EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	
Ms S McLeary		**One Housing Group Ltd**

Heard at: London South Employment Tribunal **On:** 3, 6, 7, 8, 9, 10 and 13 January 2020

Before: Employment Judge Hyams-Parish
Members: Mr A Kabal and Mr R Shaw

Representation:
For the Claimant: In person (assisted by her sister, Ms Lewis)
For the Respondent: Mr E Wojciechowski (Solicitor)

RESERVED JUDGMENT

The claims of failing to make reasonable adjustments fail and are dismissed.

The claims of unfavourable treatment because of something arising in consequence of disability fail and are dismissed.

The claim of victimisation fails and is dismissed.

The claims of harassment fail and are dismissed.

The claim of constructive unfair dismissal fails and is dismissed.

REASONS

Claim(s)

1. By a claim form presented to the Tribunal on 1 December 2016, the Claimant brings claims of constructive unfair dismissal and disability discrimination. All claims are denied by the Respondent.

2. It is admitted by the Respondent that the Claimant at all material times was dyslexic and therefore disabled within the meaning of the Equality Act 2010 ("EQA").

Preliminary matters

3. At the outset, we enquired of the Claimant whether she required any reasonable adjustments to be made during the course of the hearing. She said that she may need more time to read documents but otherwise she had attended with her sister, Ms Lewis, and asked us for permission to allow Ms Lewis to assist her in presenting her case. We asked the Respondent's representative whether he had any objection, which he did not. We therefore allowed this request and we are very grateful for the helpful assistance provided by Ms Lewis throughout the hearing.

4. This case unfortunately has a long history to it. By the date of this hearing, three and a half years had passed since the Claimant's employment ended. This was no doubt due, in part, to an appeal to the Employment Appeal Tribunal ("EAT") arising out of a decision made at a preliminary hearing to strike out the discrimination claims on the grounds that they were out of time. The Claimant was successful in her appeal because the EAT decided that the Employment Tribunal Judge failed to consider whether the dismissal itself was an act of discrimination, thereby enabling the Claimant to argue that there was a continuing act of discrimination ending with the dismissal.

5. Understandably the remainder of the claim did not proceed in the meantime without the discrimination claims and therefore the whole case was put on hold pending the outcome of the EAT case, which was heard on 6 February 2019. The effect of the EAT's decision was that all of the Claimant's claims, including the discrimination claims, were once again live claims which needed to be considered by us at a full hearing, including the issue of time limits.

6. There followed a Case Management Hearing at which Employment Judge Davies ordered the Respondent to prepare, and agree with the Claimant, a Scott Schedule. An attempt was made to agree such a document, which

was included in the documents presented to us on the first day of the hearing. However, it soon became clear that not all of it was agreed by the Claimant.

7. The first day of the hearing was a scheduled reading day. However, by lunch time, the parties were called back in and informed that we were struggling to identify precisely the allegations of discrimination and breach of contract. Part of the problem was that during the course of the proceedings, the Claimant (or rather those assisting her, albeit not at the hearing today) had produced two separate versions of a detailed schedule of events, but both lists appeared to differ in some respects, and contained significant differences to the Scott Schedule. As stated above, the objective to produce one schedule of acts of discrimination and breaches of contract had clearly not been achieved. We also informed the parties that we were struggling to comprehend certain parts of the Scott Schedule.

8. The parties were informed that we could not start the hearing until it was clear which claims it needed to determine and there was a complete list of allegations that formed the factual basis of such claims. The parties were informed that when looking at the allegations on the Scott Schedule, we could not work out what claims were being made.

9. Whilst one option would have been to work through the allegations with the parties at the hearing, having listened to representations by the Claimant and the Respondent's Solicitor, it was decided that the better course would be to leave the Claimant to produce one definitive list of allegations over the weekend, the first day of the hearing being a Friday. We were conscious of not wishing to place undue pressure on the Claimant during the hearing, bearing in mind her disability and the difficulties she had to process information quickly. We took the view that the Claimant and her sister should have the weekend to produce a complete list of allegations of discrimination and incidents relied on for the constructive dismissal claim so that the hearing would have a clear direction and we would know exactly what the issues were. We made clear that we did not want to see different lists of allegations, as was the situation on the first day, but that we wanted all allegations to be presented in one document.

10. On the second day of the hearing, Monday, the Claimant had produced a Scott Schedule which did not take things much further as it was still difficult to identify what the complaints and allegations of discrimination were. We therefore spent time working through these with the Claimant. We produced a revised Scott Schedule based on those discussions, together with an amended draft list of issues, and gave them to the parties after lunch. However, given the importance of both parties agreeing the schedule and neither party feeling pressured into saying they accepted it there and then, we agreed to adjourn for the day and allow the parties overnight to reflect on the schedule and return on the third day with any comments or proposed

amendments before witnesses started to give evidence.

11. The Claimant was also asked to check overnight which of the allegations were dealt with in her witness statement and if not, to prepare a supplemental witness statement. This is because the Solicitor for the Respondent had raised his concern that two of the allegations in the Scott Schedule were not covered at all in the Claimant's witness statement. We acknowledged these concerns and said that we would of course be more flexible in terms of allowing the Respondent to ask supplemental questions of his witnesses. Alternatively, we also gave the Respondent leave to produce a supplemental witness statement from Ms Boland to deal with any new allegations on the Scott Schedule.

12. On the third day, the Respondent's Solicitor produced a supplemental witness statement from Ms Boland, and the Claimant had also prepared a supplemental witness statement. The Claimant also sought to add additional acts of discrimination to the Scott Schedule but when we started to examine these to understand what they were, the Claimant decided to withdraw them and confine her allegations to those in the Scott Schedule agreed on the second day. In any event the Claimant was informed that the additional matters could still be raised as background. Subject to a few small amendments and additions, a final Scott Schedule was agreed and given to the parties, and on that basis both parties were happy to start the hearing.

13. The allegations on the agreed Scott Schedule were as follows:

	Allegation	Claim
(a)	Failing to provide training alongside the software that had been provided as a result of the workplace assessment.	s.21 EQA
(b)	Not allowing the Claimant to continue with her own methodology which best enabled her to complete her tasks. In particular, the Claimant had prepared a word document which she preferred to use, and she also used an ipad.	s.21 EQA
(c)	Not adjusting the Claimant's workload to cater for the fact that she needed longer time to complete tasks, resulting in her being forced to work more in her own time.	s.21 EQA
(d)	Ms Boland shouting down the phone at the Claimant because it is alleged that she did not arrive in time for a meeting with David Jones.	s.15 EQA s.26 EQA

	This was whilst the Claimant was with a young person who could hear the conversation.	
(e)	Mr Jones acting in an intimidatory manner when he sent an email to the Claimant saying that he had asked SAB to investigate the matter and take appropriate action.	s.15 EQA s.26 EQA
(f)	Deleting the Claimant's PDRs. These would have shown that the Claimant was asking for support. The Claimant says that she does not know why the PDRs were deleted.	s.15 EQA s.26 EQA
(g)	Ms Boland sending the Claimant an email which was an instruction to take on more work, thereby disregarding her disability and the fact that she was already up to capacity and having difficulty coping with her then existing workload.	s.15 EQA s.26 EQA
(h)	Issuing the Claimant with an informal warning with a 6-month monitoring period, in circumstances where a colleague, Sandy Potter, was only monitored for three months.	s.27 EQA s.26 EQA
(i)	Being subject to a number of interruptions from Ms Boland (phone calls) whilst she was running a workshop for the Bromley Young People (Awareness of Universal Credit).	s.26 EQA
(j)	Being subject to a disciplinary process because the Claimant had not arrived at work on a bank holiday when she was required to do so.	s.26 EQA
(k)	Being subject to a disciplinary process because the Claimant supported a young person in her own time at the weekend.	s.26 EQA
(l)	Leaving the Claimant in charge of approximately 20 young people, some of whom she knew and others she did not. No risk assessment had been conducted and the Claimant felt alone and unsupported.	s.26 EQA
(m)	Failing to deal with the appeal hearing properly as it did not take into account all the points that had been raised.	s.15 EQA

14. The constructive dismissal claim was put on the basis that the Claimant resigned in response to a course of conduct which, taken cumulatively, amounted to a breach of the implied term of mutual trust and confidence. The Claimant alleged that the “last straw” was when she received the outcome of the appeal hearing. She alleged that Ms Foley did not consider all the points raised, she prevented the Claimant from speaking during the appeal and she placed the Claimant back at work with Ms Boland, who the Claimant alleged had harassed her. The Claimant did not specify any particular behaviour by the Respondent that she relied on to support her constructive dismissal claim other than those matters included in the Scott Schedule, together with the changes the Respondent introduced to the rota system.

15. The list of legal issues was also discussed and agreed with the parties. It was agreed that the questions which we needed to answer in order to determine the claims were as follows:

Constructive dismissal

(a) Did the Claimant resign because of an act or omission (or series of acts or omissions) by the Respondent? The Claimant relies on the acts of discrimination complained about.

(b) If so, did the Respondent’s conduct amount to a fundamental breach of contract? The Claimant relies on the implied term of mutual trust and confidence. We will therefore need to consider whether the Respondent, without reasonable or proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties?

(c) Did the Respondent’s alleged failure to properly deal with all the points raised by the Claimant in her grievance appeal amount to a “last straw” which contributed, however slightly, to the Respondent's breach?

(d) Did the claimant affirm any breach of contract?

Discrimination arising in consequence of disability

(e) Did the Respondent treat the Claimant unfavourably by doing those things listed in the attached Scott Schedule?

(f) In each case what was the “something” that was the cause of the unfavourable treatment?

(g) in each case did the “something” at (g) above arise in consequence of the Claimant's disability?

(h) Has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Failing to make reasonable adjustments

(i) Did the Respondent apply PCPs to the Claimant which placed her at a substantial disadvantage compared to persons who are not disabled?

(j) Did the Respondent fail to make adjustments which it would have been reasonable to have made in order to avoid the above disadvantage?

Victimisation

(k) Did the Claimant do a protected act?

(l) Did the Respondent subject the Claimant to a detriment?

(m) If so, was the Claimant subjected to that detriment because she did a protected act, or because the Claimant believed the Respondent had done or might do, a protected act?

Harassment

(n) Did the Respondent engage in unwanted conduct related to a relevant protected characteristic?

(o) Did the conduct have the purpose or effect of:

  (ii) violating the Claimant's dignity?

  (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

(p) If the conduct had the above effect, was it reasonable for the conduct to have had that effect bearing in mind the perception of the Claimant and the other circumstances of the case?

Discriminatory constructive dismissal

(q) Did the Claimant resign in response to acts that amounted to a breach of s.15 EQA, such that the dismissal was itself discriminatory?

Time limits

(r) If the dismissal was discriminatory, was it the last in series of acts representing a continuing act of discrimination ending with dismissal?

(s) if the dismissal is not an act of discrimination, would it be just and equitable for us to allow the Claimant to bring claims in respect of acts of discrimination that are out of time?

Evidence

16. We heard evidence from the Claimant and four witnesses for the Respondent:

- Sue Anne Boland, the Claimant's line manager;
- Emma Roberts, Human Resources Adviser;
- Ray Austin, Head of Young People's services; and
- Nuala Foley, appeal officer.

17. We were referred, during the hearing, to documents in an agreed hearing bundle extending to 1258 pages. We were also provided with a small bundle of additional documents by the Claimant on the first day of the hearing extending to 132 pages. Where numbers in square brackets are used in this judgment, they are references to pages in the document bundles (the prefix "C" denoting Claimant Bundle).

18. As Ms Roberts was no longer working for the Respondent and was only available to give evidence on day three of the hearing, it was agreed that she would give her evidence first, before the Claimant.

19. The evidence and submissions were concluded on day six of the hearing and the parties were told that we would meet on day seven to reach a decision. The parties were told that the decision would be reserved and sent to them as soon as possible. We were able to reach a unanimous decision on all issues during our deliberations on day seven.

Background findings of fact

20. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered the evidence given by witnesses during the hearing, and any documents referred to by them. Only findings of fact relevant to the issues have been made. It has therefore not been necessary to determine each and every fact in dispute where it is not relevant to the issues which we need to determine.

21. The Respondent is a housing association that builds and maintains homes as well as providing a wide range of services, including providing supported

living for vulnerable adults who might otherwise be homeless. The Respondent employs approximately 1000 people nationally.

22. The Claimant commenced her employment with the Respondent in September 2011 when it won a contract previously run by an organisation called Look Ahead, then the Claimant's employer. As a consequence of the Respondent winning the contract, the Claimant's employment was transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Claimant had been employed at Look Ahead since 2009.

23. The Claimant worked in the Respondent's Bromley service. The Bromley service provides a mixture of floating support and accommodation services for young people with a range of needs, ranging from low to high support need. The Claimant was employed as a Support Officer. As part of that role she was responsible for managing two of the Respondent's housing schemes: Wiverton Road and Thicket Road.

24. The Claimant was diagnosed with dyslexia following an assessment in 2005. When the Claimant transferred to the employment of the Respondent, she completed a medical questionnaire which asked, "*Do you suffer from any other condition*" to which the Claimant replied "*Dyslexic*". The form then asked whether any special modifications or adjustments were required, to which the Respondent replied "*No*".

25. Up until approximately February 2015, the Claimant was managed by Pauline Chambers. She was replaced by Sue Anne Boland who became the Claimant's manager with effect from March 2015. The context of Ms Chambers' departure is that since 2012, the service had been under increasing pressure to take on higher needs young people. Contract monitoring meetings with Bromley Council had become difficult as the service provided by the Respondent came under greater scrutiny due to the low engagement of service users. In 2013, the director of Bromley Council raised concerns regarding the performance of the service which had continually scored low in the internal Quality Service Audit. An unannounced inspection of the Bromley service on 1 October 2014 concluded that there were a number of failings with the service including assessment and support planning, staff attendance and supervision.

26. Following the inspection, service and staff improvement plans were put in place. At around this time, Ms Chambers left the organisation. Her replacement, Ms Boland, was viewed by the Respondent as a talented and experienced manager who was the right person to take over from Ms Chambers at a time when the service was failing and needed to be turned around. The Respondent had identified that a different approach was required. Ms Chambers' approach to management had involved little supervision of her team or management of performance, an admission that

was candidly expressed in one sentence of an email sent by Ms Chambers to her team on 17 February 2015 [376] which read, "*am sorry that I have not been able to give you supervision as regularly as you deserve it*" .

27. The management style of Ms Boland was very different. A consequence of the particular management style of Ms Chambers was, we find, that the Claimant was not placed under the same pressure and scrutiny as when Ms Boland took over; under Ms Chambers the Claimant could work at her own place and do things more as she wanted to do. For this reason, we conclude, the issue of reasonable adjustments did not raise its head in the same way as it did after March 2015. Whilst the Claimant said in evidence that she had complained about reasonable adjustments needing to be made before March 2015, there was no documentary evidence showing that the Claimant had requested, or was continuing to request, such adjustments.

28. Shortly after Ms Boland started, she became aware that the Claimant was dyslexic and contacted HR to arrange for an assessment which resulted in the Workplace Assessment [88] which was referred to during the hearing. The written assessment included the following extracts:

> ***Mrs McLeary is a support officer working for a company that aims to house vulnerable or homeless young adults in a safe and productive environment. She currently manages to operational schemes and supports up to 12 young people at any one time. Her work involves background and health risk assessments, reports and progression planning, regular one-to-one sessions with an emphasis on building relationships and social skills also occur, with a large amount of detailed written follow-up kept as a record.***
>
> ***Mrs McLeary has been diagnosed with dyslexia, which has led her to seek assistance from Access to Work. Her dyslexic difficulties cause written and reading accuracy issues in the workplace. Included our issues such as word skipping, phonics, homophones and format and structural issues. Other issues Mrs McCleary faces are those of memory and retention. It often takes her longer to absorb the same amount of information as co-workers who do not have dyslexia….***
>
> ***…Mrs McLeary often writes a large amount of notes, to get everything down on paper to organize and re-learn later, but this requires more time than available with her large workload. Mrs McCleary is often forced to rely upon her memory for meetings and group work, as she finds it difficult to write notes and listen efficiently simultaneously. Multiple notes are made, but due to the rush and stress involved it is often confusing and lacking structure, causing Mrs McCleary to struggle when rereading notes later on.***
>
> ***The increase in notes and paperwork required can lead to organizational issues. Problems related to dyslexia are likely to be exacerbated in workplace scenarios, where existing methods of coping can be undone by the extra pressures felt. Stress, depression and frustration are common feelings in situations like these, which can lead to the mentioned deficits worsening…..***

> ***….Mrs McCleary can have problems with written accuracy and fluency because of dyslexia. Spelling can be affected regularly, and grammar and punctuation problems can occasionally arise, specifically in the areas of applying thought processes into written text. This can all lead to problems with Mrs McLeary's written tasks, such as report writing, progress reports and care plans. These deficits can cause work efficiency to be lowered down and performance to be hindered.***

29. The report concluded by making four recommendations. These were that the Claimant:

    - be provided with speech recognition software called Dragon Dictate;
    - be provided with proof reading software called ClaroRead Pro;
    - be provided with technical training to use the above software; and
    - receive training on developing work-related coping strategies.

30. Dragon dictate was installed for the Claimant on 16 July 2015 and ClaroRead was installed on 28 July 2015. We heard evidence about the reasons for the delay in installing the software, which in turn impacted on the provision of training, because the Claimant insisted on all of the software being implemented before any training was provided (allegation 13(a) above). We find that a number of different factors contributed to the delay, but notably:

    - The provision of the software was part funded by the Department for Work and Pensions. This necessitated a declaration to be sent by the Claimant to the DWP. The approval from the DWP was provided on 17 April 2015;
    - There was an unexplained – but we find not deliberate – three-week delay in HR sending instructions to ICT;
    - Infrastructure changes and upgrades were needed prior to installation, such as infinity broadband, and upgrading Sophos Box Red 10 to Red 50. These upgrades also had cost implications which needed to be approved.
    - The packages also had to be loaded on to a new device for the Claimant.
    - The Claimant was not always available at the times that ICT wished to deliver her new device to her.

31. We find that Ms Boland did her best to speed up the provision of the new

software; we were shown emails demonstrating attempts made by Ms Boland to do so. Unfortunately it required a number of different people to be involved at different points and whilst in an ideal world, the software should have been provided before it was, we did not conclude that the Respondent was at fault or that it had simply sat on its hands and done nothing.

32. Likewise, the delay in providing the training, we find, was not down to one person or one reason, but rather due to a number of different factors, including:

- The process of raising purchase orders and authorizing payment for training as the training providers wanted payment before the training started;

- The Claimant was responsible for identifying the training providers; and

- When the funding was secured, there were difficulties arranging dates for training which coincided with the Claimant being at work.

33. We also find that the Claimant had become preoccupied with dealing with the issues regarding to changes to her working pattern that are referred to at paragraphs 38-43 below, and we find that the reasonable adjustments were not her priority at this particular point in time. We find that this most likely impacted on her availability to meet with ICT/trainers as required.

34. In any event and notwithstanding the delay, the Tribunal accepts the Respondent's evidence that it did not simply wait for the software to be installed but that it made a number of adjustments (detailed below) in an attempt to assist the Claimant perform her duties in the meantime.

35. Ms Boland increased the frequency of supervision meetings with the Claimant. Supervision meetings were defined during the hearing as "*catchup*" meetings during which work issues were discussed, including workload. They were an opportunity for the Claimant to raise any problems she was facing. The normal frequency of such meetings is four to six weeks but in the Claimant's case this was increased to every three weeks, where possible. We considered the frequency of the meetings and find that, in practice, the aspiration of a meeting every three weeks did not always happen, but if one takes into account that there was an appraisal during this time, and that the Claimant had periods of sickness and holiday, where meetings did not take place as had been hoped, there were good reasons for this.

36. We find that the Claimant was relieved of duties, thereby increasing capacity to spend on her core job. Her responsibilities as Duke of Edinburgh coordinator was taken off her, she was given extensions to deadlines to

complete certain tasks (allegation 13(c) above), she did not have to undertake "sign ups" (the procedure to sign a tenant up to a tenancy agreement), new referrals were limited to those only for the two schemes she was responsible for, she was allowed to attach hard copy hand written H&S records to the files rather than transfer them on to the system and a colleague did H&S checks (which necessitated regular fire alarm checks) at Riverton Road.

37. Ms Boland was questioned about permitted methodology to carry out the Claimant's tasks (allegation 12(b) above). In particular she was questioned about the Claimant's approach which was to write notes on paper first and then transfer such notes on to their electronic system ("MPS system") which held all of the client records. The Claimant also said that she used her iPad as this helped her and that she would transfer the information over to the system at her convenience. Ms Boland said in evidence, and we accept, that Ms Boland did not have any objection to the methodology chosen by the Claimant to help her do her job. Ms Boland's only priority, and requirement of the Claimant, was that all information was transferred over to the MPS system as she said that it was crucial that information on the young people they were responsible for was maintained on one system. Likewise, we find that Ms Boland did not have any objection to the Claimant using her iPad, provided that the information was not retained on the iPad but transferred to the MPS system. We note that Ms Boland was not really challenged on these two issues during cross examination.

38. The unannounced inspection in 2014 highlighted a need to change the way the Respondent's services were delivered to improve the support to customers and to neighbours. A major problem identified by the inspection was the lack of support available at certain times during the day and at weekends and evenings to deal with issues that arose; there was a particular problem at weekends but also late at night. The problem faced by the Respondent was the ability to deal with such problems in circumstances where staff worked Monday to Friday between 9am and 5pm, with only limited cover at the weekends. The Respondent decided that it needed to change ways of working and extend the number of hours when they could provide cover. They therefore proposed a rota system which ensured that the necessary cover was provided at evenings and weekends.

39. The effect of the above proposed changes on the Claimant would be that she would be allocated her share of weekend and evening shifts, including working on certain bank holidays, subject to any specific agreement following a flexible working request. The Respondent considered that the Claimant's contract allowed them to change the Claimant's working practices because her contract expressly allowed the Respondent to require the Claimant to work a rota system. We were shown the contract of employment for the Claimant (the Look Ahead contract that transferred with the Claimant in 2011) which said as follows under "*Hours*":

> ***Your normal working week will be 35 hours, excluding meal breaks. These hours are organised into a rota pattern that allows for 24-hour cover, seven days per week. Rotas may be changed from time to time to reflect the needs of the business. You will be given reasonable notice of any proposed rota changes***

40. However, in order to introduce a rota system, the Respondent took the view that it needed to increase the Claimant's working hours from 35 to 37.5 hours a week.

41. The Claimant was first told of the proposed changes during a supervision meeting on 8 May 2015, which was shortly after a period of absence due to a bad back (from 13 April 2015 to 6 May 2015). It is clear that there was some confusion on the part of the Respondent as to the extent, if any, that consultation was required to increase the Claimant's hours to 37.5. This is because when the Claimant's employment contract transferred to the Respondent in 2011, the measures letter confirmed that the Respondent had intended to increase working hours from 35 to 37.5. Those within the Respondent's HR function had mistakenly assumed that there had already been formal consultation on the increase in hours during the TUPE consultation process.

42. By the end of May 2015, the Claimant had agreed to work the rota, but the number of hours remained an issue for her due to what she claimed was the impact of working the additional hours on her children. In an email to the Respondent on 29 May 2015 [483] the Claimant wrote:

> ***I have agreed:***
>
> ***To work via a rota system, 35 hours a week over 7 days (as stated in my contract)***
>
> ***This includes on a rota basis, working Saturday, Sunday and Bank Holiday***
>
> ***I have proposed times that meet my family well-being and the OHG service requirements to enhance the service offered to our Young People. Apart from a small change around the late shift hours, you have agreed the timescales suggested***

43. On Monday 8 June 2015, there was a meeting between Ms Boland, the Claimant and David Jones (Ms Boland's manager) at which it was confirmed that the Claimant could continue to work 35 hours rather than the proposed 37.5 hours. This was in part due to an acknowledgment by the Respondent that the Claimant had not been consulted about this change during the TUPE process as originally thought.

44. The Claimant said in evidence that on 22 May 2015, she was informed that the team's previous PDRs had been deleted (allegation 13(f) above) from

the Respondent's system. We accept that all of the team’s PDRs had been deleted, for reasons which could not be explained but which the Respondent acknowledged should not have happened.

45. On 11 June 2015, Ms Boland informed the Claimant that Mr Jones would be attending Thicket Road on 12 June 2015 to collect a computer. On that day the Claimant was scheduled to attend prison to meet one of her young people who was being released that day. Ms Boland wanted to know whether the Claimant would be back at the home in time to meet Mr Jones. The Claimant informed Ms Boland that she expected to be back by 2pm. In fact, the Claimant did not arrive at the property to meet Mr Jones. The Claimant says that when she turned on her phone (it having been turned off up to that point) she received a call from Ms Boland who screamed down the phone at her in a high pitch voice that Mr Jones had arrived at the home and had been waiting for the Claimant (allegation 13(d) above). Having listened to the evidence of Ms Boland on this point, we find that Ms Boland was frustrated - even angry - but we do not accept that she screamed down the phone at the Claimant. We accepted the evidence of Ms Boland that screaming down the phone was not her style. We also concluded that if the Claimant had been so offended and humiliated by the behaviour of Ms Boland, that she would have raised it with someone or indeed complained directly to Ms Boland that her behaviour was unacceptable. Indeed, the Claimant met Ms Boland at a supervision meeting on 18 June 2015 and we considered that this would have been an ideal opportunity for the Claimant to raise the issue but that she did not do so. This led us to doubt the Claimant’s account of this incident and prefer the evidence of Ms Boland.

46. Also, on 12 June 2015 at 15:11 [512] Mr Jones wrote an email to the Claimant as follows (allegation 13(e) above):

> ***Hi Sandra***
>
> ***I am concerned that despite Sue Anne notifying you that I was coming to Thicket Road to pick up a computer, you were not present at the scheme. If you were unable to be there, then you could have notified myself or Sue-Anne and therefore I would not have wasted 3 hours in travelling time.***
>
> ***I have asked Sue-Anne to investigate this matter and take appropriate action.***
>
> ***Regards***
>
> ***David***

47. The Claimant met with Mr Jones on 16 June 2015 when the Claimant shared how the above message made her feel. The Claimant claims that Mr Jones was unable to specify what type of investigation he had in mind. At the end of the meeting, the Claimant asked Mr Jones whether he or

management had a problem with her, to which he replied that he did not. The Claimant said in evidence that this response by Mr Jones did not make her feel at ease and made her question whether other members of management had a problem with her. Having looked at the message, we concluded that there was nothing particularly wrong with Mr Jones wanting the incident investigated as at that time he clearly wanted to know why the Claimant had not turned up to the meeting as scheduled.

48. At the supervision meeting with Ms Boland on 18 June 2015, the Claimant also asked Ms Boland whether she and Mr Jones had a problem with the way she worked, referring to her having stood her ground on the contract issue. Ms Boland replied that she did not.

49. On 19 June 2015, the Claimant said in evidence that she was informed by Lisa Cavendish of the Respondent that Ms Boland had wanted to discipline her for not being willing to take on any sign ups. The Claimant was then allegedly told by Ms Cavendish that her computer had software on it that was capable of spying on her, in response to which the Claimant said that she had noticed a strange flashing light on her computer. The Claimant said that hearing this information made her believe she had become a target. A theme that came through in the Claimant's evidence was one of there being a conspiracy, and that management were colluding, to remove the Claimant. In evidence she said "*I also believe that the Respondent's action/behaviour towards me was premeditated, an act of colluding, whilst being fully aware of the impact of my disability, the effects/cause of my impairment and how actions/behaviour can impact my day to day duties and well-being*". We considered this generally but had little difficulty rejecting any suggestion of a conspiracy or collusion and concluded that there simply was not the evidence available to support such an allegation. We noted that Ms Cavendish was not called as a witness at the hearing and none of these allegations, including those relating to collusion, were put to the Respondent's witnesses in cross examination and therefore they did not have the opportunity to respond to the allegations directly.

50. On 21 July 2015, Ms Boland sent the Claimant an email asking her to undertake sign ups, stating that she had been given considerable time to catch up with her workload. Ms Boland said in evidence that this was the first time that she had asked the Claimant to complete a sign up despite all her colleagues completing them. Ms Boland offered her assistance in the form of a colleague to help her complete the process and then further assistance from someone to check that the information collected was correct. By that stage the Claimant had also requested training on the sign-up process to help her, which the Respondent was agreeable to.

51. In evidence, the Claimant alleged she had difficulty logging in to her email account via her work mobile after her shift had ended, saying that it would be restored the next morning when back on shift. The Claimant alleged that

this had something to do with Ms Boland. We were not satisfied that the Claimant was being locked out of her emails as she alleged, or at all. This issue was considered when the Claimant later lodged her grievance, but her employer could not find evidence to support this allegation.

52. In August 2015, Ms Boland was contacted by HR and alerted to the fact the the Claimant's absence in April/May 2015 had triggered an informal caution under the Respondent's sickness absence procedures. It became clear from Ms Boland's evidence that she did not entirely agree with giving the Claimant a warning at that time, not least due to the potentially negative impact on her relationship with the Claimant. However, we are satisfied that the decision was not driven by Ms Boland and that she was simply doing as she was instructed. We also accept that such a warning was in accordance with the Respondent's attendance policies and procedures.

53. With regards the warning itself, the Claimant complained that a six-month monitoring period was not in accordance with the Respondent's attendance policy, which the Claimant said ought to have been three months. The Claimant also referred to a colleague in similar circumstances that was given a three-month monitoring period. During the hearing we considered the policy and concluded that there was an anomaly in that, depending on one's interpretation of the policy, the required monitoring period could be interpreted as either three or six months and therefore that both periods were potentially acceptable within the meaning of the policy. When asked about this in evidence, Ms Boland said, which we accept, that her understanding of the monitoring period was that it was for six-months. We found it impossible to draw any useful comparison with the treatment of a colleague under the same policy as there was no direct evidence about the circumstances of that individual.

54. On 18 August 2015, the Claimant ran a workshop at one of the homes on awareness of universal credit when she said that she experienced continual distractions in the form of telephone calls on the land line from Ms Boland. The Claimant alleged that this was an act of harassment (allegation 13(i) above). Ms Boland could not recall whether she did make any calls to the Claimant but accepted that she may have done. On the evidence, we were able to accept that Ms Boland did call the Claimant during the session. However, we also find that it was open to the Claimant to simply tell Ms Boland that she was busy training and that she would need to take the call later, something that was put to the Claimant and which we felt the Claimant did not really provide a credible answer to. We struggled to understand why this issue was the problem that the Claimant alleged.

55. On 21 August 2015, despite the Claimant's eventual agreement to the rota, the Claimant wrote an email to Ms Boland, following a conversation with ACAS, asking that she was not added to the bank holiday rota. Ms Boland sought advice from HR who again referred to the Claimant's contract and

the provision relating to hours (paragraph 39 above) which said that the contract could require the Claimant to work a rota pattern providing 24-hour cover, 7 days a week. The Respondent therefore concluded that the clause had to be interpreted as permitting the Respondent to require the Claimant to work bank holidays. The Respondent's position on the issue was relayed to the Claimant by Ms Boland to which the Claimant responded that she was being bullied and harassed. The Claimant then failed to attend work on the August bank holiday (31 August 2015) as scheduled according to the rota.

56. The Respondent wrote to the Claimant by letter dated 18 September 2015 to inform her that she was required to attend an investigation meeting to discuss the following matters:

    - That she failed to attend work on 31 August 2015;
    - Contacting a service user when off duty on 22 August 2015; and
    - Attending work when not on shift on 23 August 2015.

57. In evidence, Ms Boland explained that there were serious safeguarding issues that arose from contacting young people in their care when off shift. Similarly, Ms Boland said that there are a number of potential problems that can arise when someone attends work or performs their role when the Respondent does not know they are working or on shift. We had little difficulty in understanding the concerns alluded to by Ms Boland.

58. On 27 September 2015, as part of an effort to collaborate with the National Citizen Project, the Respondent had arranged for the charity to supply a number of young persons to attend Thicket Road to decorate some communal areas at the scheme. On the day, approximately 17 young people attended the scheme with an adult supervisor, and we accept from the picture provided, that they left the scheme in a mess when they completed the day. It was agreed that a colleague, Edwardine Lockhart, would attend the scheme to assist the Claimant. On the evidence we find that she did attend the majority of the day, even though she was late arriving.

59. On 29 September 2015, the Claimant was signed off sick due to stress. It is now known that the Claimant did not return to work.

60. In January 2016, an investigation into the allegations at paragraph 57 above was completed. The Claimant was given the opportunity to contribute to the investigation by providing written answers to the allegations but chose not to do so, due to the stress she says she was suffering.

61. The Respondent wrote to the Claimant by letter dated 25 January 2016

inviting the Claimant to a disciplinary hearing to answer the three allegations that had been the subject matter of the investigation.

62. On 2 February 2016, the Claimant sent the Respondent a written grievance complaining of a range of matters including disability discrimination, bullying and harassment, health and safety, and lone working. Due to one aspect of the Claimant's grievance being about the Respondent continuing with the above disciplinary process whilst she was off sick, the Respondent decided to suspend the disciplinary process pending the outcome of the grievance. We were told that the process was not restarted and never proceeded to a disciplinary hearing due to the Claimant's later resignation.

63. A grievance meeting was held on 17 March 2016 and there then followed interviews with other members of staff. The investigation was led by Jason Pryce-Kennedy.

64. On or about 25 April 2016, the Claimant was sent a letter informing her of the outcome of her grievance. It was a detailed letter extending to five pages and attaching eighteen appendices. The outcome was that the grievance was not upheld.

65. On 10 May 2016, the Claimant appealed against the outcome of her grievance in writing. An appeal hearing was held on 27 May 2016 which was chaired by Nuala Foley. Further to that meeting, the Claimant sent a letter to Ms Foley, as agreed, setting out clearly her grounds of appeal in as simplified a way as possible. That was a detailed letter of just over five pages. It was agreed that if the Claimant wished to submit new evidence then she could do so.

66. Ms Foley wrote to the Claimant by letter dated 28 June 2016. In her letter, Ms Foley upheld one part of the grievance relating to not making adjustments (provision of Dragon Dictate and ClaroRead software) in a timely manner albeit she found that the delay was not caused by any inaction of Ms Boland. Ms Foley also commented that the tone of one of Ms Boland's responses during the investigation into the Claimant's grievance was not appropriate. Ms Boland said in evidence that she apologised if what she said came out in a particular way but she did not intend it to sound as Ms Foley had interpreted it. Ms Foley did not uphold the vast majority of the Claimant's grievances, including those related to bullying and harassment by Ms Boland.

67. The Claimant resigned with immediate effect by letter dated 30 June 2016. In it she said that she had exhausted every option available to address her problem at work and believed that the Respondent's actions had fundamentally damaged the employment relationship. She referred to having been constructively dismissed. When the Claimant was asked during her evidence what it was about the appeal outcome, or the way the appeal

was dealt with, that she was complaining about, bearing in mind she sought to rely on this as a last straw, the Claimant referred to being forced to work with Ms Boland again and being "*put back in the firing line*" with no safety or protection as an employee. It was put to the Claimant that what else could she expect if Ms Foley had not found in her favour in relation to the complaints about Ms Boland, but she continued to refer to not being protected. Turning to the hearing itself, the only complaint the Claimant appeared to have when asked specifically about it, was that she felt that she was "*shut down*" and prevented from speaking. Having listened to Ms Foley's evidence on this issue, we reject any suggestion that the Claimant was not able to say what she wanted about her grievance, whether personally or via her union representative. We accept that given the list of topics that needed to be discussed, at times there was a need to move on to the next subject.

Relevant law

Discrimination arising from disability

68. Section 15 EQA provides as follows:

> ***(1) A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

69. Section 15 EQA therefore requires an investigation into two distinct causative issues: (i) did the Respondent treat the Claimant unfavourably because of an (identified) 'something'? and (ii) did that something arise in consequence of the Claimant's disability? The first issue involves an examination of the state of mind of the relevant person within the Respondent ("A"), to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter, whether there is a causative link between the Claimant's disability and the relevant 'something'. The causal connection required for the purposes of s.15 EQA between the 'something' and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the 'something' does not mean to say that the requirement is not met. It is also clear from case law that it is only necessary for the Respondent to have knowledge (actual or constructive) of the underlying disability; there is no added requirement that the Respondent have knowledge of the causal link between the 'something' and the disability.

70. If section 15(1)(a) is resolved in the Claimant's favour, then we must go on to consider whether the Respondent has proved that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

71. In terms of the burden of proof, it is for the Claimant to prove that she has been treated unfavourably by the Respondent. It is also for the Claimant to show that 'something' arose as a consequence of his or her disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment.

Failing to make reasonable adjustments

72. A claim for failure to make reasonable adjustments is to be considered in two parts. First the Tribunal must be satisfied that there is a duty to make reasonable adjustments; then the Tribunal must consider whether that duty has been breached.

73. Section 20 of EQA deals with when a duty arises, and states as follows:

> ***(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.***
>
> ***………***
>
> ***(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.***

74. Section 21 of the EQA states as follows:

> ***(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.***
>
> ***(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.***

75. The EQA says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, applying the evidence adduced during a case, and is assessed on an objective basis.

76. In determining a claim of failing to make reasonable adjustments, we must therefore ask ourselves three questions:

- What was the PCP?

- Did that PCP put the Claimant at a substantial disadvantage compared to someone who is not disabled?

- Did the Respondent take such steps that it was reasonable to take to avoid that disadvantage?

77. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the Respondent to make.

78. The burden is on the Claimant to prove facts from which this Tribunal could, in the absence of hearing from the Respondent, conclude that the Respondent has failed in that duty. So here, the Claimant has to prove that a PCP was applied to her and it placed her at a substantial disadvantage. The Claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

79. It is a defence available to an employer to say "*I did not know, and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the Claimant.

Victimisation

80. Section 27 of EQA provides as follows:

> ***(1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
>
> ***(a) B does a protected act, or***
>
> ***(b) A believes that B has done, or may do, a protected act.***
>
> ***(2) Each of the following is a protected act—***
>
> ***(a) bringing proceedings under this Act;***
>
> ***(b) giving evidence or information in connection with proceedings under this Act;***
>
> ***(c) doing any other thing for the purposes of or in connection with this Act;***
>
> ***(d) making an allegation (whether or not express) that A or another person has contravened this Act.***
>
> ***(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.***

81. The test to be applied here is threefold:

- Did the Claimant do a protected act?
- Did the Respondent subject the Claimant to a detriment?
- If so, was the Claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

82. The most important decision to be made by the Tribunal is the "*reason why*" the Respondent dismissed the Claimant. Was it because of the complaint alleged to be a protected act – or was it something different? Even if the reason for the dismissal is related to the protected act, it may still be quite separable from the complaint alleged to be a protected act.

83. A person claiming victimisation need not show that less favourable treatment was meted out solely by reason of the protected act. As Lord Nicholls indicated in **Nagarajan v London Regional Transport 1999 ICR 877, HL**, if protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out.

84. Whilst the same burden of proof applies in such cases, namely that the Claimant must prove sufficient facts from which the Tribunal could conclude, in the absence of hearing from the Respondent, that the Claimant has suffered an act of discrimination, it is also perfectly acceptable to go straight to the "*reason why*" because that is the central question that the Tribunal needs to answer.

Harassment

85. Section 26 of EQA provides as follows:

> **(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **……..**
>
> **(4) In deciding whether conduct has the effect referred to in subsection**
>
> **(1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

86. There are three essential elements of a harassment claim under s.26

- unwanted conduct
- that has the proscribed purpose or effect, and
- which relates to a relevant protected characteristic.

Constructive dismissal

87. Sections 95(1)(c) Employment Rights Act 1996 states that there is a dismissal when an employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

88. In order to claim constructive dismissal, the employee must establish that:

- there was a *fundamental breach* of contract on the part of the employer that repudiated the contract of employment;
- the employer's breach *caused* the employee to resign; and
- the employee did not *delay* too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

89. The breach may be of an express or implied term in a contract. Where the term is the implied term of mutual trust and confidence, the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. This means that there are two questions to be asked when determining whether the term has, in fact, been breached. These are:

- was there '*reasonable and proper cause*' for the conduct?
- if not, was the conduct '*calculated or likely to destroy or seriously damage trust and confidence*'?

90. A breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer that cumulatively amount to a repudiation of the contract. Typically, the employee resigns in response to a final incident that he or she regards as '*the straw that breaks the camel's*

back'. The last straw does not, of itself, have to amount to a breach of contract, still less be a fundamental breach in its own right. To constitute a breach of trust and confidence based on a series of acts (or omissions), the act constituting the last straw does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. As always, the test of whether the employee's trust and confidence has been undermined in this context is an objective one. An employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act — the last straw — forms part of the series.

Constructive dismissal as an act of discrimination

91. Section 39(2) EQA states:

> ***An employer (A) must not discriminate against an employee of A's (B)—***
>
> ***(a) as to B's terms of employment;***
>
> ***(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;***
>
> ***(c) by dismissing B;***
>
> ***(d) by subjecting B to any other detriment.***

92. Dismissal for the purposes of s.39(2) includes constructive dismissal, which occurs where the employee, owing to the repudiatory conduct of the employer, is entitled to resign and regard him or herself as dismissed.

Jurisdiction

93. Section 123 of EQA deals with time limits for bringing discrimination claims in the Employment Tribunal and says as follows:

> ***(1) [Subject to [sections 140A and 140B] on a complaint within section 120 may not be brought after the end of—***
>
> ***(a) the period of 3 months starting with the date of the act to which the complaint relates, or***
>
> ***(b) such other period as the employment tribunal thinks just and equitable.***

....

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

94. An "act" under the EQA includes an "omission" (section 212(2) EQA). Section 212(3) EQA goes on to say that reference to an omission includes a reference to:

    - A "*deliberate omission*" to do something.
    - A refusal to do it.
    - A failure to do it

95. Where a claim arises out of an omission:

    - The employer's failure to do something is to be treated as occurring when the employer decided not to do it (section 123(3)(b) EQA).
    - In the absence of evidence to the contrary, the employer is to be taken as deciding not to do something when it does an act inconsistent with doing it (or, if there is no inconsistent act, at the expiry of the period in which the employer might reasonably have been expected to do it) (section 123(4) EQA).

96. Where an employer fails to make reasonable adjustments for a disabled employee simply because it fails to consider doing so, time runs at the end of the period in which the employer might reasonably have been expected to comply with its duty.

97. Even if a claim is brought out of time, the Tribunal can extend time by such period as it thinks just and equitable (section 123(1)(b), EQA).

98. The EAT in **British Coal Corporation v Keeble [1997] IRLR 336** held that the Tribunal's discretion in these circumstances is as wide as that of the civil courts under s.33 of the Limitation Act 1980. This requires courts to consider factors relevant to the prejudice that each party would suffer if an extension were refused. These include:

    - The length of, and reasons for, the delay;

- The extent to which the cogency of the evidence is likely to be affected by the delay;

- The extent to which the party sued had co-operated with any requests for information;

- The promptness with which the Claimant acted once they knew of the possibility of taking action;

- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

99. While this may serve as a useful checklist, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out (**London Borough of Southwark v Afolabi [2003] IRLR 220 (CA)**). The emphasis should be on whether the delay has affected the ability of the Tribunal to conduct a fair hearing.

Submissions by the parties

100. We considered carefully the submissions made by the parties and took these into account when reaching our decision.

Analysis, conclusions and associated findings of fact

101. We then turned to each of the allegations in the Scott Schedule and applied the above legal principles to our findings of fact.

Failing to provide training (allegation 13(a)). Breach of s.21 EQA.

102. We concluded that whilst training was not provided to the Claimant before she left, it would have been provided had she stayed. The delay in providing the training was due to the Claimant's desire to have the software installed first. We accept that the delay in installing the software, and thereafter providing training, was longer than ideal, but we find that there was a combination of reasons for this (explained further at paragraphs 30-33 above) ending with the fact that the Claimant did not return to work. We concluded that the Respondent did all that it could to speed up the process as far as it was able to do so. In all the circumstances, we find that the Respondent did not breach their duty to make reasonable adjustments. We also acknowledge that the Respondent did not simply wait for the software to be installed but also made a number of adjustments in the meantime (as detailed at paragraphs 34-36). We concluded that the Respondent made such adjustments that were reasonable in the circumstances to ensure that the Claimant was not placed at a substantial disadvantage compared to someone who is not disabled.

Not allowing the Claimant to use her own methodology (allegation 13(b)). Breach of s.21 EQA.

103. We have found as fact that the Respondent *did* allow the Claimant to use her own methodology to assist her perform her role bearing in mind her disability. We rely on our findings of fact at paragraph 37 above. Accordingly, we do not find that the Respondent breached the duty to make reasonable adjustments.

Not adjusting the Claimant's workload (13(c)). Breach of s.21 EQA.

104. We find that the Respondent did allow the Claimant additional time to complete her paperwork. The Claimant was relieved of her Duke of Edinburgh promotional duties, she was relieved of the requirement to carry out customer sign ups, new referrals were not being sent to her and she was not asked to carry out Health and Safety checks at the Wiverton Road scheme. Accordingly, we do not find that the Respondent breached the duty to make reasonable adjustments.

Ms Boland shouting down the phone at the Claimant (allegation 13(d)).

Breach of s.26 EQA

105. We do not accept the Claimant's account of this incident and prefer instead Ms Boland's evidence that she did not, neither was it her style to, scream down the phone at the Claimant as is alleged. There is no evidence that what Ms Boland did was in any sense whatsoever related to the Claimant's disability, or indeed any relevant protected characteristic. For this reason alone, the claim fails. However, we are also not satisfied that Ms Boland's conduct had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Even if Ms Boland's conduct had that effect, we do not believe it reasonable for it to have done so in the circumstances.

Breach of s.15 EQA

106. Given our findings in relation to Ms Boland's behaviour, we do not accept that what Ms Boland did can be interpreted as unfavourable treatment. Even if it was considered unfavourable treatment, the reason Ms Boland telephoned the Claimant was because she did not arrive for a meeting with Mr Jones. We do not accept there is any evidence to suggest that the reason the Claimant did not arrive for the meeting arose in consequence of the Claimant's disability. We believe that Ms Boland was perfectly justified in calling the Claimant and questioning her as she did and therefore even if such conduct could be considered unfavourable treatment arising in consequence of disability, we believe it was justified.

Mr Jones acting in an intimidatory manner (allegation 13(e)).

Breach of s.26 EQA

107. There is no evidence that what Mr Jones did by sending the email (see paragraph 46 above) was in any sense whatsoever related to the Claimant's disability, or indeed any relevant protected characteristic. For this reason alone, the claim fails. However, we are also not satisfied that Mr Jones' email had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Even if Mr Jones' email had that effect, we do not believe it reasonable for it to have done so in the circumstances.

Breach of s.15 EQA

108. Our conclusion is the same as that set out in paragraph 106 above.

Deletion of time sheets (allegation 13(f)).

Breach of s.26 EQA

109. Firstly, there is no evidence that time sheets or PDRs were in fact deleted. We accept that they may no longer exist, but we do not know why that is, and importantly neither does the Claimant. We accept the Respondent's evidence that it is not just PDRs belonging to the Claimant that are no longer available, but those of other employees as well. Even if they were deleted, there is no evidence whatsoever that this was related to the Claimant's disability, or indeed any relevant protected characteristic. For this reason alone, the claim fails. However, we are also not satisfied that there is evidence which shows that it was done with the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Neither do we believe it was reasonable for it to have had that effect in the circumstances.

Breach of s.15 EQA

110. Even if we accepted that the time sheets and PDRs were deleted and that their deletion amounted to unfavourable treatment, we do not know why they were deleted and neither does the Claimant. We cannot therefore conclude that the reason for the deletion of the time sheets and/or PDRs was because of something arising in consequence of disability.

Instructing the Claimant to take on more work (allegation 13(g)).

Breach of s.26 EQA

111. This was not put to Ms Boland during cross examination. We refer to our

findings of fact at paragraph 50 above. We do not accept that asking the Claimant to take on "sign ups" can be interpreted as unwanted conduct related to the Claimant's disability, or any relevant protected characteristic. For this reason alone, this claim fails. We do not accept that it was done with the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Neither do we think it reasonable for it to have had that effect in the circumstances.

Breach of s.15 EQA

112. We do not accept that instructing the Claimant to perform her job can be interpreted as unfavourable treatment. The reason for wanting the Claimant to take on more work was to assist with coping with the workload of the team. We do not accept, therefore, that the reason for requiring the Claimant to take on more work was because of something arising in consequence of disability.

Issuing the Claimant with an informal warning with a sixth month monitoring period (allegation 13(h)).

Breach of s.26 EQA

113. We find that a six-month monitoring period was allowed under the policy notwithstanding its anomaly. It related to a period of absence for something wholly unconnected with the Claimant's disability (i.e. a bad back) or in fact any protected characteristic. We do not believe the application of the policy to the Claimant was done with the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Neither do we find that it was reasonable in the circumstances for it to have had that effect.

Breach of s.27 EQA

114. We find that there was no protected act, a fact admitted by the Claimant during the hearing. Without a protected act, we find that the Respondent did not victimise the Claimant.

Ms Boland interrupting the Claimant during her training session (allegation 13(i)). Breach of s.26 EQA.

115. We refer to our findings at paragraph 54 above. There is no evidence that what Ms Boland did was in any sense whatsoever related to the Claimant's disability, or indeed any relevant protected characteristic. For this reason alone, the claim fails. However, we are also not satisfied that Ms Boland's conduct had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Even if Ms Boland's

conduct had that effect, we do not believe it reasonable for it to have done so in the circumstances.

Starting but not completing a disciplinary process (allegations 13(j) and (k)). Breach of s.26 EQA.

116. We concluded that the Respondent acted perfectly reasonably in investigating acts of misconduct. The furthest the proceedings reached was an invite to a disciplinary hearing, but this did not go ahead because by that stage the Claimant had raised a grievance. There is no evidence that what the Respondent did was in any sense whatsoever related to the Claimant's disability, or indeed any relevant protected characteristic. For this reason alone, the claim fails. However, we are also not satisfied that starting a disciplinary process had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Even if it had that effect, we do not believe it reasonable for it to have done so in the circumstances.

Leaving the Claimant in charge of approximately 20 young people (allegation 13(l)). Breach of s.26 EQA.

117. We rely on our findings at paragraph 58 above. We find that the Claimant could have taken steps to have prevented the young persons entry to the scheme if she wanted or was worried about anything or if she wanted to wait for her colleague to arrive. There is no evidence that what the Respondent did was in any sense whatsoever related to the Claimant's disability, or indeed any relevant protected characteristic. We conclude that it was not reasonable for the Claimant to believe such a matter violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. Neither do we accept that the Respondent acted with this purpose in mind.

Failing to deal with the appeal hearing properly (allegation 13(m)). Breach of s.15 EQA.

118. This was put forward as a last straw and as a discriminatory act. We could not point to any unfavourable treatment given our findings in relation to the appeal hearing (paragraphs 65-67). We find that the appeal hearing was handled fairly and was very thorough. We could find no criticism of it. Even then, it is difficult to seen how the alleged unfavourable treatment was because of something arising in consequence of disability.

119. For the above reasons, all of the discrimination claims are not well founded and are dismissed.

Constructive dismissal

120. The Tribunal does not accept as fact the criticism by the Claimant of the appeal. Indeed, it could find no criticism of the way in which the appeal was handled or how Ms Foley reached the conclusions that she did. For this reason, we could not find anything which could be considered a “last straw”. However, even if the fact of not determining the appeal in the Claimant's favour, was a “last straw”, we concluded it could not be considered a breach of contract in itself. Further, we considered very carefully what the Respondent did over the period alleged by the Claimant, we found no evidence from which we could conclude that the Respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Accordingly, we conclude that the Claimant was not constructively dismissed.

Time limits

121. In light of our above findings, we did not go on to deal with the time points.

……………………………………………….

Employment Judge Hyams-Parish
17 March 2020

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.