EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107860/2019

Heard in Glasgow on 14, 15 and 16 January; and 2, 3, 4 and 5 March 2020

Employment Judge L Wiseman
Members Julie Ward
Andrew McFarlane

Ms Philomena Donnachie	**Claimant** **Represented by:** **Mr B McLaughlin - Solicitor**
Mr Stuart McMillan MSP	**Respondent** **Represented by:** **Mr W Rollinson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 29 July 2019 alleging she had been unfairly constructively dismissed, discriminated against because of her disability, harassed on grounds of sex and sexual harassment.

2. The respondent entered a response denying all of the claims in their entirety.

3. A case management preliminary hearing took place on the 11 October, following which the claimant provided further and better particulars of her claim (pages 46 – 48).

4. The parties also prepared a draft list of issues to be determined (pages 50 – 52). The respondent conceded the claimant was a disabled person at the time of these events, based on the various conditions the claimant had (Fibromyalgia, Irritable Bowel Syndrome and Migraines). The only issue which was not conceded was whether the claimant's depression also amounted to a

disability and the claimant's representative asked the tribunal to determine this matter based on the evidence given by the claimant at this hearing.

5. We heard evidence from the claimant and Ms Geraldine Harron, a friend who had accompanied the claimant to the mediation; and from Mr Stuart McMillan MSP, the respondent; Ms Gillian Renwick, an employee of the respondent and Mr Matthew Leitch, the respondent's office manager. We were also referred to a folder of documents jointly produced for this hearing.

6. This hearing was originally listed for four days. The hearing did not conclude in that time and had to be continued for a further four days. There were concerns the hearing would not conclude in this further period and accordingly the Tribunal, with the consent of the representatives, agreed how long the representatives would be permitted for examination in chief, cross examination and submissions.

7. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

8. The respondent, Stuart McMillan, was elected a regional MSP in 2007, and as a constituency MSP for the Greenock and Inverclyde area in 2016. Mr McMillan has a constituency office in Greenock.

9. The claimant commenced employment with the respondent on the 15 June 2015. The claimant was employed as a Caseworker. She earned £475.38 gross per week, giving a net weekly take home pay of £388.52. The claimant's Statement of Terms and Conditions of Employment was produced at page 54.

10. The claimant has Fibromyalgia; Irritable Bowel Syndrome and Migraines. She is also the sole carer for her son who has Aspergers.

11. The respondent employed three members of staff in 2015: the claimant, who was employed as a Caseworker, Shaun Kavanagh, Researcher and one other part time Researcher. The part time Researcher left the employment of Mr McMillan and Darren Walker was subsequently employed to work on case work.

12. The role of Caseworker is to deal with enquiries from constituents. Mr McMillan described this as the "bread and butter of the undertaking". It is important that case work is dealt with first in the office. The Caseworker is expected to deal with 80% of the enquiries. Mr McMillan recognised that in the run up to the 2016 election there would be an increase in case work and this was his reason for employing Mr Walker.

13. Mr McMillan was made aware there was a backlog of cases which he considered unacceptable in an election year. Mr Walker was tasked with clearing this backlog.

14. Mr McMillan decided, following the election in 2016, to reorganise the office because he required an office manager to run the office and manage the staff. Mr Leitch, Mr Walker and the claimant (among others) applied for the post. Mr Matthew Leitch was successful and commenced employment as the respondent's Office Manager in August 2016.

15. Mr Leitch, as Office Manager, was responsible for supervising the office; being the person responsible in Mr McMillan's absence; line managing the claimant and Mr Walker; delegating work and preparing the budget for the office. Mr Leitch was advised by Mr McMillan that he wanted him to "get on top of things" such as timekeeping and ensuring case work was done to the required standard.

16. Mr Leitch had previously been employed as a Caseworker and he had knowledge and experience of the casework system. Mr McMillan wanted Mr Leitch to train the claimant and others to do case work effectively and to support them in their roles.

17. Mr Leitch introduced a change to the case work system so that all cases in the office were entered in his name. This enabled everyone to work from a "to do" system which meant everyone could see what was to be done and could do it. This particularly helped when people were absent or on annual leave.

18. Mr Leitch met with the claimant on the 9 August 2016 (10 days after he started working with the respondent). Page 83 is a note of the meeting. Mr Leitch acknowledged the change to the case work system but emphasised that in his

experience this system worked well and improved efficiency. Mr Leitch referred to a situation previously where cases had been left untouched for 40 weeks, whereas with the new system, everyone would be able to see what needed to be done and the target time for it. The claimant expressed unhappiness with the change because she felt she no longer had "ownership" of cases, it was taking her longer to get up to speed and she was struggling to find things.

19. The claimant told Mr Leitch that she did not need the job and could get a new one tomorrow. She also told him that she would not be "*taking any nonsense, and if [she] gets any nonsense [she] will leave and Stuart knows this".*

20. Mr Leitch was taken aback with the claimant's response and her resistance to change in circumstances where the previous approach to case work had not been good enough. This was the first of many issues Mr Leitch had with trying to manage the claimant.

Timekeeping

21. Mr McMillan was aware staff used to arrive late and leave early, but until he had an office manager he was unable to monitor and address the situation. He asked Mr Leitch to ensure people were at work on time. This was important because constituents may visit or contact the office from the minute it is open, and will want to see the Caseworker.

22. Mr Leitch observed the timekeeping of the three employees over two weeks and noticed the claimant would often arrive late and, prior to arriving, would go to the local bakery for a breakfast roll. Mr Kavanagh tended to arrive on time but then spent time away from his desk making breakfast. Darren Walker had, by this time left the employment of the respondent, and been replaced by Seonaid Knox, whose timekeeping was not an issue (although he subsequently met with Ms Knox on the 4 September 2018 to remind her of the need to ensure she was on time).

23. Mr Leitch decided to make a record of timekeeping (page 173) and to speak to the claimant and Mr Kavanagh about their timekeeping. Mr Leitch met with Mr Kavanagh regarding his timekeeping on the 5 October 2016 (page 402). This meeting produced an improvement in Mr Kavanagh's timekeeping.

24. Mr Leitch spoke with the claimant on the 4 October 2016 (page 89). Mr Leitch noted Mr McMillan had agreed she may be late on a Monday, Wednesday and Friday due to dropping her son off at College, but he had noticed she was also late on the Tuesday and Thursday. Mr Leitch also noted the claimant made herself even later by going for a breakfast roll before coming to the office. The claimant agreed this needed to stop.

25. Mr Leitch spoke with the claimant again regarding timekeeping on the 10 November 2016 (page 90). Mr Leitch noted the claimant had been late every day that week. Mr Leitch told the claimant he had spoken to Mr Kavanagh about timekeeping and his had improved, whereas the claimant's timekeeping appeared to be getting worse. Mr Leitch confirmed this was not acceptable and if it continued he would need to look at giving the claimant a written warning.

26. The claimant did not complain to Mr Leitch about what he had said, but instead wrote to Mr McMillan (page 91). The claimant started the email by stating she felt she had been "approached unnecessarily" by Mr Leitch and she wished to keep Mr McMillan up to date with this. The claimant referred to some problems with her health and a lack of understanding and consideration from Mr Leitch regarding her "serial lateness". The claimant accepted her timekeeping was "far from great". The claimant went to complain that (i) she had been suffering from headaches, and that she found it difficult to cope with Mr Leitch continually playing music in the office; (ii) Mr Leitch wanted her to apologise for being late, but she would not do that; (iii) she was the only responsible person at home; (iv) threatening her with a written warning was of "absolutely no relevance at all" and (v) she wanted to experience some of the "attitude, compassion and flexibility from Matthew that [she] gives to others".

27. Mr McMillan considered that Mr Leitch's reference to a written warning arose from his newness to the role. Mr McMillan told the claimant this and that any written warning would come from him and not Mr Leitch. Mr McMillan was disappointed with the claimant's response to Mr Leitch and considered it showed a complete disregard for him.

28. Mr McMillan forwarded the claimant's email to the Scottish Parliament HR Office and received a response (page 93) confirming it was not unreasonable for Mr

Leitch to raise timekeeping issues with a member of his team. Mr McMillan considered the issue remained under review.

29. Mr McMillan agreed to amend the claimant's starting time to 09.15 each morning in order to try to make it easier for her to be in the office on time.

30. Mr Leitch met with the claimant again on the 4 July 2017 (page 142) to note the claimant had been late 12 times since the 8 May and that it needed to improve.

31. The discussions Mr Leitch had with the claimant did not lead to an improvement in her timekeeping. The discussions were not pleasant. There was frustration on Mr Leitch's part that no improvement or apology was forthcoming. The claimant complained that Mr Leitch's timekeeping record was not accurate, and so she kept her own record.

32. The claimant also wrote to Mr McMillan again (page 192). The claimant noted her opinion that "looking at 5 mins or so here and there is to my mind very petty and does not produce a healthy office environment. Particularly when it is clear that the majority of time I am early, work late and have attended more Community Council meetings than any other member of staff. These positives are not weighed in any way."

33. The claimant considered the raising of timekeeping with her to be petty and unwarranted. The claimant referred to having a professional attitude and being committed to the smooth running of the office. She considered she had to be trusted to get the work done. She hoped this would be the last time the issue of timekeeping was raised. The claimant was resentful that Mr Leitch would not recognise and reciprocate what she was giving in terms of working late.

34. Mr Leitch and Mr McMillan accepted the claimant did work late, but this did not offset her lateness in the morning. The office opened at 9am, and there was a need for the claimant to be present when the office was open. All members of staff were repeatedly told not to work late, and not to work late alone in the office. The claimant was the only member of staff who disregarded this instruction and continued to work late alone in the office.

Data Protection

35. In October/November 2017 the claimant spoke with two constituents who visited the office to request help to find out why their son and daughter (both adults) had been unsuccessful in getting a Council house. The claimant wrote to the Housing Association concerned asking a number of questions about the current housing applications made by the son and daughter, and giving the son and daughter's full names and addresses. The claimant copied this letter to the parents who had visited the office, and to the son and daughter. The claimant took this action of her own volition and not on the instruction or suggestion of Mr Leitch.

36. The Housing Association responded to query whether authorised consent had been given by the son and daughter. The son and daughter also contacted Mr McMillan and were furious regarding what had occurred.

37. Mr McMillan had to issue a letter of apology to the son and daughter (page 156).

38. Mr Leitch spoke with the claimant regarding this matter and explained she should not have written without the consent of the son and daughter. The claimant was defensive and asked Mr Leitch to obtain information regarding what breach had actually occurred. Mr Leitch obtained this information (page 164). The email referred to the handling of personal data and the fact the names and addresses of the son and daughter had been passed to the housing association without their consent. The email concluded "*this would be sufficient to cause a low level data breach"*.

39. The claimant sent an email to Mr McMillan following her meeting with Mr Leitch (page 165). The claimant regretted any embarrassment caused, but went on to say there had been circumstances which diverted her attention and this included Mr Leitch's interruptions which undermined her.

40. Mr McMillan met with the claimant regarding this matter and her email of the 15 November (above). The claimant did not appreciate and was unwilling to accept there had been a data breach. Mr McMillan emailed the claimant following the meeting (page 164) and attached the information received from the Scottish

Parliament confirming a low level breach had occurred. Mr McMillan was content to let the matter rest and for everyone to learn from what had happened.

Beast from the East

41. In March 2018 heavy snow was forecast to hit the country for several days. Mr Leitch asked employees if they could work from home if it snowed, and all agreed. Mr Leitch sent a message on the work Whatsapp (page 213), to the claimant, Shaun and Seonaid in the following terms: "*Ok. I had emailed yesterday afternoon asking you and Seonid to let me know all the cases you had done Wed/Thurs. If you can just make sure this is done for Monday morning please."*

42. The claimant responded "*what possible reason could you need that".* Mr Leitch replied "*So I know what people have been doing when we have been closed for 3 days and all working from home".* The claimant responded "*Right I just wanted to give you the benefit of doubt and be clear if you were checking up on the children and not treating us like responsible professional adults".* Mr Leitch replied that they would have a chat about this on Monday.

43. Mr Leitch met with the claimant on Monday 7 March (page 214) because he considered the claimant's Whatsapp response to be cheeky and wholly inappropriate to send it to the group. Mr Leitch noted (in relation to work) the claimant had sent 4 emails over the course of 2 days. The claimant responded to say she had also watched Topical Questions, First Ministers Questions and the Brexit debate. The claimant saw no issue with the Whatsapp message, and complained there was no need to check up on her and that she should be treated as a professional adult.

44. Mr Leitch concluded the meeting by asking the claimant to send him all of the emails she had sent over the past 2 days, and that it was likely he and Mr McMillan would speak to the claimant again.

45. The claimant did not advise Mr Leitch of any issues she had had whilst working at home. Instead, she wrote a lengthy email to Mr McMillan (page 220) in which she complained that her integrity and abilities were being questioned. The claimant went on to list the challenges she had whilst working at home, which

included not having the same adapted equipment available to her as was in the office; the standard of her laptop being poor; she was easily accessible to her son who was demanding; the dogs were stir-crazy because they were not getting out enough and she had been interrupted by neighbours and phone calls.

46. The claimant felt Mr Leitch had a problem with her and that he continually tried to get her into trouble. The claimant then rehearsed the timekeeping and data protection issues and noted she had not breached the data protection act.

47. Mr McMillan was disappointed to receive this email. He understood that it is not easy for people to work at home, and he had not expected the usual level of work to be done. He considered the claimant's email to be simply a long list of reasons to justify why so little work had been done, and noted these reasons had not been raised with Mr Leitch. Mr McMillan sought advice from HR and then arranged to meet with the claimant and Mr Leitch.

48. Mr McMillan met with the claimant and Mr Leitch on the 19 March 2018 and the notes of that meeting were produced at page 238. Mr McMillan considered Mr Leitch had made a perfectly reasonable request of the claimant and that the claimant's response had been disrespectful and unprofessional. Mr McMillan emphasised that when he was not in the office Mr Leitch was in charge. He also emphasised that he had no issue with Mr Leitch questioning anyone in the office about casework and projects they had been doing.

49. Mr McMillan advised the claimant there was nothing wrong with the way in which Mr Leitch had asked the claimant the question regarding how much work had been done. He further expressed his discontent with the way in which the claimant had responded. The claimant confirmed that in future she would respond differently to Mr Leitch.

50. Mr McMillan referred to the claimant's email where she had complained about Mr Leitch interrupting her when she was speaking to a constituent. Mr Leitch accepted he did this but it was for the benefit of the claimant and/or constituent. Mr Leitch agreed to think more before interrupting her in the future.

51. Mr McMillan then met with the claimant and Mr Leitch individually. A note of the meeting with the claimant was produced at page 240. Mr McMillan confirmed they would discuss each of the issues referred to in the claimant's email of 9 March: he also highlighted concerns regarding the level of sickness absence; the claimant's health and the measures which had been put in place to assist the claimant.

52. Mr McMillan suggested that as a result of the level of the claimant's sickness absence, when she returned to work there was a growing amount of work to do and she did not always cope with the workload. Consequently, Mr McMillan confirmed he wished the claimant to meet with Occupational Health and consider working part time.

53. Mr McMillan responded to each of the points in the claimant's email which included:

- The claimant had stated she felt Mr Leitch had questioned her integrity and abilities: Mr McMillan indicated that at no time had Mr Leitch highlighted any comments regarding her integrity or abilities.

- Timekeeping: Mr McMillan indicated Mr Leitch had informed him of all staff timekeeping including his own. The claimant noted Seonaid had only been spoken to recently.

- Mr Leitch spending time in the toilet when he arrived for work: Mr McMillan noted he was not aware of any health reason for this, but there could be an underlying issue which Mr Leitch had not yet informed him of.

- Micro management by Mr Leitch, and trying to get her into trouble: Mr McMillan disagreed with what the claimant had said and again stressed Mr Leitch's role was as office manager. Mr McMillan stressed he had asked Mr Leitch to keep on top of issues including timekeeping and casework.

- The claimant felt Mr Leitch had a problem with her because of her age: Mr McMillan rejected this.

54. Mr McMillan concluded the meeting by indicating he would contact HR who would, in turn, contact the claimant regarding a referral to Occupational Health.

The claimant's health

55. The claimant has a number of ongoing health issues including Fibromyalgia, Irritable Bowel Syndrome and Migraines.

56. In April 2016, whilst working alone late in the office, the claimant suffered a stroke. The claimant was off work from 6 April 2016 until July 2016.

57. The respondent obtained an Occupational Health report dated 8 December 2016 (page 95). The report noted: "*It takes about a year to recover from a subarachnoid haemorrhage. The majority of the recovery takes place in the first six months but further gradual recovery continues for the full period. Ms Donnachie confirms this is the case with her. Whilst she thinks she may have rushed back to work a little too quickly she also feels that the effort has been worthwhile as her work stamina is improving. It is not uncommon for people who have had any sort of brain injury to have to work harder to maintain the same level of previous cognitive functions and to report that this conscious effort is very tiring. Ms Donnachie is working her way through this quite well. Ms Donnachie's recovery and improvement should continue for another 6 months or so."*

58. The claimant considered she had not been 100% when she returned to work in July 2016 and, in particular, had been slower at her job.

59. The claimant was off on sickness absence (work related stress) from March 2018, following the meetings with Mr McMillan. The claimant's stress manifested itself in panic attacks, a fear of going out alone, not doing domestic tasks, a flare up of the irritable bowel syndrome and spondylitis and she slept a great deal.

60. The claimant's brother contacted Mr McMillan by email in April 2018 (page 247) to voice concerns regarding Mr Leitch and a culture of bullying. Mr McMillan responded to that email (page 246) and confirmed that as he had alleged

bullying in the workplace, the matter should be dealt with as a formal grievance, and an independent person would be appointed to investigate.

61. The claimant did not progress with a grievance.

62. An Occupational Health report was obtained in August 2018 (page 257). The report addressed a number of specific questions, one of which was whether there was an underlying cause for the absence. The occupational health doctor noted the claimant had provided information suggesting her absence had been triggered by accumulating difficulties with her line manager. The report recommended a gradual return to work comprising a phased return to work; mentoring; flexibility regarding working hours and adjusting her caseload.

63. The doctor confirmed the claimant was sufficiently fit to be able to have a conversation with an independent consultant to discuss how to move forward. The report suggested that consideration be given to holding any such discussion in a neutral venue and that it would also be medically appropriate to allow the claimant to have someone to support her.

64. Mr McMillan met with the claimant to discuss the report on the 19 October 2018 and a note of the meeting was produced at page 291. Mr McMillan confirmed he wished the claimant to return to work and that a phased return and such adjustments as were operationally feasible would be put in place.

65. Mr McMillan emailed the claimant (page 296) to confirm what had been discussed and also confirming that, as previously discussed, the claimant was entitled to take forward any concerns she had regarding Mr Leitch under the Grievance Procedure.

66. Mr McMillan met with the claimant again and an amended version of the proposal for the phased return to work was agreed (page 315).

67. The claimant returned to work on Monday 18 February 2019. She went off sick again on the 1 March 2019 and did not return to work.

List of adjustments made for the claimant

68. A list was produced on page 230 which listed 12 points which had been put in place to assist the claimant at work. The list was as follows:

    1. Changed how casework is done – should be working from the to do list so that things are not missed (initial apprehension to this but done to make things easier).

    2. Removed all tasks from Phil (the claimant) other than casework. She does not need to deal with bills, PR, motions, speeches, social media, diary (other than constituents' appointments) deal with interns etc.

    3. Made Phil aware on numerous occasions that any detailed response ie constituents asking policy questions or looking for Stuart's view on a particular issue, could be forwarded to Matthew or Shaun, subsequently Matthew, Seonaid or Jen.

    4. Initiated a phone rota so that Phil was no longer answering the phones the majority of the day.

    5. Occupational Health came in and assessed Phil's work space. New chair, document holder, head set, foot rest and dyslexia software all provided.

    6. Phil allowed to start at 09.15am due to persistent lateness.

    7. Matthew/Seonaid/Jen combined doing around 50% of casework to support Phil (however this is not sustainable).

    8. Allowed staff to record their own timekeeping after a comment from Phil that it may have been recorded inaccurately.

    9. Screen put at the top of the front window to help Phil with the glare from sunlight.

    10. Option to forward council related cases to ward councillor.

    11. Specific days given over where whole office does solely casework.

    12. Specific periods where no new casework is sent to Phil.

The claimant's return to work

69. The claimant returned to work on Monday 18 February 2019. The claimant had been absent for 11 months and in the interim Ms Gillian Renwick had been employed to cover her post.

70. Mr McMillan emailed the claimant in advance of her return to work (page 326) to confirm Ms Renwick would be working with her on the Monday to go through the processes in operation in the office. He confirmed any new cases would be allocated to the claimant, and that Ms Renwick and others would deal with existing cases. He also confirmed there was no need for the claimant to deal with past emails in her Inbox, because the others had dealt with any backlog. This meant there would be no emails requiring the claimant's attention. Mr McMillan concluded by stating he looked forward to seeing her back in the office.

71. The claimant attended for work at 1.30pm as agreed. Ms Renwick was delayed in returning from lunch and was 5 minutes late to meet the claimant. The claimant noted the office layout had changed and she asked where she had to sit. Ms Renwick showed the claimant where to sit and arranged the claimant's chair and laptop.

72. Mr Leitch had been out of the office at a meeting. He and Seonaid returned to the office in the afternoon. The atmosphere was subdued.

Mediation

73. Mediation was proposed to Mr Leitch and the claimant as a way of resolving the workplace difficulties and allowing them both to move on. The claimant was initially resistant to the idea of mediation because she did not want to go back over everything that had happened. Mr McMillan invited the claimant to discuss this with the mediator, Mr Cox, and, having done so, the claimant agreed to take part in the mediation.

74. The mediation was arranged for the 1 March at a neutral venue away from the respondent's office. The claimant, in discussion with Mr Cox, agreed she would be accompanied by Ms Geraldine Harron at the mediation.

75. Mr McMillan attended the mediation and upon entering the room, noted Mr Cox was present together with the claimant and Ms Harron. This came as a surprise to Mr McMillan who had not been advised the claimant would be accompanied. Mr McMillan questioned this and was told by the claimant that it had been agreed with the mediator.

76. Mr Leitch arrived and upon entering the room was equally surprised at seeing the claimant was accompanied by Ms Harron. Mr Leitch commented to the effect “this is not happening” and “I’ve got things to say to Philomena that she’s not going to want Geraldine to hear”.

77. Mr McMillan did not intervene in this exchange. He acknowledged voices were slightly raised. Mr Cox also took no action.

78. The claimant and Ms Harron were upset and left the main room to wait in another room. Mr McMillan went to the other room: Mr Leitch followed and apologised for what had happened. Ms Harron made a number of comments to Mr Leitch; voices were raised, and Mr McMillan asked Mr Leitch to leave the room.

79. Mr Leitch did not want the mediation to be lost and so he suggested to Mr McMillan and the mediator that Ms Harron remain in the other room whilst the mediation take place in the main room. The claimant could be given breaks as required to discuss matters with Ms Harron. Mr Cox put this suggestion to the claimant and Ms Harron, but it was rejected. Ms Harron appeared in the main room to tell Mr Leitch he had been threatening and aggressive and as a result of this the claimant had been sick, and was going home.

80. Mr Leitch asked Mr Cox if he had been aggressive when he had first entered the room. Mr Cox replied he did not consider Mr Leitch had been aggressive, but he had been abrupt.

81. The mediation ended with Mr Cox apologising for the fact he had omitted to inform Mr McMillan and Mr Leitch the claimant had enquired about bringing a companion, but he had not thought this had been had confirmed.

82. Mr Cox sent an email to the claimant after the mediation (page 341). In the email he sincerely apologised for his oversight in forgetting that Geraldine was coming to the meeting, for not informing the others beforehand and the consequences it had had for everyone. This email was forwarded by the claimant to Mr McMillan.

83. The claimant emailed Mr Cox at 23.17 on the 1 March 2019 (page 343) regarding the mediation. She stated she had felt sick as soon as Matthew reacted so aggressively and dominant to Geraldine. The claimant felt she had learned a lot that day and that it was a "context of bullying and disregard for me and all the evidence was seen today. The way Matthew acted towards Geraldine is how he has acted towards me at work on a number of occasions". The claimant noted she had received some professional advice and would be asking a male Employment Lawyer to attend for the next mediation.

84. Mr Cox responded on the 4 March (page 343) noting the suggestion of involving a lawyer was an understandable reaction to events. The email went on to say "*What we witnessed from Matthew was his knee jerk reaction to finding a very unexpected situation when he arrived. Please do not reply in a quick, unthinking way yourself. If you suggest a lawyer you will be increasing the gulf between the two of you. Even if the mediation then takes place, which I doubt because Stuart will feel that he must support Matthew and the result might be that they will want lawyers as well, then your health will be under greater threat…'*

85. The mediation broke down because the mediator omitted to inform Mr McMillan and Mr Leitch that the claimant would be accompanied by Ms Harron. Mr McMillan would not have had any objection to the claimant being accompanied at the mediation, but he would have wanted to know this in advance so the same opportunity could have been afforded to himself and Mr Leitch.

Mr Leitch's complaint

86. Mr Leitch emailed Mr McMillan on the 7 March 2019 attaching "an official complaint" regarding the claimant. The complaint (pages 346 – 349) referred to the claimant's attitude towards Mr Leitch being poor and being one of disrespect and disdain. Mr Leitch then set out the various issues he had had with the

claimant which included timekeeping, working from home, the fact that if Mr Leitch tried to address issues with the claimant she complained to Mr McMillan, the claimant's level of absence and the mediation. Mr Leitch concluded by stating he had learned that the claimant and Ms Harron had been making comments in public that Mr Leitch stared at the back of the claimant's head, following which he often goes to the toilet: the insinuation was that Mr Leitch had become aroused whilst staring at the back of the claimant's head and had gone to the toilet to masturbate. Ms Harron had commented she thought Mr Leitch was attracted to the claimant.

87. Mr Leitch asked Mr McMillan to investigate the claimant's "conduct, poor performance and her untrue personal claims".

88. Mr McMillan contacted HR for advice following which he wrote to the claimant on the 18 March (page 350) to make her aware of the complaint and the issues raised by Mr Leitch: this included reference to the issue that "*on the 6th March 2019 Matthew was told by a local constituent that you had said in public to people known to him that he stares at the back of your head when you are at work, and that he removes himself to the toilet having done so. Matthew has been told that it is insinuated by your alleged comments that he goes to the toilet to masturbate."* The letter advised the claimant that Mr McMillan had decided to deal with the complaint as a formal grievance and had appointed an independent Consultant to carry out an investigation. Mr McMillan noted he had invited the Consultant to make recommendations to him on the resolution of the complaint, and that the Consultant would be in contact with her to take a statement about the complaints being investigated.

89. Mr McMillan had phoned the claimant in advance to advise her the letter would be received.

90. Mr McMillan did not name those who had informed Mr Leitch of the comments said to have been made by the claimant and Ms Harron. Mr McMillan knew who had informed Mr Leitch of the comments. He knew this from a conversation with Mr Campbell-Sturgess who had told him that comments had been made regarding Mr Leitch. Mr McMillan acted on that by informing Mr Leitch that he ought to contact Mr Campbell Sturgess.

91. Mr Fraser Sked of Hunter Adams was appointed to carry out the investigation into the complaint.

92. Mr McMillan emailed the claimant on the 1 April (page 359) to confirm the independent Consultant required to meet with her to interview her regarding the complaint. He confirmed he had already met with Mr Sked who had also interviewed Mr Leitch, Seonaid Knox and Ms Renwick. Mr McMillan confirmed that Mr Sked was proposing to meet with the claimant on the 8 April, and further confirmed that if the claimant was not fit enough to attend the meeting he would consider referring her to occupational health.

93. The claimant responded by email of the 2 April (page 361) stating she would not be able to meet with Mr Sked until she was fit and given the all clear by her doctor to do so. The claimant enquired what had become "of the arbitration on my concerns of the office environment, and what was planned post the failed meeting with Mr Cox".

94. Mr McMillan responded the same day (page 361) to confirm he would ask Mr Sked to stand down the appointment and re-arrange it for the following week to give her time to get over her high temperature. Mr McMillan reminded the claimant that he had invited her to provide details of her concerns regarding the office environment so that he could take steps to have them investigated, but she had declined to do so. Mr McMillan noted that if the claimant now wished to do so he would give them serious consideration. Mr McMillan concluded by stating a second mediation was not proposed at this time.

95. Mr McMillan met with the claimant on the 3 May for a health and welfare meeting. The claimant provided another sick line for 6 weeks. The claimant also made clear to Mr McMillan that she had not made comments regarding masturbation and that she was horrified this had been put in writing in the complaint.

96. The claimant sent Mr McMillan copies of the email exchange she had had with Mr Cox the mediator regarding bringing a companion. The claimant complained about Mr Leitch's conduct at the mediation, asserting he had been aggressive and dominant; that she worked in a context of bullying and that he

inappropriately exercised authority and power. Mr McMillan wrote to the claimant on the 30 May (page 379) to confirm her complaint would be investigated by an independent person.

97. Mr McMillan informed Mr Leitch, by email of the 5 June (page 383) that the claimant's complaint regarding his conduct would be investigated by an independent investigator.

98. The claimant, by email of the 11 June (page 385) notified Mr McMillan of her resignation with immediate effect. She stated she felt she had been left with no choice but to resign in light of recent experiences regarding the way she had been treated whilst undertaking her role.

99. Mr McMillan acknowledged and accepted the resignation (page 385). He confirmed one month's notice was required and accordingly the effective date of termination would be the 11 July 2019.

100. Mr McMillan informed the staff of the claimant's decision to resign.

101. Mr Sked produced an Investigation Report dated 25 June 2019 (page 393). The report confirmed he had interviewed Mr McMillan, Mr Leitch and Ms Renwick and had been provided (by Mr Leitch) with a letter from Mr Campbell-Sturgess and his partner setting out the comments made by the claimant (page 358). The report set out the findings of the investigation and the conclusions. The report acknowledged it had not been possible to interview the claimant. The report concluded "*it would appear difficult for Philomena Donnachie to resume her role in the office of Stuart McMillan without significant progress being made in relation to capability and conduct in order to address the current breakdown in trust and confidence between her, Matthew Leitch and the wider team."*

102. The report continued to state that if the claimant had not resigned, it would be the recommendation that appropriate action (that is, disciplinary action) be considered in relation to two policy breaches: (i) refusing to complete a reasonable request from a superior (this related to the working from home and Whatsapp incident) and (ii) in relation to the comments alleged to have been made by the claimant, it should be considered whether this was deliberate behaviour/action which prejudiced the company's business relationships with

customers/suppliers/community. The report went on to say that this type of conduct, if found to be proven, may potentially be considered gross misconduct and appropriate sanctions would need to be considered.

103. The report also referred to performance management and capability.

104. Mr McMillan confirmed that if the claimant had not resigned, he would have written to the claimant again to say she was required to take part in the investigation and to arrange a date for the interview. If the claimant was unfit to attend, then an occupational health report would have been instructed. Ultimately Mr McMillan would have acted on the recommendations in the Investigation Report, and if the allegations against the claimant had been proven, it would have been very difficult for her to continue in her role and she would have been dismissed.

105. Mr McMillan believed the claimant resigned because she realised, following contact from Mr Sked for a second time, that this was not going to go away and she did not want to take part in the investigation.

Since dismissal

106. The claimant described the resignation as immediately being a huge weight off her shoulders. The claimant has not worked since her resignation. She was in receipt of Employment Support Allowance until 2 January 2020 when she was assessed as being fit for work.

107. The claimant has registered with various employment agencies, updated her CV and has applied for a number of jobs, but has not been successful yet in obtaining an interview.

Credibility and notes on the evidence

108. We did not find the claimant to be an entirely credible or reliable witness. The claimant told the tribunal:-

- *that the job of Caseworker had been a passion for her as a supporter of the SNP and Independence;*

- *She felt Mr Leitch had been quite confrontational, and that his mannerisms were rather overbearing, when raising the issue of timekeeping with her. She had asked to record her own timekeeping because she felt Mr Leitch was giving Mr McMillan an erroneous opinion of her. The claimant emailed Mr McMillan about this because she wanted him to know how she felt about what was happening. The claimant felt Mr Leitch did not take on board her health issues or the fact she more than made up time for being late in the morning. She resented the fact Mr Leitch did* not recognise and reciprocate what she was giving: *she wanted to be valued.*

- *The claimant felt Mr Leitch had been very aggressive at the meeting on the 7 March 2018 following the home working incident. She wrote to Mr McMillan formally about this and to explain her position. The claimant felt she had been "going the extra mile" by working at home and she felt under-valued and put upon because she had contributed what she could, but was being checked up on. The claimant came to the conclusion Mr Leitch had an issue with her: she did not know what it was and questioned whether it was her age.*

- *The claimant acknowledged she did not proceed with a grievance against Mr Leitch. She had wanted to draw a line under everything and move on. She reluctantly agreed to mediation.*

- *The claimant and Ms Harron arrived first for the mediation and sat at one side of the table. Mr McMillan arrived and sat at one end, with Mr Cox at the other end. Mr Leitch arrived and sat at the other side of the table. Before he took off his jacket, he said to Ms Harron "what are you doing her: this is not happening: you had better get out". Mr Leitch turned towards the claimant, leaned on the table and said "I've got things to say to you which you're not going to like". Mr Leitch was angry and speaking through clenched teeth. The claimant felt intimidated.*

- *The claimant and Ms Harron left the main room and went to another room. Mr McMillan came to speak to them, and then Mr Leitch came to apologise.*

He then launched into another attack on Ms Harron and Mr McMillan removed him.

- *Mr Cox shuttled between the two rooms for some time but the claimant felt sick and vomited in the toilet. She felt this had been caused by a panic attack and being upset.*

- *The claimant subsequently told the mediator that she would try to take a male companion to a future mediation because she did not think Mr Leitch would behave in the same way towards another man.*

- *The claimant, with regard to the complaint made by Mr Leitch, was "horrified" the word "masturbation" appeared in the letter Mr McMillan sent to her. It was not something the claimant would ever refer to: it offended her sensibilities and she was shocked. The claimant considered the two people who told Mr Leitch about the alleged comments were lying.*

- *The claimant did not see the letter from Mr Campbell-Sturgess and Ms Brammer until preparing for this hearing. She knew Mr Campbell-Sturgess and Mr McMillan were very good friends. The claimant was friendly with Ms Brammer and spoke with her regarding health issues. The claimant would never have said anything which could be construed as masturbating.*

- *The claimant had a relapse in health following receipt of the letter from Mr McMillan.*

- *The claimant was devastated at having to resign. It had been a very difficult decision for her: she had not been well and had conflicting thoughts about it. She had visited her brother and taken advice. The claimant accepted there was no way she could go back to work after Mr McMillan's letter of the 18 March: she was mortified and just could not contemplate it.*

109. We found as a matter of fact that the claimant resented being line managed by Mr Leitch, whom she did not respect. This much was evident from the very first meeting the claimant had with Mr Leitch 10 days after he started, where she told him that she would not take "any nonsense". The issue of timekeeping also illustrated the point: the claimant resented being challenged about her

timekeeping by Mr Leitch because, although she acknowledged her timekeeping was not good, she thought allowance should be made for this because she worked late. This, in the opinion of the tribunal, completely missed the point that (a) Mr Leitch, as her line manager was entitled to address the issue of timekeeping; (b) there was a need for her to be in the office for 9am regardless of how often she worked late; (c) she was not asked to work late and (d) simply because the claimant thought timekeeping should be addressed in this way did not mean Mr Leitch was wrong for not doing so.

110. The claimant's lack of respect for Mr Leitch was also demonstrated by the fact she complained to Mr McMillan whenever Mr Leitch tried to manage her. The claimant acknowledged that she provided Mr McMillan with more information regarding a situation, and "*just tended to ok what Mr Leitch said"*. This was illustrated by the home working situation where the claimant at no time suggested to Mr Leitch that she had difficulties working at home, yet she provided Mr McMillan with a list of reasons to explain why she had had difficulty working at home.

111. The claimant also described her role as "autonomous" and this again illustrated the claimant's approach to being managed by Mr Leitch.

112. We also found there were inconsistencies in the positions adopted by the claimant: for example, the claimant accepted her timekeeping was not good but she was indignant about Mr Leitch addressing this; she accepted the Whatsapp message was "not [her] finest hour", but stated she could not understand why Mr Leitch thought her rude; and, she accepted adjustments had been made to reduce the amount of work she had to do, but she then described this as a criticism of her and her ability.

113. The claimant maintained she had been treated differently regarding timekeeping because Mr Kavanagh arrived at the office and then made breakfast. She refused to alter her position regarding this matter notwithstanding the document produced to support Mr Leitch's evidence that he had spoken to Mr Kavanagh regarding his timekeeping and to address that it was not appropriate to arrive on time but then take time making breakfast.

114. The claimant also tended to use emotive and exaggerated language. For example, the claimant described Mr Leitch as "exploding with one of his aggressive outbursts" at the mediation; but she accepted Mr Leitch's voice had only been slightly raised. Further, she said Mr Leitch placed both hands on the table and leaned over towards them, but at another point the claimant stated Mr Leitch had been sitting down.

115. The claimant, in her evidence, referred on at least three occasions to Mr Leitch having been aggressive (although she did not explain what the allegedly aggressive behaviour entailed). The claimant at no time, however, took out a grievance regarding this alleged aggressiveness, notwithstanding being informed by Mr McMillan on several occasions, that she could raise the matter as a grievance. The claimant offered no real explanation why she had not raised a grievance.

116. Ms Harron is a friend of the claimant: their families have known each other for many years. Ms Harron told the tribunal that when Mr Leitch arrived at the mediation and saw her, he was "immediately livid" and that he was "towering over her". This was in contrast to the claimant's evidence that Mr Leitch had come in and sat down before making any comment.

117. Ms Harron recalled she and the claimant left and went to another room. She said Mr McMillan, Mr Cox and Mr Leitch came into the room, but she "didn't really know what happened". This was in complete contrast to the claimant's evidence that Mr Leitch had "vented" at Ms Harron.

118. We found Mr McMillan to be a credible and reliable witness. He gave very full answers to questions asked in cross examination, which occasionally strayed from the point, but we could not accept any suggestion that this was him being evasive.

119. We also found Mr Leitch to be a credible and reliable witness, who gave his evidence in a straightforward and honest manner. Mr Leitch impressed as a witness who had given thought at the time of these events to his own conduct (for example, in asking the mediator if he had been aggressive) because it was important to him to address any issues regarding his own behaviour. Another

example of this was that he had noted his reference to him previously being a caseworker was not well received by the claimant, and so he stopped referring to this.

120. We preferred Mr Leitch's version of events to that of the claimant in any dispute. The findings of fact as set out above reflect this. We accepted he had encountered difficulties in managing the claimant primarily because she did not respect him and considered herself to be autonomous in the office, above his direction and protected by Mr McMillan.

121. Ms Renwick spoke to the claimant's return to work in February 2019 and her limited interaction with the claimant thereafter. We did not find her evidence added anything to the hearing.

Respondent's submissions

122. Mr Rollinson noted, with regard to the complaint of constructive dismissal, that the claimant relied on an alleged breach of the implied term of trust and confidence. Mr Rollinson addressed each of the broad headings relied on by the claimant as follows:

- Timekeeping

  - Mr McMillan had wanted Mr Leitch to get a grip on this;
  - the claimant accepted her timekeeping was poor;
  - the claimant would not apologise for being late;
  - both other employees were spoken to regarding their timekeeping. Mr Kavanagh's timekeeping improved after he had been spoken to. There was, accordingly, no inconsistent treatment;
  - the claimant's start time was adjusted to assist her;
  - Mr McMillan and Mr Leitch both explained why it was important to have staff in the office on time and
  - Mr McMillan and Mr Leitch did not agree or accept the issue had been dropped following the claimant's lengthy email to Mr McMillan.

123. Mr Rollinson submitted there had been nothing untoward in Mr Leitch tackling the issue of timekeeping. He was asked by Mr McMillan to get a grip of the situation and this is what he did. The claimant argued that because she worked late this should offset any lateness in the morning. Mr McMillan and Mr Leitch both rejected that position and explained why it was necessary for the claimant to be in the office when it opened.

- Data Protection

- there was no evidence to support the claimant's position Mr Leitch had been aggressive. Mr Leitch denied this when it had been put to him and confirmed the claimant had never raised it with him;

- Mr Leitch did not tell the claimant to write to the Housing Association and the claimant's position on this now was different to her position at the time of these events. Mr Leitch's evidence should be preferred;

- the claimant said Mr Leitch should have interrupted if she was doing something wrong, but this was in contrast to her position that she did not want him to interrupt;

- the claimant appeared to accept at this hearing that there had been a data protection breach, but this was in contrast to her position at the time and

- it was clear, based on the advice received, that there had been a low level data protection breach.

124. Mr Rollinson submitted it had been perfectly legitimate for Mr Leitch, as the claimant's line manager, to pick her up on a mistake she had made. The issue was the fact the claimant was unable to accept criticism, rather than anything Mr Leitch had done.

- Beast from the East

- the claimant told Mr Leitch she could work from home, and confirmed she had got into the case management system;

- the claimant told Mr McMillan there had been numerous distractions at home, but she accepted she had not ever informed Mr Leitch of this. Further,

the claimant only raised these points after she had been questioned by Mr Leitch regarding the work carried out at home;

- the claimant's responses on the Whatsapp were inappropriate;
- the claimant accepted at this hearing that "it was not [her] finest hour" but at the time she would not accept it was inappropriate.

125. Mr Rollinson submitted the claimant was unmanageable, had no respect for Mr Leitch, and sought to undermine him. The claimant was not treated inconsistently regarding this issue: all members of staff were asked to confirm what work they had carried out at home. The only difference was the claimant's reaction. This matter was not dropped, as suggested by the claimant, but it could not be addressed because she went off sick.

- Interrupting/belittling/undermining

  Mr Rollinson submitted there was nothing in the documentation to support this allegation and it was an example of the claimant trying to build a case after the event. Indeed, rather than Mr Leitch acting in this way, it was the claimant who sought to undermine and belittle Mr Leitch, and who was confrontational and challenging. The reality was that the claimant did not like Mr Leitch correcting her.

- Different treatment

  Mr Rollinson submitted no specific examples of this were given and the claimant, when questioned about it, stated it was a "feeling" she had.

- Return to work in February 2019

  Mr Rollinson contacted the claimant prior to her return to inform her who would be present when she returned and what would be expected of her. Ms Renwick was told by Mr McMillan what was to happen. Ms Renwick was unfortunately delayed in returning to the office after lunch. Mr Leitch and Ms Knox subsequently returned to the office and all were on hand to help the claimant.

- Mediation

- Mr Rollinson invited the tribunal to find the claimant and Ms Harron had been “crystal clear” in their recollection of events during cross examination, and this contrasted with their earlier “hazy” recollection;

- the claimant described Mr Leitch as angry and aggressive but not shouting;

- the ET1 set out two comments alleged to have been made by Mr Leitch at the mediation. Mr Leitch agreed he had made those comments. The additional comments referred to by the claimant in her evidence were nothing more than trying to build a case;

- the evidence supported a finding that Mr Leitch had been abrupt;

- the suggestion Mr Leitch had deliberately sabotaged the mediation was fanciful in circumstances where Mr Leitch did not know Ms Harron was going to be present and

- there was no dispute regarding the fact Mr Leitch was surprised to see Ms Harron: all he wanted was a level playing field.

- Complaint

- The claimant’s position was that she thought, having contacted Mr McMillan regarding various matters, that they had been dropped. Mr Rollinson submitted this was not supported by the evidence or documents. The issues had not been dropped.

- The claimant complained about the use of the word “masturbation” in Mr McMillan’s letter to her informing her of the complaint. Mr Rollinson submitted this was the word used by Mr Leitch to describe what had been insinuated by the claimant, and it was reasonable to give the claimant notice of the allegations made against her.

- The claimant took issue with the fact Mr McMillan’s letter referred to “constituents” when in fact Mr Campbell Sturgess and Ms Brammer were not constituents. Mr Rollinson submitted this was irrelevant.

- The claimant refused to take part in the investigation. Mr Rollinson acknowledged the claimant was on sick leave, but submitted these were very serious issues which required to be addressed and

- the timing of the claimant's resignation, on the day the Investigator tried to make contact with her for a second time, was more than coincidental.

126. Mr Rollinson submitted none of the above matters, either alone or if taken together, constituted a breach of the implied term of trust and confidence. The claimant, at no time during her employment, had raised a grievance.

127. Mr Rollinson referred to the cases of **Western Excavating Ltd v Sharp** 1978 ICR and **Malik v Bank of Credit and Commerce 1998 AC 20** and submitted the respondent and Mr Leitch had good cause to manage the claimant.

128. Mr Rollinson also referred to the cases of **London Borough of Waltham Forest v Omilaju 2005 ICR 481** and **Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978** and submitted it appeared the last straw relied on by the claimant was being notified of the grievance. This was part of a proper process and could not be relied upon by the claimant. The claimant resigned because she had been found out and she knew she could never again work with Mr Leitch: she resigned when the Investigator contacted her again on the 11 June to arrange a time to interview her.

129. In any event the claimant delayed too long before resigning. There was a period of three months between being notified of the complaint and her resignation. In this period of time the claimant affirmed the contract by attending a health and welfare meeting with Mr McMillan (**Fereday v South Staffordshire NHS Primary Care Trust 2011 WL 274780**).

130. Mr Rollinson invited the tribunal to find the claimant had not been constructively dismissed. The reason for dismissal was conduct or some other substantial reason. The Investigation Report noted disciplinary action could be taken for reasons of conduct (refusal to comply with a reasonable instruction and Whatsapp) and gross misconduct (in respect of the comments made regarding Mr Leitch). Dismissal would have been fair in the circumstances where Mr Leitch and the claimant could never work together again.

131. Mr Rollinson next dealt with the complaint of a failure to make reasonable adjustments. The provision, criterion or practice relied on by the claimant was the requirement that the claimant must participate in the mediation meeting without a companion. Mr Rollinson submitted this PCP was not applied. Mediation was voluntary and therefore the claimant could not have been compelled to attend without a companion: no-one knew Ms Harron was attending the mediation. Furthermore, the evidence of Mr McMillan was that he would have allowed the claimant to attend with a companion if he had been asked. There was no substantial disadvantage to the claimant, who had been offered the opportunity to have Ms Harron remain at the mediation. It was Mr Leitch who had been disadvantaged because he did not have a companion.

132. The claimant, in her evidence, referred to attending a future mediation with a companion. This undermined the claimant's position.

133. Mr Rollinson noted the tribunal had been asked to determine whether the claimant's depression was a disability. He submitted the claimant had failed to provide sufficient evidence to the tribunal regarding this matter.

134. Mr Rollinson concluded the duty to make reasonable adjustments had not been triggered, and in any event, if the claimant had asked to bring a companion, it would have been allowed.

135. Mr Rollinson next dealt with the claimant's complaint that she had been subjected to harassment because of her sex. The claimant relied on two points: (i) the conduct of Mr Leitch at the mediation and (ii) Mr Leitch's complaint where he alleged the claimant had implied he masturbates at work after staring at the back of her head.

136. Mr Rollinson submitted there was a conflict in the evidence of the claimant and Ms Harron as to whether Mr Leitch's conduct at the mediation was directed to the claimant or Ms Harron. Mr Leitch's evidence was that he would have behaved in the same way if it had been a man, because the issue was one of surprise rather than one of there being two women present.

137. Mr Rollinson reminded the tribunal of the evidence (not in dispute) that neither Mr McMillan nor Mr Cox had intervened, and submitted this was because they

had not needed to in circumstances where Mr Leitch had been abrupt rather than aggressive.

138. The conduct did not have the proscribed effect. The **Weeks v Newham College of Further Education 2012 WL 2191433** case was authority for the fact that all circumstances have to be taken into account.

139. The claimant had not given any evidence to suggest Mr Leitch raised the complaint because she was female. In fact, she stated in her evidence that the complaint was raised not because she was female but because it was salacious.

140. Mr Rollinson, with regard to the complaint of sexual harassment, submitted Mr McMillan gave the claimant fair notice of the allegations against her. He used the terminology used in the complaint. There was nothing sexual about the raising, or processing, of the complaint.

141. Mr Rollinson invited the tribunal to dismiss the claim. If however the tribunal found for the claimant, he submitted no award of compensation should be made because the claimant had failed to mitigate her losses; ***Polkey*** should be applied and the claimant, by her conduct, contributed to her dismissal. There should be no award for injury to feelings.

142. The respondent reserved its position regarding expenses.

Claimant's submissions

143. Mr McLaughlin made reference to the following case authorities: **Kaur** (as above); **Gogay v Hertfordshire County Council 2000 EWCA Civ 228** (paragraphs 50, 53, 55, 57 and 59)**; Colomar Mari v Reuters Ltd UKEAT/05391/13** (paragraph 36)**; Cooper Contracting Ltd v Lindsey UKEAT/0184/15** and **Working Men's Club and Institute Union Ltd v Balls UKEAT/0119/11** (paragraphs 29 and 32)**.**

144. Mr McLaughlin invited the tribunal to prefer the evidence of the claimant and Ms Harron whom he described as having given a truthful account of events and who had not been evasive in answering questions. This was in contrast to the respondent's witnesses. Mr Leitch had set out a picture of the claimant which had not been foreshadowed in the ET3: he had referred to having been told the

claimant was the problem in the office and to others not liking the claimant. The theme was that the claimant was a difficult, unmanageable employee. Mr McLaughlin submitted the only objective evidence was the documents in the bundle and the claimant's evidence. Mr McMillan had been evasive and avoided answering questions put to him.

145. Mr McLaughlin submitted there had been a breach of trust and confidence. All of the issues listed in the List of Issues (page 49/50) were relied upon cumulatively. The claimant accepted her timekeeping was not good, and that she was late, but she worked well beyond her contractual hours to mitigate being late. There was a relentless focus by Mr Leitch on the time she arrived each morning, whereas the claimant wanted some understanding and balance to be made with the later hours she worked.

146. Mr Leitch addressed timekeeping in a confrontational manner and he never gave consideration to her extra hours. There was a great deal of antipathy towards the claimant (see for example page 143), and he was uncharitable. There was a constant angry barrage against the claimant and this should have been dealt with appropriately to stop it festering.

147. Mr Leitch said the claimant did not apologise, or show remorse, for the data protection breach, but her email to Mr McMillan said she was deeply sorry for any embarrassment caused.

148. Mr Leitch's interruptions were not helpful or supportive.

149. The claimant agreed to try to work at home. She was not forthcoming to Mr Leitch about the difficulties she had had, but she was to Mr McMillan. It would have been ideal to have told Mr Leitch all this, but the relationship did not lend itself to that.

150. The context of the return to work in February 2019 was important. The claimant did not suggest the lateness of Ms Renwick was deliberate, but the claimant was extremely anxious about returning to work and she found Ms Renwick was not there, the office had been re-arranged and her computer and chair were not in place.

151. Mr McLaughlin submitted the respondent set out on a course of conduct calculated or likely to destroy trust and confidence. The purpose of the mediation had been to clear the air. Mr McLaughlin invited the tribunal to have regard to the claimant's emails to Mr Cox for insight into how Mr Leitch had behaved. He also invited the tribunal to contrast the way in which Mr McMillan had behaved with the way in which Mr Leitch had behaved that day.

152. Mr McLaughlin submitted it was clear from the complaint that Mr Leitch wanted the conduct and performance of the claimant to be investigated. He submitted that for the respondent to initiate proceedings on the 18 March and set out allegations going back to 2016 was calculated to destroy trust and confidence. No reasonable employer would ask an employee to account for behaviour three years old, particularly when these issues had been dealt with and resolved.

153. The allegation made was horrific and grotesque: it fell within the ***Gogay*** principles because it was so serious it could destroy the reputation of all involved. Mr McLaughlin submitted that some pre-investigation ought to have taken place before the allegations were put to the claimant. For example, the claimant was not given any details about from whom Mr Leitch had obtained the information, or when/where it was alleged to have happened.

154. Mr McLaughlin submitted it had been unreasonable for the respondent not to have interviewed Mr Campbell Sturgess and Ms Brammer, and accordingly the matter would not have justified the dismissal of the claimant.

155. Mr McLaughlin submitted the claimant had given evidence to satisfy the tribunal that she is depressed and that this is a disability. With regard to the complaint of failure to make reasonable adjustments, it was submitted the respondent was on notice via the occupational health report that if there was a meeting with an independent consultant (page 261), it would be reasonable for the claimant to have a companion present. They had not been mindful of this at the mediation.

156. Mr McLaughlin referred the tribunal to the ET1 and further and better particulars regarding the complaint of harassment.

157. Mr McLaughlin invited the tribunal to uphold the complaint and make an award of compensation.

Discussion and Decision

158. We considered it would be helpful to set out the List of Issues agreed by the representatives, as follows:

Constructive Dismissal (section 95 Employment Rights Act)

1. Did the respondent breach an implied term of the contract of employment namely the implied duty of trust and confidence? The claimant relied on the following course of conduct:

   - the manner in which Mr Leitch managed her from in or around October 2016 to February 2018 followed by his conduct at the mediation meeting on the 1 March 2019, including –

   - the manner in which Mr Leitch dealt with concerns relating to time keeping from around October 2016 to March 2018;

   - the manner in which Mr Leitch dealt with an alleged breach of the Data Protection Act by the claimant including how this breach arose in the first place through his interference in her handling of a constituent;

   - Mr Leitch's handling of and attitude towards the claimant in relation to the homeworking arrangements in March 2018;

   - Mr Leitch's aggressive manner in his dealings with the claimant including his tendency to micromanage, interrupt her, undermine her and belittle her;

   - the claimant's differential treatment by Mr Leitch;

   - the insensitive approach taken to the claimant's return to work in February 2019;

   the conduct of Mr Leitch at the mediation meeting including his inability to understand her wish and need to be supported in the process;

   - the nature of and allegations against her within the grievance submitted by Mr Leitch in March 2019 and

   - the manner in which the grievance was intimated to her.

2. If established, were the alleged breaches (above) on their own or taken together sufficiently fundamental to entitle the claimant to treat herself as dismissed.

3. Did the claimant resign on the 11 June 2019 in response to the alleged breach/es of contract by the respondent.

4. Did the claimant's resignation in response to the alleged breach/es occur within a reasonable time from the alleged breaches or did the claimant delay too long in treating any such breach as repudiating her contract and therefore affirm any breach.

5. In the event the tribunal decides the claimant was constructively dismissed by the respondent, was there a potentially fair reason for the dismissal for the purposes of section 98(2) Employment Rights Act namely conduct or some other substantial reason.

6. In the event the tribunal decides there was a potentially fair reason for the dismissal was the dismissal fair or unfair for the purposes of section 98(4) Employment Rights Act.

Failure to make reasonable adjustments (section 20 Equality Act)

1. Did the respondent apply a provision, criterion or practice (PCP) namely, the requirement that the claimant must participate in the mediation meeting on the 1 March 2019 without a companion.

2. Did the application of any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that she was unable to participate without a companion.

3. Would the following adjustments have been reasonable: allowing the claimant's companion to remain on site and for the claimant to take regular breaks during the mediation if required to consult with her companion.

4. Did the respondent take such steps as were reasonable to avoid the disadvantage.

Harassment on the grounds of sex (section 26(1) Equality Act)

1. Whether, because of the claimant's sex, the respondent subjected the claimant to harassment by engaging in unwanted conduct which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The unwanted conduct was said to be:-

    - Mr Leitch's conduct during the mediation on the 1 March 2019 and/or

    - Mr Leitch's complaint in which he alleged the claimant had implied that he masturbated at work after fixating on her.

Harassment of a sexual nature (section 26(2) Equality Act)

1 Whether the respondent subjected the claimant to sexual harassment by engaging in unwanted conduct which had the purpose or effect (as set out above). The unwanted conduct relied upon was:-

- Mr Leitch's complaint in which he alleged the claimant had implied that he masturbated at work after fixating on her.

159. We considered each of the complaints in turn.

Failure to make reasonable adjustments

160. Section 20 of the Equality Act provides that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

Was the claimant a disabled person in respect of depression?

161. The respondent conceded the claimant was a disabled person in terms of section 6 of the Equality Act. This concession was made in respect of the various conditions the claimant had (Fibromyalgia, Irritable Bowel Syndrome and Migraines) and the cumulative effect of those conditions.

162. The respondent did not accept the claimant was a disabled person in respect of depression, and the tribunal was asked to determine this issue. The claimant told the tribunal that following the meetings in March 2018, she went off with work-related stress. She had panic attacks and a fear of going out alone; she did not do domestic chores; she slept a lot and her spondylitis and irritable bowel syndrome flared up. The claimant thought that without her medication she would not be getting out of bed.

163. The claimant referred to a report from her GP dated 5 December 2019 (page 481) confirming the claimant first attended her GP on the 27 March 2018 with symptoms attributed to work-related stress. The claimant was already receiving a prescription for an anti-depressant on account of a milder background depressive disorder, which was not thought to be of a significant level. The GP diagnosed work-related stress. The GP increased the dosage of the anti-depressant and the claimant continues to take this medication.

164. The GP confirmed the claimant's symptoms had partially resolved on account, mainly, of her not attending the workplace. The GP suspected that if the claimant returned to work the symptoms would develop again.

165. The GP further confirmed that the claimant had described significant levels of distress and anxiety at the initial presentation and for some period of time thereafter, and that this caused a general mild withdrawal from many day to day activities although the GP was not aware of any specific areas upon which s\he could comment. The GP did not believe her treatment would have any significant bearing on her being able to carry out day to day activities.

166. We referred to section 6 of the Equality Act which provides that a person has a disability if s/he has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his/her ability to carry out normal day to day activities. The phrase "long term" means lasting 12 months or more.

167. We considered the evidence given by the claimant was insufficient and too general to enable us to conclude that depression was a disability within the meaning of the Act. We say that for a number of reasons. Firstly, because the GP described the condition as a "mild depressive disorder" which was not

thought to be of a significant level. Further, the GP diagnosed the claimant's condition in March 2018 as being work-related stress rather than depression.

168. Secondly, the claimant had a number of other conditions and there was no evidence to inform the tribunal of the inter-play (if any) between those conditions and depression. We accordingly could not determine whether the depressive episode impacted on the claimant's ability to carry out normal day to day activities, or whether it was the impact of the other conditions.

169. Thirdly, the effects described by the claimant (above) clearly did not continue but there was no evidence to inform the tribunal how long the claimant had felt these effects. This was particularly so in circumstances where the claimant was fit to return to work in February 2019.

170. We, for these reasons, concluded the claimant was not a disabled person for the purposes of the Equality Act in relation to depression.

The PCP

171. The claimant asserted the respondent had applied a provision criterion or practice and described that PCP as the requirement that the claimant must participate in the mediation meeting on 1 March 2019 without a companion.

172. The claimant, in support of her position, relied on the occupational health report dated August 2018 (page 261). A number of specific questions had been put to the occupational health physician, the first of which was whether the claimant was able to have a conversation with an independent consultant to discuss how to move forward with her work related stress. The second question was whether any reasonable adjustments should be made to facilitate any such meeting. The occupational health physician had responded to suggest consideration should be given to the venue for any such meeting and that a neutral location would be appropriate. She also noted that it would be medically appropriate to allow the claimant to have someone to support her.

173. Mr McLaughlin suggested, in cross examination of Mr McMillan, that he ought to have known from this that the claimant would want to have someone with her to support her at the mediation. Mr McMillan accepted that he had understood

from this report that it should apply to the mediation. He went on to say, however, that if the claimant had told him she wanted to have someone there for support, he would have considered extending that to Mr Leitch and himself.

174. The mediation process was entirely voluntary and Mr McMillan, in an email to the claimant (page 335) made this very clear. Mr McMillan invited the claimant to speak with the mediator direct. This was an offer the claimant accepted and she exchanged various emails with Mr Cox (pages 336 – 340) before speaking with him on the phone. Mr Cox told the claimant she could bring a friend to the mediation for support.

175. Mr Cox omitted to inform Mr McMillan and Mr Leitch that the claimant was bringing a friend to the mediation for support. Mr McMillan accordingly had no opportunity to understand that was happening, or agree to it, or refuse to agree to it. The first Mr McMillan (and Mr Leitch) knew of the fact the claimant would be accompanied at the mediation was when they arrived and entered the room.

176. Mr McMillan arrived at the mediation before Mr Leitch. Mr McMillan questioned the presence of Ms Harron and was told by the claimant that it had been agreed with the mediator. The mediator told Mr McMillan there had been a discussion about bringing someone for support, but he had not understood the position to have been confirmed.

177. There was no dispute regarding the fact that when Mr Leitch arrived he also questioned Ms Harron's presence and said "it's not happening".

178. We accepted the evidence of Mr McMillan and Mr Leitch that it was Mr Leitch who suggested the mediation continue with Ms Harron remaining in the building in another room, but available to the claimant for discussion or support during breaks. This suggestion was rejected.

179. We concluded from these facts that the issue of whether the claimant could bring a friend to the mediation for support was never raised with Mr McMillan and accordingly he had no opportunity to agree to it or reject it and require the claimant to attend alone. The mediation process was entirely voluntary and we accepted Mr McMillan's evidence that he could not force the claimant to attend: equally he could not force her to attend without support.

180. The central issue in this incident was the fact that it came as a surprise to Mr McMillan and Mr Leitch that the claimant was accompanied by Ms Harron at the mediation. The issue was not that Mr McMillan did not want the claimant to be accompanied, but rather that if she had the opportunity to be accompanied, he wished to extend that opportunity to Mr Leitch and to himself.

181. There was nothing to suggest Mr McMillan would have rejected any request by the claimant to be accompanied, and the fact the suggestion was made to proceed with the mediation but with Ms Harron in a separate room available to the claimant at breaks, supported this.

182. We concluded there was no requirement for the claimant to participate in the mediation without a companion. The claimant has not demonstrated a PCP was applied and accordingly this claim must fail.

Harassment on grounds of sex

183. We had regard to section 26 of the Equality Act which 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.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection 1(b) above

(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 and

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

184. The claimant's case was that she, because of her sex, had been subjected to harassment by Mr Leitch's conduct during the mediation on the 1 March 2019 and by Mr Leitch's complaint when he alleged the claimant had implied that he masturbated at work after fixating on her.

185. The claimant alleged Mr Leitch had "exploded with one of his aggressive outbursts"; that he had "a slightly raised voice, a lot of agitation in his mannerisms, and making big oversized gestures physically and facially". The claimant suggested Mr Leitch had been aggressive towards Ms Harron and that he had "vented" at her. The claimant stated in her evidence that she felt intimidated.

186. Mr McMillan and Mr Leitch rejected this description of what had happened at the mediation, and we preferred their version of events because of inconsistencies in the claimant's evidence and between her evidence and that of Ms Harron. We found as a matter of fact that both Mr McMillan and Mr Leitch were surprised to see Ms Harron with the claimant and both questioned why she was there. Mr Leitch went beyond this and said "it's not happening" and "I've got things to say to Philomena and she's not going to like it". We also found that Mr Leitch was abrupt in his manner at the mediation meeting, but was not aggressive.

187. We asked whether the conduct of Mr Leitch (as found by this tribunal) was unwanted conduct. We noted unwanted conduct can include a wide range of behaviour. We accepted Mr Leitch's conduct was unwanted by the claimant. She was present to try to resolve differences and find a way of working together and the conduct of Mr Leitch, in immediately challenging Ms Harron's presence in an abrupt manner, was unwanted and not conducive to the mediation process.

188. We next asked whether the unwanted conduct had the proscribed purpose or effect. There was no suggestion the unwanted conduct violated the claimant's dignity and accordingly we had to consider whether the unwanted conduct had

the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding this, we must have regard to section 26(4) Equality Act and take into account the perception of the claimant; the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

189. We, when considering the perception of the claimant, had regard to her evidence (above) and the fact she thought Mr Leitch was being aggressive: this was the claimant's perception.

190. We considered the other circumstances of the case. First, that this was a mediation taking place under the authority of Mr Cox. Second, it was not for Mr Leitch to decide who should be present. Third, neither Mr Cox nor Mr McMillan intervened or said to Mr Leitch that his conduct was not appropriate. Fourth, the claimant accepted Mr Leitch had not been shouting and that he had a "slightly raised voice". Fifth, it was Ms Harron who thought she and the claimant should leave the room, but this did not happen until Ms Harron got up and put on her coat. Sixth, the claimant told the tribunal the mediation continued for about another hour after they went to the separate room, with Mr Cox shuttling between the two rooms. Seventh, the mediation was taking place because there were difficulties in the relationship between the claimant and Mr Leitch. Eighth, Mr Leitch apologised to the claimant and Ms Harron for the way he had behaved. Ninth, the mediator was at fault in omitting to inform Mr McMillan and Mr Leitch that the claimant would be accompanied at the mediation. Tenth, Mr McMillan and Mr Leitch were both surprised at seeing Ms Harron there albeit they reacted to that surprise differently. Eleventh, the claimant had recently returned to work following a period of sickness absence of 11 months for work-related stress.

191. We considered the fact neither Mr Cox nor Mr McMillan reacted to Mr Leitch's behaviour was significant. Mr McMillan is Mr Leitch's employer: Mr Cox was responsible for the mediation process. The suggestion that they sat and did nothing in response to an aggressive outburst by Mr Leitch, directed at the claimant and Ms Harron, where he was (allegedly) gesturing wildly, towering over them, spitting and speaking through gritted teeth, was simply not credible.

Mr Cox was subsequently specifically asked by Mr Leitch if he had acted aggressively, and Mr Cox confirmed that he had not, but that he had been abrupt.

192. We next considered whether it was reasonable for the conduct to have that effect. The EAT in the case of **Richmond Pharmacology v Dhaliwal 2009 ICR 724** noted it was important for tribunals not to encourage the imposition of legal liability in respect of every unfortunate phrase. If a tribunal feels an employee is unreasonably prone to take offence then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it is reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal, and it will be important for it to have regard to all the relevant circumstances including the context of the conduct in question.

193. The issue for the tribunal to consider is whether it was reasonable for the conduct to have that effect on that particular claimant. We considered that in the circumstances of this case, and based on the findings of fact that Mr Leitch's conduct had been abrupt and not aggressive, it was not reasonable for the conduct to have that effect on the claimant.

194. We next considered whether the unwanted conduct was related to the protected characteristic of sex. The claimant argued Mr Leitch's would not have behaved in that way if she had been a man, or if her companion had been a man. The claimant, beyond making this statement, offered no explanation or evidence in support of it. We, in considering this matter, were entirely satisfied that Mr Leitch's reaction at the mediation was caused by his surprise at finding the claimant was accompanied by a companion and was not related to the fact the claimant and/or her companion were female. There was nothing to suggest Mr Leitch would have behaved any differently if the claimant and/or her companion had been male.

195. We, in conclusion, decided Mr Leitch's abrupt conduct at the mediation was unwanted by the claimant, but that conduct was not related to the protected characteristic of sex, and did not, in the circumstances of this case, have the

proscribed effect and nor was it reasonable for the claimant to claim Mr Leitch's conduct had that effect.

196. We next considered whether the respondent subjected the claimant to harassment in terms of Mr Leitch's complaint in which he alleged the claimant had implied that he masturbated at work after fixating on her. Mr Leitch's complaint was sent to his employer, Mr McMillan, who sought HR advice. Mr McMillan wrote to the claimant on the 18 May (page 350) to inform her a complaint had been made by Mr Leitch regarding the claimant's attitude and behaviour towards him. Mr McMillan stated that in support of the complaint Mr Leitch had cited a number of specific examples, and he set these out in the letter. The examples included "*That on the 6th March 2019, Matthew was told by a local constituent that you had said in public to people known to him that he stares at the back of your head when you are at work, and that he removes himself to the toilet having done so. Matthew has been told that it is insinuated by your alleged comments that he goes to the toilet to masturbate."*

197. Mr McLaughlin submitted the intimating of the complaint to the claimant, in the language used by Mr Leitch, was the act of harassment.

198. The claimant, during the course of her evidence, told the tribunal that she had been "horrified" when the word masturbation appeared in the letter from Mr McMillan. It offended her sensibilities and shocked her.

199. We accepted this was unwanted conduct: the claimant did not want to read, or hear, of the allegation.

200. We asked whether the conduct of Mr McMillan, in intimating the complaint to the claimant, had the proscribed effect. We, in considering this point, noted the perception of the claimant that the word shocked and offended her.

201. We next noted the other circumstances of the case which were that Mr Leitch had made a complaint regarding the claimant, which included this particular allegation. Mr McMillan, having sought HR advice, intended to appoint an independent Consultant to carry out an investigation into the complaint which was to be treated as a grievance. We accepted it was incumbent on Mr McMillan to inform the claimant of the complaint and the allegations against her. It would

have been neither fair nor reasonable for Mr McMillan to have advised the claimant that an investigation was to be carried out into allegations made against her, but not to advise her of the nature of those allegations. Mr McMillan, when informing the claimant of the nature of the allegations, used the language used by Mr Leitch.

202. We next asked whether it was reasonable for the conduct to have that effect. The claimant, during her evidence, suggested that a word other than "masturbate" should have been used, but she did not suggest what other word could have been used which would have been less shocking. This suggested to the tribunal that the claimant was being hypersensitive regarding the word.

203. We next asked whether the unwanted conduct was related to the protected characteristic of sex, and we decided it was not. The claimant gave no evidence regarding this matter except to accept that there was nothing sexual in the respondent writing to her and notifying her of the allegations. There was nothing to suggest Mr McMillan would have used different language if he had been writing to a man. We concluded the conduct related to informing the claimant of the allegations against her, and not to sex.

204. We concluded the intimation by Mr McMillan of the allegation against the claimant was not an act of harassment.

205. We decided, for all of the above reasons, to dismiss this complaint.

Harassment of a sexual nature

206. The claimant argued that she had been subjected to sexual harassment by Mr Leitch's complaint. Mr McLaughlin, in his submission, stated Mr Leitch had deliberately made the nature of the allegation sexual.

207. We must first determine whether Mr Leitch engaged in unwanted conduct of a sexual nature. Was the use of the word "masturbation" conduct of a sexual nature? We considered that in order to answer that question, we had to look at the context in which it was used. Mr Leitch complained that he had been told the claimant made comments about him in public and insinuated that he went to the toilet to masturbate after staring at the back of her head at work. We

acknowledged the word “masturbate” could be described as a sexual word but we could not accept that Mr Leitch, in reporting, and complaining about, what he had been told was engaging in conduct of a sexual nature.

208. Mr McLaughlin’s submission that Mr Leitch had deliberately made the nature of the allegation sexual must be premised on the basis the allegation was made up by Mr Leitch. We could not accept this submission because we could not accept Mr Leitch conspired with Mr Campbell-Sturgess and Ms Brammer to make up a complaint which was embarrassing and potentially damaging to Mr Leitch’s reputation.

209. We next asked whether the conduct had the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We acknowledged the claimant perceived the use of the word masturbation to create an offensive and/or humiliating environment.

210. We had regard to the circumstances of the case. These are set out above and not repeated here. The key fact was that Mr Leitch, in making the allegation, was setting out what he had been told.

211. We next asked whether it was reasonable for the conduct to have that effect. We concluded it was not. Mr Leitch was acting on a what he had been told by Mr Campbell-Sturgess and Ms Brammer, people whom he knew and had worked with. Mr Leitch wished the allegation to be investigated. The claimant required to be told of the allegation to allow the investigation to take place and have an opportunity to respond to it.

212. We concluded the allegation made by Mr Leitch was not unwanted conduct of a sexual nature. If we have erred in that conclusion, and the conduct was unwanted conduct of a sexual nature, then we would have decided that although the claimant perceived the allegation created a humiliating and/or offensive environment for her, the circumstances of the case meant it was not reasonable for the conduct to have that effect.

213. We decided, for these reasons, to dismiss this complaint.

Constructive dismissal

214. Section 95 Employment Rights Act provides that an employee is dismissed by his employer if (and subject to subsection 2, only if) "(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

215. The Court of Appeal in the case of **Western Excavating Ltd v Sharp 1978 ICR 221** decided the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. It was stated: "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

216. An employee, in order to claim constructive dismissal, must establish:

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

217. The claimant, in bringing her case of constructive dismissal, sought to argue there had been a fundamental breach by the employer of the implied term of trust and confidence. There is implied in any contract of employment a term that the employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (**Malik v Bank of Credit and Commerce 1998 AC 20**). The test of whether there has been a breach of the implied term of trust and confidence is objective. The conduct relied on as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of

trust and confidence the employee is reasonably entitled to have in his employer.

218. The case of **Lewis v Motorworld Garages Ltd 1986 ICR 157** recognised the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. It was also said (**Woods v W M Car Services Peterborough Ltd 1981 ICR 666)** that the breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract: the question is, does the cumulative series of acts taken together amount to a breach of the implied term. Although the final straw may be relatively insignificant, it must not be utterly trivial.

219. We were also referred to the cases of **Omilaju** and **Kaur** regarding the quality of the final straw if it is to be successfully relied on by the employee as a repudiation of the contract. In **Omilaju** it was said that the final straw did not have to be of the same character as the earlier acts, but that its essential quality was that, when taken in conjunction with the earlier acts on which the employee relied, it amounted to a breach of the implied duty of trust and confidence. It must contribute something to that breach.

220. The Court of Appeal in **Kaur** referred to the earlier case of **Omilaju** and described the reasoning in the case as being clear and needing no further exposition.

221. The claimant relied on the list of points set out at 1 above to demonstrate that cumulatively there had been a breach of the implied term of trust and confidence. The claimant argued the last straw had been the way in which Mr Leitch's complaint had been intimated to her on the 18 March 2019. We examined each of these matters.

Timekeeping

222. The claimant complained about the manner in which Mr Leitch had dealt with concerns relating to timekeeping from October 2016 ongoing to March 2018. There was no dispute regarding the fact Mr Leitch did raise timekeeping issues with the claimant and Mr Kavanagh. Mr Leitch had been tasked by Mr McMillan with getting a grip on the situation. Mr Leitch monitored the timekeeping of the staff for two weeks and noted the claimant was regularly late in the morning and compounded her lateness by going to buy a breakfast roll before coming to the office. Mr Kavanagh was usually in work on time but then spent time making breakfast. Mr Leitch decided to tackle both employees regarding their timekeeping.

223. We were satisfied that it was perfectly reasonable for Mr Leitch, as the employees' line manager, to seek to address timekeeping issues, particularly when he had been asked by Mr McMillan to do so. We accepted there was good reason for employees to have to be at work on time, and this was because constituents may attend or contact the office when it opened.

224. The claimant did not respond well to Mr Leitch raising the issue of timekeeping with her. She challenged that his record of timekeeping was not accurate; she challenged that she was being picked on; she resented Mr Leitch raising this with her and she maintained that she made up time by working late and that this should be recognised. The respondent did not dispute the claimant worked late, but they did not see this either as a positive, or making up for lateness in the morning.

225. The fact the claimant worked late did not make up for, or excuse, her lateness in the morning: the office did not operate a flexi time system and there was a requirement for the claimant to be present at 9am and this was explained to her many times. Further, the claimant continued to work late notwithstanding the fact she had been told not to do so. There are health and safety issues regarding lone working. The claimant had suffered a stroke whilst working alone at night in the office. Her refusal to comply with a reasonable instruction not to work late alone in the office was illuminating.

226. We accepted Mr Leitch met with the claimant several times regarding timekeeping because it was an ongoing issue. The claimant's timekeeping, in contrast to that of Mr Kavanagh, did not improve. There was no dispute regarding the fact the respondent made adjustments to try to assist the claimant with timekeeping. Mr McMillan acknowledged the claimant would be late on a Monday, Wednesday and Friday because of dropping her son off at College. The claimant, however, continued to be late on a Tuesday and Thursday. The claimant's arrival time was amended to 09.15am, but the claimant continued to be late.

227. The claimant described Mr Leitch as being "overbearing" regarding timekeeping and not taking on board her health issues or the fact she made up time if late. She felt being 5 minutes late should not have been so aggressively challenged and that she should not have to apologise for lateness. The claimant told the tribunal she resented the fact Mr Leitch didn't recognise what she was giving and allow her some leeway because of this.

228. The difficulty with the claimant's evidence was that whilst she asserted being 5 minutes late had been "aggressively challenged" she did not support this with any evidence to explain what this meant. The claimant herself accepted she resented Mr Leitch's interference: the reality was that the claimant simply did not want her timekeeping to be monitored. We concluded that her use of terms such as "overbearing" and "aggressively challenged" related to the fact merely of having been challenged, rather than to any action/s on the part of Mr Leitch.

229. We concluded Mr Leitch was entitled to manage and challenge the claimant regarding timekeeping, and that he did so in a reasonable manner.

Data Protection

230. The claimant's evidence was that she had written to the Housing Association regarding this matter because Mr Leitch had interrupted her discussion with the parents to say the Housing Association could be contacted to see if applications for housing had been made. Mr Leitch, in cross examination, rejected the suggestion that he had interrupted the claimant and made this suggestion. We

preferred Mr Leitch's evidence and found as a matter of fact that he had not suggested to the claimant that she write to the Housing Association.

231. We preferred Mr Leitch's evidence because the documentary evidence did not support the claimant's position. For example, Mr Leitch met with the claimant to discuss this incident. He sent an email to Mr McMillan following this discussion (page 154) in which he summarised what had happened. He noted the claimant had accepted she should have obtained consent, but felt the parents had given consent and in those circumstances proceeded as normal. There was no note of any suggestion made by the claimant that it had been Mr Leitch's fault she wrote to the Housing Association without consent. Similarly in the claimant's email to Mr McMillan (page 165) the claimant repeated that she thought the parents had given consent, she went on to say that circumstances had *"diverted [her] attention".* Those circumstances included reference to "*Matthew's interruptions"* but beyond this there was no suggestion Mr Leitch had suggested she write to the Housing Association in the manner in which she did.

232. We concluded the fact there was no suggestion by the claimant, at the time of these events, to Mr Leitch interrupting her to suggest she write to the Housing Association, rendered her evidence to this tribunal unreliable.

233. The claimant made an error in writing to the Housing Association without the consent of the son and daughter. Her error constituted a low level breach of the Data Protection Act. Mr McMillan had to issue an apology to the son and daughter. The claimant, notwithstanding asking for, and receiving, advice and confirmation that a low level breach had occurred, would not accept that position until this hearing.

234. We concluded, having had regard to these facts, that Mr Leitch, as the claimant's line manager, was entitled to discuss what had occurred with the claimant; to explain to her why her actions were a low level breach of the Data Protection Act and what action she ought to have taken in progressing the parents' enquiry; and that he had done so in a reasonable manner.

Beast from the East

235. There was no dispute regarding the fact Mr Leitch asked all staff if they could work from home to avoid having to travel to the office if it snowed: all staff, including the claimant agreed. The claimant did not suggest to Mr Leitch that she may have any difficulty whatsoever in working from home.

236. Mr Leitch also asked all staff to confirm the cases they had worked on whilst at home. This request was made by way of a message on the staff Whatsapp. The claimant replied to this message "*what possible reason could you need that"*. Mr Leitch replied that it was so he knew what people had been working on and the claimant responded "*Right I just wanted to give you the benefit of doubt and be clear if you were checking up on the children and not treating us like responsible professional adults".* The claimant's responses to Mr Leitch were available for everyone in the group to see (that is, Mr Kavanagh, Ms Knox, Mr Leitch and Mr McMillan).

237. Mr Leitch considered the claimant's Whatsapp messages were inappropriate. He also checked the list of work the claimant said she had carried out and concluded that of the list of 8 items said to have been worked on, the claimant had in fact sent four emails in two days, equating to approximately one hour of work.

238. Mr Leitch was frustrated when he met with the claimant to discuss this matter, and this was compounded by the fact the claimant refused to acknowledge her messages had been inappropriate. Mr Leitch also noted that all of the issues raised by the claimant in her subsequent letter to Mr McMillan to explain the difficulties she had working at home, had not ever been raised with him.

239. The claimant felt that Mr Leitch checking up on what work had been done was "excessive"; she felt "under-valued" because she was contributing what she could and she felt Mr Leitch wanted to reprimand her for not doing enough work at home. The claimant, in her letter to Mr McMillan (page 220) referred to Mr Leitch believing she did not pull her weight with regard to work; and that he questioned her integrity and ability.

240. We acknowledged the claimant may have felt Mr Leitch checking up on what work had been done was "excessive", but Mr Leitch was the line manager responsible for ensuring the smooth and efficient running of the office. The request for staff to confirm what cases had been worked on over 2/3 days at home was a legitimate and reasonable management request made to all staff. We concluded the claimant's response to this request was unreasonable and inappropriate.

241. The claimant did not, in her evidence, explain why she had agreed to work from home if she faced such difficulties, or why she had not informed Mr Leitch of her difficulties in working from home. Instead, she provided this information to Mr McMillan. The claimant agreed she went to Mr McMillan after the event and provided information to him, whereas with Mr Leitch she "*tended just to ok what Mr Leitch said"*.

242. We concluded Mr Leitch's request for staff to confirm what work they had done whilst working at home was a legitimate and reasonable management instruction.

Micromanage, interrupt and belittle

243. The claimant complained that Mr Leitch interrupted her in front of other members of staff and/or constituents. Mr Leitch acknowledged that he did interrupt members of staff, including the claimant but this was done to be of benefit. Mr Leitch confirmed, at the meeting on the 19 March (page 239) that he would think more before interrupting in the future. There were no further instances of Mr Leitch interrupting the claimant.

244. The claimant's complaint regarding Mr Leitch interrupting her was undermined by the fact the claimant also suggested that it would have been helpful on occasion for Mr Leitch to have interrupted her, for example, if she was giving wrong advice to a constituent. It appeared from this evidence that it was not the fact of Mr Leitch interrupting which the claimant objected to.

245. The claimant's reference to micromanaging related to the timekeeping issue and the issue of checking up on work done. These matters are dealt with above where we concluded Mr Leitch was entitled to manage the claimant and that he

did so reasonably. Mr Leitch was responsible for checking Mr McMillan's Inbox, removing cases and allocating them to the members of staff. We accepted it was his job to check up on all cases being done to ensure they had been actioned. We further accepted Mr Leitch's evidence, which was not challenged, that he checked on the work of all members of staff, to ensure the efficient and effective running of the office.

246. There was no evidence of specific instances where the claimant alleged Mr Leitch had belittled her.

247. We concluded, based on the evidence regarding these matters, that Mr Leitch managed the claimant reasonably; interrupted reasonably and did not belittle her.

Differential treatment

248. The claimant asserted she had been treated differently by Mr Leitch and she cited one example of this in respect of timekeeping. The claimant felt she had been treated differently to Mr Kavanagh and Ms Knox.

249. We could not accept the claimant's assertion because it was clear from the evidence of Mr Leitch (which we accepted), supported by the documents, that Mr Leitch spoke with both the claimant and Mr Kavanagh, within a day of each other, regarding their timekeeping. The difference was that Mr Kavanagh's timekeeping improved, whereas the claimant's did not and therefore Mr Leitch had to speak to her again.

250. The claimant also pointed to the fact Ms Knox was not spoken to at the time, and was only subsequently spoken to after she (the claimant) had raised this. There was no dispute regarding the fact Ms Knox was not spoken to regarding timekeeping in October 2016, but we accepted Mr Leitch's evidence that this was because there was no issue with Ms Knox's timekeeping at that time. We noted the claimant did not dispute this.

251. Ms Knox was subsequently spoken to by Mr Leitch in 2018 when he thought there was a minor issue to address.

252. We concluded the claimant was not treated differently by Mr Leitch.

Insensitive approach taken to the claimant's return to work in February 2019

253. Mr McMillan had agreed with the claimant the date of her return to work, and the details of the phased return. Mr McMillan had emailed the claimant in advance of her return to work to confirm Gillian Renwick would be at the office and what was expected to the claimant. The claimant, when asked about this email in cross examination, stated she had "*forgotten about that"*.

254. There was no dispute regarding the fact Ms Renwick was not present when the claimant arrived for work. Ms Renwick had gone out to collect a prescription at lunch time, was delayed and arrived back approximately 5 minutes late.

255. There was also no dispute regarding the fact the layout of the office had changed. Ms Renwick showed the claimant where to sit and ensured the claimant's chair and laptop were available.

256. The claimant felt that for no-one to be there to greet her and welcome her back, and tell her what to do, was a let-down. We acknowledged the claimant may have felt this, but we balanced this with the fact Ms Renwick's delay was unintentional and not her fault, and with the fact Mr McMillan had written to the claimant to explain in clear terms what was expected of her regarding new pieces of case work and there being no need to go through old emails.

Conduct of Mr Leitch at the mediation and his inability to understand her wish and need to be supported in the process

257. We have set out above the fact there was a marked difference in the version of events given by the claimant and Ms Harron, on the one hand, and Mr McMillan and Mr Leitch, on the other hand, regarding what occurred in respect of Mr Leitch's conduct at the mediation. We preferred Mr McMillan and Mr Leitch's evidence, supported by the mediator, Mr Cox, that Mr Leitch was abrupt at the mediation and not aggressive.

258. Mr Leitch acknowledged that "*on reflection [he] probably would not have wanted to respond like that"*. He also apologised to the claimant and Ms Harron on the day of the mediation.

259. We could not accept the suggestion that there was an inability on the part of Mr Leitch to understand the claimant's wish and need to be supported at the mediation. The evidence of Mr McMillan and Mr Leitch and the documentary evidence regarding emails from Mr Cox all make clear that his reaction was "a knee jerk reaction" caused by his surprise at finding Ms Harron present. We accepted Mr Leitch wanted the mediation to work: he stated twice during the course of the mediation that he wanted it to work. Further, this was supported by the fact that it was Mr Leitch who suggested Ms Harron remain in the separate room whilst the others had a discussion in the main room, and in this way Ms Harron remained available to support the claimant during breaks.

260. We, in addition to the above, considered the crucial issue was not simply the claimant's need to be supported, but rather the need for everyone attending the mediation to have the same opportunity to bring a companion for support if they wished to do so.

261. We concluded the conduct of Mr Leitch at the mediation was "a knee jerk reaction" which he subsequently regretted, but was not unreasonable conduct.

The nature of the allegations against the claimant

262. Mr Leitch's complaint regarding the claimant (page 346) was focussed on two main issues: (i) the difficulties Mr Leitch had faced when trying to manage the claimant and (ii) the alleged comments made by the claimant.

263. We considered it helpful to refer to the actual content of Mr Leitch's complaint. Mr Leitch stated he wished to make a formal complaint regarding the claimant and noted that since he had started working in August 2016, *"Philomena's attitude towards me has been poor".* Mr Leitch went on to make the following points:

- Philomena's attitude towards me has been one of disrespect and disdain;
- discussions I have had with Philomena regarding her conduct have been extremely difficult;
- Mr Leitch had spoken to the claimant when he started work, regarding the way in which casework would be getting done in the future. The claimant's

response to this was to challenge Mr Leitch and refer to Mr McMillan knowing she would only continue to work for him if she got job satisfaction;

- with regard to timekeeping, Philomena's attitude seems to be that she can turn up when she wants and not be challenged; when she is, she becomes defensive and displays a poor attitude and rarely, if at all, apologises;
- Philomena is very defensive in one-to-one discussions and clearly holds no respect for his position as office manager;
- with regard to the data protection issue the claimant still believes she did nothing wrong;
- Mr Leitch considered, with regard to the home working issue, that the claimant, rather than face up to her conduct, had become defensive and played the victim card;
- Mr Leitch felt his ability to deal with issues involving Philomena was problematic, and she normally made a complaint to Mr McMillan if he raised anything with her;
- Mr Leitch felt the claimant was resistant to management and did not like being spoken to about the effect her timekeeping, absence of performance had on others in the office;
- Mr Leitch understood the claimant was currently annoyed that he had spoken to her about timekeeping and she felt he micromanaged her performance. Mr Leitch considered he had been tasked with monitoring what was going on in the office, and he regularly checked with everyone that things had been done in a timely manner and
- the claimant's absence record was shocking and unsustainable.

264. Mr Leitch provided details of the comments said to have been by the claimant. He concluded his complaint by stating *"Stuart, the time has come for Philomena's conduct, poor performance and her untrue personal claims about me to be investigated."*

265. We accepted Mr Leitch's evidence that he felt the claimant had continually challenged him and resisted the raising of legitimate concerns. Mr Leitch felt he "*could not go anywhere else with it"* and this explained why he had decided to raise a grievance.

266. The claimant's concern regarding the allegations was (a) that she could not understand why such old matters, which had been dealt with at the time, were being raised years after the event; (b) the claimant had already spoken to Mr McMillan regarding working from home, and the resolution was that matters could rest there; (c) she had already expressed concerns regarding the way in which Mr Leitch had approached her regarding timekeeping; (d) she did not "play the victim card" and (e) she had not made the comments referred to and had been horrified when the word "masturbation" appeared in Mr McMillan's letter. The claimant considered Mr Campbell-Sturgess and Ms Brammer were lying.

267. The claimant considered the issues of timekeeping, data protection and working from home had been dealt with at the time they occurred. The claimant formed that view because she had written at length to Mr McMillan regarding these matters, and understood no further action was to be taken. The claimant argued that it was unreasonable to, for example, investigate timekeeping issues relating to three years ago. We considered however, that this argument, missed the point of Mr Leitch's complaint. We say that because Mr Leitch did not want Mr McMillan to investigate whether there were timekeeping issues, but rather he wanted the claimant's attitude to this matter being raised with her to be investigated. We considered this was clear from the thrust of the complaint which was about the claimant's attitude, defensiveness to being challenged and resistance to being managed.

268. We acknowledged the claimant had written to Mr McMillan regarding these matters, and we acknowledged the claimant felt matters were at an end, but it was the clear evidence of Mr McMillan and Mr Leitch that the home working issue was not at an end, but rather that it could not be taken forward because the claimant went off sick. The issue was, essentially, overtaken by events.

269. We acknowledged the claimant may, if she had participated in the grievance process, have argued all of these points, and the investigator may have put these issues to Mr McMillan. We did not however consider any of these points rendered it unreasonable for Mr Leitch to have raised them in his complaint as examples of times when he had had difficulty with the claimant.

The manner in which the grievance was intimated to the claimant

270. The claimant told the tribunal that she was "*horrified"* when the word masturbation appeared in the letter from Mr McMillan (page 350). The claimant stated it was not something she would ever refer to: it offended her sensibilities and was shocking. There were two key points to the claimant's position: first, that another word could have been used instead of masturbation, which would have been less offensive; and, second, that Mr McMillan ought to have carried out some form of preliminary investigation before putting such a serious allegation to the claimant.

271. The claimant, in suggesting a word other than masturbation could have been used, did not explain what that word may have been or why it would have been less offensive given it would refer to the same act. Further, there is always the risk, for example, in using slang, that it may be more offensive, or that alternative words do not convey exactly what is being meant. The insinuation was that Mr Leitch went to the toilet to masturbate, and we could not, in the absence of any evidence from the claimant, conceive of a less offensive way to convey this.

272. Mr McLaughlin, in his submission to the tribunal, referred to the ***Gogay*** case (above) and the **Working Men's Club and Institute Union Ltd v Balls** case (above) where there was reference to an employer having done a pre-investigation before putting serious allegations to the employee.

273. The Court of Appeal in ***Gogay*** acknowledged that sexual abuse was a very serious matter, doing untold damage to those who suffer it. Further, to be accused of it was also a serious matter. It was said that "*To be told by one's employer that one has been so accused is clearly calculated seriously to damage the relationship between employer and employee The question is therefore whether there was reasonable and proper cause to do this."*

274. The Court decided there was not reasonable and proper cause to do this in circumstances where the information provided by the young person was difficult to evaluate: the difficulty lay in the fact that it was difficult to determine what, if anything, the young person was trying to convey.

275. Mr Rollinson, in his submission, invited the tribunal to distinguish the claimant's case from the ***Gogay*** case, and we did. The allegation in this case was not as serious as an allegation of sexual abuse, and there was no difficulty in determining what Mr Leitch was alleging. The claimant may have found the word masturbation offensive, but it was clear that Mr Leitch was complaining that comments had been made by the claimant to the effect Mr Leitch fixated on the back of her head in the office and then went to the toilet, the insinuation being that he went to the toilet to masturbate.

276. We could not accept this was a case where any pre-investigation was required. Mr McMillan knew the information provided by Mr Leitch had come from Mr Campbell-Sturgess. He knew this because it had been Mr McMillan, following a discussion with Mr Campbell-Sturgess, who had told Mr Leitch to make contact with Mr Campbell-Sturgess. Mr McMillan not only knew where Mr Leitch had obtained the information, he considered it had come from a reliable source. Mr Campbell-Sturgess is a good friend of Mr McMillan; they speak weekly and Mr Campbell-Sturgess and Ms Brammer have carried out work for Mr McMillan.

277. We concluded Mr McMillan had reasonable and proper cause to put the allegations raised by Mr Leitch, including the allegation concerning masturbation, to the claimant.

Was there a breach of the implied term of trust and confidence

278. We have set out above the facts and circumstances relating to each of the issues relied upon by the claimant and our conclusions regarding each of those issues. The claimant is required to show that the employer, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The test of whether there has been a breach of the implied term of trust and confidence is objective.

279. We concluded that the key points to take from the above are (a) that the claimant's version of events was not reflected in the findings of fact made by the tribunal and (b) whilst the claimant may have genuinely interpreted events as she told the tribunal, that was a mistaken interpretation of the facts. We were wholly satisfied that it was the claimant who had an issue with Mr Leitch: she did not want to be managed; she did not like being managed and she resented his management of her. This was demonstrated time and again in the issues set out above; and by the fact the claimant chose to go to Mr McMillan each time Mr Leitch sought to manage her.

280. We were satisfied, as set out above, that Mr Leitch was entitled to manage the claimant and that he did so in a reasonable manner and treated the claimant no differently to other members of staff. We concluded that none of the points set out above were individually, or cumulatively, sufficient to constitute a breach of the implied duty of trust and confidence.

281. The claimant relied on the letter from Mr McMillan advising her of the complaint, being a last straw. We referred (above) to the ***Omilaju*** case where it was held that the final straw must, when taken in conjunction with the earlier acts relied upon, amount to a breach of the implied duty of trust and confidence. We concluded (above) that the earlier acts relied upon where not sufficient either individually or cumulatively to constitute a breach of the implied duty of trust and confidence. The sending of the letter from Mr McMillan could not, therefore, constitute a last straw.

282. We did ask ourselves whether the letter from Mr McMilan advising of the complaint was, in itself, sufficient to breach the implied duty of trust and confidence. We decided it was not because we concluded (for the reasons set out above) that Mr McMillan had reasonable and proper cause to send the letter informing the claimant of the complaint made against her.

283. We decided the claimant has not shown there was a breach of the implied term of trust and confidence entitling her to resign.

284. We should state that if we had been satisfied there was a breach of the implied duty of trust and confidence, we would have to have continued to determine

whether the claimant resigned in response to that breach and whether the claimant delayed in resigning and affirmed the contract.

Did the claimant resign in response to the breach (if we had decided there was a breach of contract)

285. The claimant told the tribunal that following receipt of Mr McMillan's letter dated 18 March 2019 advising her of Mr Leitch's complaint, which was to be investigated by an independent Consultant (page 350) it was "*all too much for [her]"*, and she "*could not cope*". The claimant thought Mr Leitch "*must hate her and not want her around: things which she felt had been resolved were not. It was final straw*". The claimant did not resign at that point. She did not resign until the 11 June.

286. The claimant knew an independent Consultant had been appointed to investigate Mr Leitch's complaint. She also knew, because Mr McMillan informed her, that the Consultant would wish to interview her regarding the complaint, and that he had passed her contact details to the Consultant so that he may make contact with her to arrange a time for the interview. The Consultant contacted the claimant in April to arrange a meeting, but the claimant advised Mr McMillan that she was not fit to attend the meeting.

287. Mr McMillan had informed the claimant that if she was not fit to attend the meeting, he would propose referring her to occupational health for an opinion regarding when she would be fit to participate in the process.

288. Mr McMillan met with the claimant on the 3 May regarding her sickness absence and whether anything could be done to assist.

289. The Consultant contacted the claimant again on 11 June. The claimant resigned that day.

290. The claimant dismissed as coincidence the fact the second contact from the Consultant and her resignation occurred on the same day. The claimant maintained the resignation had been a very difficult decision to make. She had not been well and had had many conflicting thoughts about the matter. She had also visited her brother and taken advice from him.

291. We acknowledged the fact resignation is a difficult decision, but the claimant did not resign until three months after the alleged final straw. We asked ourselves the question what was it that prompted the claimant to resign on the 11 June. We decided that what caused the claimant's resignation was the second contact from the Consultant. We considered the claimant did not want to be interviewed regarding the allegations in Mr Leitch's complaint. The investigation was being carried out by an independent Consultant and the claimant did not have the opportunity to turn to Mr McMillan as she had done in the past. We concluded these factors were the cause of the claimant's resignation.

Did the claimant delay too long before resigning

292. We were referred to the case of ***Colomar Mari*** (above) where the EAT reviewed the principles applying to affirmation. It was stated: *"To my mind there is no doubt that **WE Cox Toner (International) Ltd v Crook** has been for 30 years, and remains, the leading case on the doctrine of affirmation as it applies where an employer is in fundamental breach of an employee's contract."* The EAT set out the important passages from the decision in that case and noted it had been said that the question whether or not the conduct of the innocent party amounts to an affirmation of the contract is a mixed question of fact and law.

293. The EAT referred to ***Hadji v St Luke's Plymouth2013 UKEAT/0095/12*** where the essential principles were confirmed as being that the employee must make up his or her mind whether or not to resign soon after the conduct of which s/he complains. Mere delay, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay. If the employee calls upon the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation.

294. The EAT noted that both ***Cox Toner*** and ***Hadji*** make clear that the doctrine of affirmation is applied more liberally in the case of an employee who is the victim of a fundamental breach, and that it is highly fact sensitive.

295. We, in considering the issue of whether the claimant affirmed the contract, noted firstly that the last straw upon which the claimant relied occurred on the 18 March 2019, three months prior to the date of resignation. The claimant, in explaining why she had not resigned earlier, told the tribunal that it had been a difficult decision and that she had had a relapse with her health. The claimant referred to headaches, confining herself to the house, Irritable Bowel Syndrome flaring up and panic attacks.

296. We acknowledged the decision to resign will rarely be easy. We noted the claimant, whilst stating she had a relapse, did not provide any evidence regarding visiting her GP, the severity of her symptoms or their duration.

297. The authorities referred to above make clear that mere delay is not of itself sufficient to constitute affirmation. We accordingly acknowledged the fact a period of three months elapsed before the claimant resigned was not, of itself, sufficient to constitute affirmation. We asked whether the claimant had, in that period of time, called upon the employer to perform its obligations under the contract. We concluded, for four reasons, that she had done so. We say that because (i) the claimant contacted Mr McMillan (page 362) to query her pay and statutory sick pay in April 2019; (ii) the claimant attended an absence monitoring meeting with Mr McMillan on the 3 May 2019; (iii) the claimant instructed Mr McCourt (Welfare Rights Officer) to contact Mr McMillan on her behalf and (iv) the claimant collated the emails she had exchanged with the mediator Mr Cox, and sent them to Mr McMillan with a complaint regarding Mr Leitch's conduct at the mediation. Mr McMillan confirmed this would be treated as a grievance and investigated by an independent Consultant.

298. We concluded, having had regard to the above points, that the claimant called upon Mr McMillan to perform obligations under the contract following the alleged final straw. The claimant, having done so (in April/May) and having delayed a further month (until June) before resigning, affirmed the contract.

299. We, in conclusion, decided there was no breach of the implied term of trust and confidence entitling the claimant to resign. Further, even if there had been a breach of trust and confidence, the claimant did not resign in response to that

breach and, further, affirmed the contract. We decided for all of these reasons to dismiss this complaint.

Employment Judge: L Wiseman

Date of Judgement: 20 April 2020

Entered in Register,

Copied to Parties: 20 April 2020