 4(g)*, the Respondent admitted the facts alleged and that there was causation - it was caused by the Claimant's sickness absence. The issue however was justification. In this instance also, the Tribunal repeated its findings and conclusions above in relation to the improvement notice and the prior warning about getting a warning. The Tribunal took into account in assessing the unfavourableness of the treatment of the Claimant the state of the Claimant's health at this stage, particularly as exemplified by the Claimant's inability to enter the building after the meeting in August 2016 (p234a).

247. The Tribunal considered that the treatment complained about under issue 4(h) was justified. The complaint was not well founded and was dismissed.

Issue 4(i)

248. The Claimant complained as an act of discrimination under Section 15 of the 2010 Act that the Respondent informed her of the likelihood of a final written warning or dismissal or moving her to the redeployment scheme if her absence did not improve and/or she did not return to work by 12 October 2016.

249. This was a complaint about the next stage of the implementation of the process. The Tribunal took on board the point being made on behalf of the Claimant that at every stage the Respondent was in effect making a fresh decision as to how it implemented the SAP. The Tribunal's view however was that against the factual background and the findings that we set out above, the balance in relation to justification still lay in favour of the Respondent. This is for the reasons already set out above. It was only right and fair that a structure be incorporated into the situation and the appropriate process for doing this was the SAP.

250. This complaint was not well founded and was dismissed.

251. The next allegation was at *4(j)*, namely that on 14 October 2016 the Respondent refused to overturn on appeal, the decision to issue the Claimant with a written warning. This was the last of the Section 15 Equality Act 2010 allegations.

252. The findings of the Tribunal set out above in relation to the reasons that Mr Hollingworth refused to overturn the warning which had been issued previously by Mrs MacArthur are relevant here. This was a complaint about the next stage of the application of the SAP. The primary facts alleged were not disputed. The issue was once again justification. The Tribunals findings in relation to this process were also in favour of the Respondent, for the same reasons as were set out above. This allegation therefore was not well founded and was dismissed.

Indirect Discrimination

253. The Claimant withdrew the allegations of indirect discrimination, issues 8-10, as substantive complaints. The indirect discrimination complaints were dismissed on withdrawal. However, we had to have regard to issues 8-10 in so far as they set out the PCPs, as they were relevant to the reasonable adjustments complaints.

Failure to make Reasonable Adjustments

254. Issue 11 asked whether the Respondent applied a PCP namely the Essex County Council sickness absence policy to the Claimant. It was admitted by the Respondent that the SAP was a PCP (para 58 of R8). There was no dispute that the Respondent usually applied its SAP to staff and that it was applied to the Claimant.

255. The next question (issue 12) was whether the PCP placed the Claimant at a substantial disadvantage in comparison with persons who were not disabled, and if so, whether the Respondent knew about or should have known about such disadvantage?

256. It was relevant that the policy being considered here was a sickness absence policy which, in relation to the provisions governing the management of long term sickness, must be taken to have been designed to address the situation of members of staff who were likely to be disabled as compared to those who were not disabled, as it distinguished between the way in which people with longer periods of sickness absence were dealt with. Long term absence was more likely to be an element or feature which was applicable to a disabled person. Thus, for example, the introduction to the sickness absence policy (p346) expressly defines sickness absence as happening "*when employees are not well enough to work."* It goes on to provide that *"it is only natural for employees to become ill from time to time, or on occasions to be ill for longer periods".* That does not imply any sort of blameworthiness or fault on the employee. The policy was set out to address these sorts of situations. The Tribunal did not consider that the SAP in itself was a policy which placed a disabled person at a substantial disadvantage as compared to somebody who was not disabled.

257. If the Claimant does not succeed in showing that she was put at a substantial disadvantage (issue 12) by the PCP, then she cannot bring a complaint of failure to make reasonable adjustments. That complaint was therefore not well founded and was dismissed.

258. Even if the Tribunal were wrong in its conclusion that the SAP did not place the Claimant at a substantial disadvantage, the next question would be whether the Respondent had in fact failed to make reasonable adjustments. The Tribunal dealt on this alternative basis with *Issue 13* which identified adjustments which it was said were reasonable and should have been made. Mr Roberts set out the adjustments as follows

(a) Delaying the trigger for the formal process from February to July 2016;

(b) Mrs MacArthur providing the Claimant with personal support;

(c) Meeting the Claimant away from the Respondent's premises which also helped to ease the process on her;

(d) Allowing non-colleagues such as the Claimant's mother or mental health supporters to attend meetings with the Claimant;

(e) Allowing the Claimant to contribute to the occupational health referrals;

(f) Offering the Claimant reasonable adjustments and a supportive development plan when she was ready to return to work;

(g) Offering to explore alternative roles/redeployment;

(h) Providing the Claimant's team with the resources that the Claimant said were needed and keeping the Claimant updated on positive progress in the team;

(i) Extending the Claimant's improvement plan by 4 weeks beyond the 10 weeks initially given;

(j) Issuing the Claimant with a written warning rather than a final written warning in September 2016;

(k) Offering internal sources of help to the Claimant including BUPA treatment and the staff counselling service; and Mrs MacArthur checking on the Claimant to ensure that she was getting the medical help she needed.

259. Alternative roles were offered to the Claimant between May and September 2016 – para 39 of R8.

260. The work support was provided to the Claimant (para h above) in April to June 2016.

261. Issue 13(a) was that the Respondent could have adjusted the SAP so that the Claimant was not threatened with disciplinary action, a warning or final written warning for her long-term sickness absence. The first point is that the Claimant was not actually given a final written warning. She was informed as set out above, about the possibility of disciplinary action down the line and then a written warning was issued in September. However, the Tribunal refers back to its findings on the justification. We were satisfied that it was important and consistent with fairness and good employment practice for the Respondent to signal to an employee what were the likely consequences of the continued absence. This was not with a view to punishing an employee but simply to putting them on notice as to the possible consequences of the continued absence under the relevant Policy.

262. In her closing submissions in this context, Ms Lawson submitted that while the medical evidence was such that Mrs Atterbury was unfit to return to work and that no return date could be given, the SAP should have been adjusted as pleaded. The Tribunal considered that it was very clear, especially on the evidence as it was set out to us in this case, that the Claimant's health was not likely to improve in the foreseeable future and in the event, did not improve substantially. We have already referred to the fact that a year after she started her new far more junior post in January 2017, she was then kept on a permanent contract requiring only 12 hours work per week. The submission was in effect that it would have been reasonable for the Respondent to effectively suspend the operation of the SAP until some unspecified date in the future when the medical evidence was that the Claimant would be fit to return to work. The Tribunal did not consider that the uncertainty attached to such a situation was reasonable for either party.

263. We were also satisfied on the evidence that the Claimant was by virtue of her own role and past duties aware of the structure and objectives of the SAP.

264. We were satisfied that the Respondent had considered and enquired into all the possible potential options. Thus, for example, in the occupational health referral of 14 September 2016 (p239a) at page 239c Mrs MacArthur asked the occupational health service the questions whether the Claimant was permanently incapable of performing her job due to ill health or incapacity and whether redeployment on medical grounds was recommended. The occupational health report which was prepared as a result of that referral was dated 5 October 2016 (p269). In relation to the question of permanent incapacity, the occupational health advisor Ms King stated that she did not deem the Claimant to be permanently incapable of performing her job at this current time. In relation to the question of redeployment on medical grounds, she stated that having discussed this matter with the Claimant as an option for support in return to work, that the Claimant was currently not fit enough to contemplate this.

265. The Tribunal also noted as found above, that at each stage the Claimant was aware of the questions which were put in the referral and she was aware of the answers from occupational health.

266. The Tribunal rejected this complaint on the basis that the Claimant was not 'threatened' with the disciplinary sanctions referred to, but was made aware that these were possible outcomes. A failure to keep her informed of these potential outcomes – the adjustments sought – would have been unfair and detrimental to her. This complaint was not well founded and was dismissed.

267. The next adjustment which was contended for as a reasonable adjustment was that the Claimant should not have been told that she was headed for dismissal or redeployment if she did not imminently return to work: *Issue 13(b)*.

268. The Respondent did not use the word "imminently". What was clear however was that they specified in accordance with the policy, the timeframes from the date of the improvement notice onwards in which they were assessing whether there had been an improvement in the Claimant's attendance. The Claimant was never required to return to work nor indeed was she told she was headed for dismissal because there was still some way to go in terms of the application of the SAP.

269. The third adjustment argued for under *Issue 13(c)* was that the Claimant should not have been issued with a written warning which was then upheld on appeal.

270. The written warning was issued by Mrs MacArthur in the second week of September 2016. The Tribunal did not consider that this was a valid complaint having regard to what we have already said above about the open endedness of following a different process and about the need for the Respondent to impose a structure given the information they were being given about the Claimant's state of health and indeed given the Claimant's own presentation to them. The adjustment therefore would not have been reasonable in any event.

271. All the complaints alleging failures to make reasonable adjustments were not well founded and were dismissed.

Limitation

272. Finally, in relation to the discrimination complaints, there was an issue about limitation. It was also unnecessary to consider these as none of the discrimination complaints was successful on its merits. In any event, it was likely that if they had been, the Tribunal would have considered the treatment complained of by the Claimant to be part of a continuing act. That continuing act would have brought them to the date of the termination of the employment. Alternatively, it would have been in the interests of justice to extend the time because all the complaints related to issues relating to the sickness absence which started from February 2016 and the application of the SAP as a result.

Constructive Dismissal – Issues 14 - 19

273. The first alleged breach of the implied term of mutual trust and confidence at issue 14(a) was that the Respondent failed to implement the recommendations of the occupational health practitioners (in particular to carry out an individual stress risk assessment between 29 January and 17 October 2016).

274. The Tribunal has already referred above to its findings above about what the occupational health reports said about an individual stress risk assessment in January and April 2016. In relation to the Claimant's constructive dismissal complaint, the Tribunal did not consider that she could properly rely on the recommendation in the 29 January 2016 occupational health report because it predated the material time frame in this case. In any event, as set out above, the Respondent did not ignore that recommendation which was in conditional terms and sought to implement the spirit at least of the recommendation. Matters were however overtaken then by the Claimant's breakdown at the beginning of February 2016.

275. Thereafter, the later occupational health report of April 2016 left the requirement for an ISRA to the point at which the Claimant was fit enough to return to work. That situation never materialised. In the circumstances therefore, the matters pleaded in issue 14(a) did not amount to a breach of the implied term of breach in trust and confidence.

276. Finally, the Claimant pleaded that the fact that she complained about a failure to carry out an ISRA in her appeal letter dated 28 September 2016 was to be relied on in her support. The Tribunal considered that the Claimant was aware of the reasons why the ISRA had not been complied with as she had copies of all the OH reports. It cannot objectively therefore have been a matter which contributed to a breach of trust if it was a matter that the Claimant was fully aware of.

277. The second alleged breach of contract was under issue 14(b), failing to take appropriate steps to facilitate the Claimant's return to work between 2 February and 17 October 2016. The Tribunal refers back to its finding about the various steps which the Respondent took as set out in the penultimate paragraph of Mrs MacArthur's statement and as listed in some detail in the Respondent's closing submissions, especially at paragraph 58.

278. The Claimant however in her closing submissions, (para 4, page 8 of C6), listed a number of matters which it was said that the Respondent did not do and which therefore meant that there was a breach of the implied term of the contract. Despite the list of some seven matters which Ms Lawson proposed in her submissions that the Respondent had omitted to do, the Tribunal found that the Respondent had indeed taken appropriate steps

to facilitate the Claimant's return to work in that eight-month period. The Tribunal also noted that the Clamant had not put forward these seven matters as potential reasonable adjustments. The Tribunal took that into account when assessing whether these were matters which either on their own or together, constituted fundamental breaches. The Respondent was not being criticised in these respects for failures to make reasonable adjustments and yet the Claimant sought to rely on them as breaches of contract.

279. There was on the Tribunal's findings of fact, no basis for saying that the Respondent failed to canvas with the Claimant or her mother if there were any additional measures it could put in place to support the Claimant; they took what the Tribunal considers were strenuous steps to try to understand the workplace issues that the Claimant or the occupational health advisor said were hindering the Claimant's return to work. Further, in relation to the contention that the Respondent should have contacted the Claimant's GP to understand more about the Claimant's condition and additional support measures it could put in place to facilitate her return and that the Respondent had failed to refer the Claimant to a mental health expert for the same purpose, the Tribunal again reminded itself that these had not been put forward as reasonable adjustments. We also had regard to the effect of the disability discrimination case of *Tarbuck v Sainsbury Supermarket Limited* [2006] IRLR 664 in concluding that a failure to conduct an assessment or to seek or obtain medical evidence could not in itself constitute a reasonable adjustment, unless the Tribunal found that the employer had failed to comply with its obligations, judged objectively. The Tribunal considered that this was then even more so the case in relation to relying on this as a breach of contract.

280. The Claimant also referred to the failure by the Respondent to seek clarification from occupational health or from the Claimant's GP as to whether the Claimant was disabled. The Tribunal has already reached a finding above that it did not matter whether the label was attached to the Claimant, what was relevant was the substantive way in which the Claimant was treated.

281. It was also said on the Claimant's behalf in paragraph 4F (p9) of C6 that the Respondent was in breach of contract because it did not communicate the outcome of the grievance against the Claimant until April 2016 and then did not so in writing until October 2016. It was not in dispute that the communication to the Claimant, albeit orally, was in an earlier meeting at which the Claimant's mother was also present. There was no attempt to chase up written confirmation of the outcome of the grievance thereafter. Further, the grievance being referred to in this submission was a grievance brought against the Claimant and Mrs MacArthur together by a member of staff that the Claimant line managed, referred to as Zoe. That grievance was taken out against the Claimant in April 2015 (para 4c of the Claimant's opening submissions [C1]). In the letter from Mrs MacArthur responding to the Claimant's resignation (pp306-307), Mrs MacArthur confirmed that the grievance by Zoe had been rejected in March 2016 and as set out above, it was not in dispute that the Claimant was told about this at a meeting she attended with her mother. That meeting took place on 5 April 2016 (p178). The suggestion therefore that there was a fundamental breach of the contract because of a delay in notifying the Claimant about the outcome of the grievance was not established because in any event, the Claimant was told promptly about the outcome of the grievance.

282. Finally, Ms Lawson suggested in closing that the Respondent was in breach of contract either on this ground or on this ground taken with other matters, namely that they

had failed to communicate to the Claimant in writing until October 2016 the steps that they had taken to reduce the workload of the Claimant's team and to address the capacity issues. The Tribunal did not consider that the Claimant had established this constituted or contributed to establishing a breach of contract. Although it may not have been set out in a letter as comprehensively drafted as the response to the resignation by Mrs MacArthur, there was no question that the notes of the meetings with the Claimant recorded these matters which were discussed with her.

283. The Tribunal did not consider therefore that there was anything thrown up by these seven points either singularly or taken together which led to the Claimant meeting the test of constructive dismissal. In any event, this was not the way in which the constructive dismissal claim was pleaded, and the paragraph in which Ms Lawson rounded this up, made it very clear that this was Mrs Atterbury's subjective impression as opposed to alleging that these were objectively viewed breaches of contract by the Respondent, either taken singly or together.

284. Issue 14(c) alleged that the Respondent was in breach of the implied term of mutual trust and confidence by discriminating against the Claimant under the Equality Act 2010 as alleged above. The Tribunal found that none of the allegations of discrimination under the Equality Act was well founded. This alleged breach of contract was therefore not made out.

285. Finally, under issue 14(d) the Claimant alleged that the Respondent breached the implied term of mutual trust and confidence by deciding on 14 October 2016 not to overturn its decision to issue the Claimant with a written warning because of her disability related absence (final straw).

286. The submissions on behalf of the Claimant on this issue were contained in paragraph 4(d) at page 9 of [C6]. Our findings about the decision by Mr Hollingworth not to overturn the decision in relation to the issue of "disability" was set out above in our discussion of issue 4(j) in particular. The hearing of the appeal before Mr Hollingworth was preceded by the third and as it turned out, the final occupational health report which was dated 6 October 2016 (pp269-270). The Respondent thus had up-to-date information on the Claimant's condition at the time the appeal was dealt with.

287. Ms Lawson relied on the case of *Gallop v Newport City Council* [2013] EWCA Civ 1583 in support of the proposition that an employer has to make reasonable enquiries to satisfy itself of whether the Claimant is disabled and not simply rely on an unfavourable or ambiguous OH assessment. Mr Roberts disputed that this was the effect of the *Gallop* case and contended that the *Gallop* case simply addressed the issue of knowledge; it did not imply a duty on the employer to take advice.

288. The Tribunal cites the relevant part of the headnote in relation to the Court of Appeal's judgment:

> "The question for the ET was not what OH's opinion on the matter was but whether, at the times material to the discrimination claims, the *respondent* had actual or constructive knowledge of the facts constituting the claimant's disability. The ET did not engage in that inquiry. It considered that the respondent was entitled to deny relevant knowledge by relying simply on its unquestioning adoption of OH's unreasoned opinions that the claimant was not a disabled person. In that respect the ET was in error; and the EAT was wrong to agree with the ET."

289. In Mrs Atterbury's case, the Respondent accepted that they had constructive knowledge of her disability from 2 February 2016, the beginning of the material time. It was our view therefore that the *Gallop* case did not assist further.

290. The Tribunal reiterates its conclusion above that it was not necessary for an employer to make a determination that a particular person met the definition of a disabled person. The Tribunal also construed the standard wording under the hearing "Status Under Equality Act 2010" for example at page 270 of the bundle in the October 2016 occupational health report, as meaning that the occupational health's position was that it was not a matter for occupational health to make a determination as to whether any particular individual actually met the criteria of disability under the 2010 Act, but that regardless of the status under the Act they would advise the employer that the employer had a duty of care to consider reasonable adjustments to allow the employee to continue working.

291. We were satisfied that Mr Hollingworth was addressing a point of complaint in the appeal that the Claimant was alleging that she had been classified as a disabled person within the Act by occupational health and it was his understanding that this was not the case and he therefore rejected her appeal.

292. Mrs Lawson made a further point that in considering whether she had been treated unfavourably, Mr Hollingworth only went on to consider whether the Claimant had been treated less favourably than others suffering from work-related stress "rather than those without that disability". The Tribunal concluded that it was clear that Mr Hollingworth had considered whether the Claimant had been treated less favourably than others suffering from work-related stress and had found that the evidence did not substantiate that. The Tribunal however struggled to understand what was being contended for in the second half of that sentence, namely that he had failed to compare the treatment of the Claimant with those without that disability. If it was being argued that Mr Hollingworth should have compared the treatment of the Claimant with others who had other disabilities, the Tribunal considered that this was an impossible if not meaningless exercise. The differing impairments and the effects of different disabilities did not lend themselves to making an across the board comparison between someone who was disabled by reason of work related stress and someone who was disabled by reason of say, multiple sclerosis.

293. As we were satisfied that the Respondent had not acted in breach of contract, the Claimant had resigned and was not constructively dismissed. It was therefore unnecessary to address issues 15 to 19.

Employment Judge C Hyde

Date 7 December 2018