EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102176/2018

Held in Glasgow on 14, 15, 16 & 17 May and 12, 13, 14 & 15 November 2019, and remotely via CVP on 8, 9, 12, 15, 16, 17 & 18 February 2021.

Members Meeting 8 March 2021

Employment Judge: C McManus

Members : J McElwee

A Grant

Miss G Young — **Claimant**
In Person

G C Group Ltd — **Respondent**
Represented by:-
Mr S Maguire (Consultant)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:-

- The claimant's claim of (constructive) unfair dismissal is successful and the claimant is awarded the total sum of £55,406.85 (FIFTY FIVE THOUSAND FOUR HUNDRED AND SIX POUNDS AND EIGHTY FIVE PENCE, being comprised of an unfair dismissal basic award of £8,435.25 (EIGHT THOUSAND

FOUR HUNDRED AND THIRTY FIVE POUNDS AND TWENTY FIVE PENCE) and a compensatory award of £46,971.60 (FORTY SIX THOUSAND NINE HUNDRED AND SEVENTY ONE POUNDS AND SIXTY PENCE), that compensatory award being the maximum compensatory award payable on application of section 124(1ZA) of the Employment Rights, and the total sum being subject to the provisions of the Recoupment Regulations, as set out below.

- The claimant's claim of disability discrimination under section 15 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim under section 20 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim of harassment under section 26 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim of victimisation under section 27 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim in respect of accrued unpaid holiday pay is unsuccessful and is dismissed.
- The claimant's claim for unpaid notice pay is unsuccessful and is dismissed.

REASONS

Background

1. The ET1 claim form was submitted by the claimant against the respondent on 25 January 2018. Claims were made for unfair dismissal, disability discrimination, notice pay, holiday pay, arrears of pay and other payments. There was no specification of the particular statutory provisions which were being relied upon in respect of the disability discrimination claim, or otherwise. The ET3 response was submitted on behalf of the respondent on 27 February 2018. Agenda forms were completed by both parties. Preliminary Hearings ('PH's) for the purpose of case management in this case took place before EJ S MacLean on 6 April 2017 and 8 August 2018.

2. The claimant was unrepresented. The respondent was represented by Mr Maguire, who is not a legally qualified but does have experience in providing representation before the Employment Tribunal and Employment Appeal Tribunal. Mr Maguire is a sole practitioner providing employment HR services to clients, including the respondent. The claimant was concerned throughout these proceedings about the representation by Mr Maguire because he had been involved with the respondent throughout the internal grievance procedure which has preceded these claims. Mr Maguire acted professionally in the proceedings before this Tribunal.

3. There was a PH on the preliminary issue of the claimant's disability status on 8 January 2019. The judgment in respect of that PH was issued on 16 January 2019. It was the judgment of the Employment Tribunal (EJ S MacLean) that between 30 October 2014 and 15 December 2017 the claimant was disabled for the purposes of section 6(1) of the Equality Act 2010. A further PH for the purposes of Case Management took place before EJ S MacLean on 11 March 2019. The PH note issued following the Case Management PH on 11 March 2019 included an Order for the purpose of case management.

4. Given that as at the Final Hearing before this Tribunal there had been a judicial determination on the issue of disability status, and particularly where the claimant was unrepresented, we were careful to ensure that reasonable adjustments were made during the course of these proceedings. In line with the overriding objective in Rule 2 of the Employment Tribunal Rules of Procedure 2013, several adjustments were made, as outlined in this decision, including the issue of Notes at several stages of the proceedings. At the close of proceedings the claimant thanked the Tribunal for the adjustments made and both parties confirmed that they were content that they had had a fair hearing.

5. The Final Hearing commenced on 14 May 2019. Those proceedings were adjourned to allow the claimant to make an application for amendment, for the reasons set out in the PH Note following proceedings on 14 and 15 May 2019.

6. The terms of the claimant's amendment application were received on 28 May 2019. The respondent then stated in writing their objection to the amendment application. The decision on the amendment application was set out in Note dated 4 July 2019. That Note included the reasons for the decision on the claimant's proposed amendment. The Tribunal refused to allow the ET1 to be amended in terms of the claimant's proposed amendment of 28 May 2019, for the reasons set out in that Note. Parties were notified in that Note that the adjourned Final Hearing would proceed to allow the Tribunal's determination on the issues set out at paragraph 17 of the Note Following Proceedings dated 15 May 2019.

7. The Final Hearing continued on 12, 13, 14 and 15 November 2019. Evidence was heard then from the claimant and her witness, Amanda Lees. The Final Hearing required to be continued. A Note was issued following the proceedings in November 2019. Further case management Orders and directions were issued in that Note. In order to assist both parties and this Tribunal, the issues set out in the Note Following Proceedings in May 2019 were further broken down, as set out below (with a slight amendment re knowledge, following clarification of the respondent's position) .

8. There was a delay in the continued hearing in the case being listed. There were restrictions in place as a result of the COVID-19 pandemic. EJ McManus was absent from work from March until September 2020. On EJ McManus' return to work, she directed that a Preliminary Hearing (a 'CMPH') should take place for the purposes of case management and to fix dates for the continued hearing. She directed that correspondence be sent to the parties setting out several case management matters. On 30 September a Case Management Order was issued, including an Order in respect of exchange of witness statements. Parties were informed of the effects of the COVID-19 restrictions on the Hearing arrangements. Parties were informed that in order to progress the case in accordance with the overriding objective and in circumstances where, for the foreseeable future, there may be challenges with holding a hearing attended by the parties and their witnesses in person, it may be appropriate for a Judge to fix a hearing to be heard remotely. Parties were informed of:-

    a) Presidential Guidance in Connection with the Conduct of Employment Tribunal Proceedings during the Covid-19 Pandemic (being Joint Presidential Guidance issued with the President of the Employment Tribunals (England and Wales),

    b) FAQs about the Covid-19 pandemic (being a document issued jointly with the President of the Employment Tribunals (England and Wales),

    c) Practice Direction on the Fixing and Conduct of Remote Hearings

Parties were informed that the Practice Direction, Remote Hearings Practical Guidance and Frequently Asked Questions about the Impact of COVID-19 on Tribunal practice are all available online[1] and that parties must make themselves aware of the guidance in those documents.

9. The CMPH took place in person before EJ McManus sitting alone in the Glasgow Tribunal Centre ('GTC') on 9 November 2020. A Note of Proceedings was issued following that CMPH. That Note set out the procedure to follow at the continued hearing and set dates for that continued hearing. There followed a slight change in those dates due to unavailability of a panel member.

10. An arrangements hearing took place by telephone on 3 February 2021. This took place because the continued Final Hearing had been scheduled to take place in person. The country was in a further lockdown and it was appropriate to consider if the hearing could instead take place via the Cloud Video Platform (CVP). It was then agreed that, dependent on successful tests of the equipment, the continued hearing would be converted to be heard remotely via Cloud Video Platform (CVP). The continued Final Hearing proceedings in February 2021 took place via Cloud Video Platform (CVP).

[1] https://www.judiciary.uk/publications/directions-for-employment-tribunals-scotland/

Issues for Determination

11. The issues for determination by the Tribunal were identified and set out in the PH Note following proceedings on 14 and 15 May 2019. At the proceedings in February 2021 there was an amendment to reflect the respondent's position that at no time during the claimant's employment with them did they have knowledge of the claimant's disability status. The issues determined were:-

Knowledge

- Has the respondent established that it did not know, and could not reasonably be expected to know, at any time during the course of the claimant's employment with the respondent that the claimant had a disability?
- If not, from what date did the respondent have that knowledge?

Equality Act s15

- Did the respondent discriminate against the claimant contrary to section 15 of the Equality Act 2010?
- In particular, with regard to the guidance given in *Pnaiser v NHS England* [2016] IRLR 170, EAT and in *City of York Council v Grosset* [2018] ICR 1492, CA:-
  Did the respondent treat the claimant unfavourably?
  If so, what was that unfavourable treatment?
  What in the mind of the respondent caused or was the reason for that unfavourable treatment?
  On an objective test conducted by the Tribunal, was the claimant treated unfavourably because of 'something'?
  On an objective test conducted by the Tribunal, did that 'something' arise in consequence of the claimant's disability?

If so, on an objective test conducted by the Tribunal, was the claimant's disability the cause, or a significant (more than trivial) influence on or for that unfavourable treatment?

Has the respondent established that it had a legitimate aim?

If so, has the respondent established that the treatment of the claimant by the respondent was a proportionate means of achieving that legitimate aim?

Equality Act s20

In respect of each of the provision criterion or practice ('PCP's), relied on by the claimant (as set out at paragraph 11 of the Note issued following proceedings on 14 May 2019):-

- What relevant PCP(s) has the claimant proved (if not admitted by the respondent)
- In respect of such proven or admittedly applied PCP(s) of the respondent, has the claimant shown that that (or those) PCP(s) put her at a substantial (i.e. more than minor or trivial) disadvantage in comparison with persons who are not disabled?

- If so, what steps does the claimant say it would have been reasonable for the respondent to have taken to avoid that disadvantage?

- Did the respondent know, or could they reasonably have been expected to have known, (i) that the claimant had a disability and (ii) that the claimant was likely to be placed at a substantial disadvantage?

- Did the respondent fail to take such steps as it was reasonable for them to take to avoid that disadvantage?

Equality Act s26

Did the respondent engage in conduct relating to the claimant's disability 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, that conduct being alleged by the claimant to be as set out in her letter initiating a complaint under the respondent's grievance procedure, and the conduct in the handing of that grievance?

Equality Act s27

Did the claimant do a protected act in terms of section 27 of the Equality Act 2010 by

(1) Raising a complaint under the respondent's grievance procedure

(2) making an application for parental leave

If so, was the claimant subject to a detriment because of having done such protected act?

If so, what was that detriment?

Compensation

Is the claimant entitled to any award in respect of any breach of the Equality Act 2010, and if so in what amount, having regard to:-

(a) any financial loss sustained as a direct consequence of any such unlawful treatment and

(b) any impact of any such unlawful treatment on the claimant

Constructive Dismissal

Did the respondent engage in action or a course of action which was in breach of the implied term of trust and confidence, so entitling the claimant to resign?

Unfair dismissal

Is the claimant entitled to an unfair dismissal award, and if so in what amount, having regard to sections 118 – 126 of the Employment Rights Act 1996?

Notice Pay

Is the claimant entitled to any payment in lieu of notice period, and if so in what amount, taking into account any payments made to the claimant in respect of this notice period?

Holiday Pay

Is the claimant entitled to any payment in respect of accrued but untaken holidays, and if so in what amount?

In the year of termination of employment was the claimant entitled to carry over any holiday entitlement from any previous holiday year?

12. These are the issues on which this Tribunal has made its determination.

Proceedings

13. The claimant's evidence was heard in the proceedings in May and November 2019 and at the start of the continued hearing in February 2021. In November 2019 evidence was also heard from the claimant's witness, Amanda Lees. The proceedings in May and November 2019 were held in the Employment Tribunal Offices in the Eagle Building in Glasgow. The hearing in February 2021 was entirely held remotely using the CVP platform. During case management, it was agreed that, given the time which had elapsed, it was appropriate to hear evidence from the claimant in February 2021 on her health and any steps taken in mitigation since the previous hearing dates. The claimant was also given the opportunity to comment during her recall on new documents lodged by the respondent (Bundle 4).

14. In February 2021, evidence was also heard for the claimant from a Psychologist, instructed by her for the purpose of providing a report to this Tribunal, Dr Ewing-Day. Dr Ewing Day had prepared a medical report and an updating report on the claimant, which he referred to in his evidence. No medical evidence was presented by the respondent.

15. The respondent's case was heard during the proceedings in February 2021. For the respondent, evidence was heard from:-

    i. Mr Maguire (Respondent's Representative)

    ii. Margaret Patrick

    iii. Donna Sweeny

    iv. Laura Aird

    v. Sandy Blaney

    vi. Tom Preston

16. In the February 2021 proceedings, for all except Dr Ewing-Day, witness statements were used as each person's evidence in chief and taken as read. Dr Ewing-Day relied on his medical reports as his evidence in chief. This was as part of the adjustments made by the Employment Tribunal.

17. All witnesses gave their evidence on oath or on affirmation. After her evidence had been heard, Mrs Patrick was present in the proceedings.

Relevant Law – Constructive Dismissal

18. Section 95(1)(c) of the Employment Rights Acts 1996 ('the ERA') sets out that where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct, then that employee shall be taken as dismissed by his employer. This is known as constructive dismissal. Case law has developed in respect of constructive dismissal and which is relevant to the Tribunal's determination of a claim under section 95(1)(c). The issues agreed by parties' representatives as being the issues for determination by the Tribunal in respect of claimant's claim of constructive dismissal are identified with reference to the Court of Appeal's decision in *Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.*

19. Following *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*, for the purposes of a claim of unfair dismissal, an employee is dismissed by his employer if the employee terminates the contract (with or without notice) in circumstances in which he is entitled to do so without notice by reason of the employer's conduct. The test of whether an employee is entitled to do so is a contractual one. There must be a breach of contract by the employer. It may be either an actual breach or an anticipatory breach. That breach must be sufficiently important or serious to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. The employee must leave in response to the breach and not for some other, unconnected reason. Following *Leeds Dental Team Ltd v Rose [2014] IRLR 8,* the test of whether there has been a breach of the implied term of trust and confidence is objective.

Following *Mahmud v BCCI SA [1997] ICR 606,* and *Bournemouth University Higher Education Corp v Buckland [2009] ICR 1042 (EAT),* in a claim in which the employee asserts a breach of the implied term of trust and confidence, he must show that the employer had, 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 them. Following *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,* in a case involving the 'last straw', 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. 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.

20. For a successful claim of constructive dismissal, there must be a causal link between the employer's breach and the employee's resignation – i.e. the employee must have resigned because of the employer's breach and not for some other reason, such as an offer of another job. It is a question of fact for the Employment Tribunal to determine what the real reason for the resignation was. To be successful in a constructive dismissal claim, the employee must establish that (i) there was a fundamental breach of contract on the part of the employer (ii) the employer's breach caused the employee to resign; and (iii) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

21. Where the Tribunal makes a finding of unfair dismissal, it can order reinstatement, or in the alternative award compensation. In this case the claimant seeks compensation. This is made up of a basic award and a compensatory award. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum

amount of a week's pay to be used in this calculation. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Provisions re. the maximum compensatory award are set out in section 124A ERA.

Relevant Law – Equality Act 2010

22. The claimant relies on section 15 of the Equality Act 2010 (discrimination arising from disability). The provisions of section 15 are as follows:-

"(1) A person (A) discriminates against another (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know, that B had the disability."

23. In applying this legislation to the Findings in Fact, relevant case law requires to be taken into account. Following *City of York Council v Grosett [2018] ICR 1492, CA,* section 15 requires an investigation of two distinct causative issues:

-Did A treat B unfavourably because of an identified 'something'; and

-Did that something arise in consequence of B's disability.

24. The first issue involves an examination of the putative discriminator's state of mind – did the unfavourable treatment occur because of A's attitude to the relevant ' something'. That may be a conscious or unconscious state of mind. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant 'something'. There is no further requirement that A must be shown to have been aware, when choosing to subject B to the unfavourable treatment in question, that the relevant 'something' arose in consequence of B's disability. Liability can be established under section 15(1) even though the respondent does not know that the 'something' arose from the claimant's disability. The test of justification under section 15(1)(b) is an objective assessment by the ET. The 'something' must 'more than trivially' influence the treatment but it need not be the sole or principle cause (e.g. in *Pnaiser v NHS England [2016] IRLR 170, EAT*).

25. The claimant relies on section 20 of the Equality Act 2010 (duty to make adjustments). The applicable provisions of section 20 are as follows:-

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…."

26. The claimant relies on section 26 of the Equality Act 2010 (harassment). The relevant provisions of section 26 are 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)…

(3)…

(3) In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) The perception of B;

(b) The other circumstances of the case;

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

27. Disability is listed as one of the relevant protected characteristics in section 26(5).

28. The claimant relies on section 27 of the Equality Act 2010 (victimisation). The relevant provisions of section 27 are as follows:-

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;

(c) Doing any other thing for the purposes of or in connection with this Act;

(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

Section 20 / 21

27. In determining the section 20 claim, the Tribunal took into account the case law as set out below.

Code of Practice

29. In determining the claims under the Equality Act 2010, the Tribunal had regard to the Equality and Human Rights Commissions Code of Practice on Employment (‘the EHRC’) (2011).

30. In particular, the Tribunal took into account Chapter 5 re the section 15 claim; Chapter 6 re the section 20 claim and Chapter 7 re the section 26 claim.

Comments on Evidence

31. The parties relied upon documents set out in five Bundles, and voice recordings as noted in the Findings in Fact. Witness statements for the proceedings in February 2021 were in a Bundle 5. Bundles 4 and 5 were presented for the continued proceedings in February 2021 and were not before the Tribunal in the earlier proceedings. The number after '@' in this judgment refers to the document's page number(s) in the bundle referred to.

32. The Tribunal found the claimant to be a generally credible witness. The claimant was open in her answers to questions and did not seek to avoid any questions asked of her. Her evidence was in general terms consistent with the position in the documents before the Tribunal but there were some differences, for example with regard to dates. The Tribunal attached significance to the contemporaneous GP records (as did Dr Ewing Day). The Tribunal also attached significance to the emails in Bundle 2, some of which the claimant had sent 'from herself to herself' as a record of how she was feeling at the time. There was another such email which the claimant spoke to. Her position was that she had given her only copy of that to Mr Maguire during the Tribunal proceedings in May 2019 and that it could now not be found on her computer. Mr Maguire denied having been given that email. The claimant's evidence about the meeting with Morag Blaney and Margaret Patrick on 11 July, after she overheard the phone call was consistent with the position set out in her letter of 18 July 2017, and consistent with the claimant's email to herself of that afternoon (Bundle 2 @ 6). The claimant's interpretation of events on that day was consistent throughout the documentary evidence and in her oral evidence. The Tribunal attached significant weight to that.

33. As set out in the findings in fact, the Tribunal found the claimant's emails 'to herself from herself' to be an accurate account of how the claimant perceived events at the time. There was no dispute that the discussion between Margaret Patrick and the claimant had escalated to the extent that Morag Blaney had told them both to '*act like grown ups'.* The Tribunal considered it to be significant that there was a heated argument between the claimant and Margaret Patrick which was unresolved.

34. The Tribunal considered the content of the claimant's GP records (Bundle 1 @ 150 and Bundle 4 @ 1). It was noted that Dr Ewing Day had also referred to those GP records and had found them to be consistent with the claimant's account. It was the respondent's position that the claimant had not been certified as unfit for work in October / November 2014 and that Margaret Patrick had not visited the claimant at her home at that time. The GP records (Bundle 1 @ 150) show that the claimant was issued with a Med 3 form for 2 weeks on 30 October. That was not before the Tribunal and it was the respondent's position that they did not receive it. The claimant was issued with another Med 3 form certifying her as unfit for the period from 13 to 27 November 2014 (Bundle 1 @ 152).

35. In determining whether Margaret Patrick had visited the claimant at her home in October / November 2014, the Tribunal considered the claimant's contemporaneous emails to her friend, as set out in the findings in fact, to be significant and attached significant weight to their content. There was no mention in these emails of the claimant having told Margaret Patrick that she had been diagnosed with depression, although other interactions with Margaret Patrick are mentioned. The Tribunal considered the claimant's email to her friend in Bundle 2 @ 4 - 6 to be significant in respect of the issue of whether the respondent had received the Med 3 form certifying her as unfit for work from for 2 weeks from 30 October 2014. Those emails are contemporaneous records of the claimant's boss (Margaret Patrick) having visited the claimant in November (Bundle 2 @ 5 – email sent Monday 10 November 2014 stating '*I'm going back to work tomorrow!!!boss came round Friday have agreed to go back and try it tomorrow although I have the doctor's on Thursday morning*.') They

also are a contemporaneous record of Margaret Patrick position being that she had not received the Med 3 form, although the claimant thought it had been posted by another to her (Bundle 2 @ 4), email sent 3 November 2014 stating '…*did not phone in work this morning as Pamela posted my sick line of on Friday so thought she would have gotten it but obviously not as I got a text from her at 9am this morning saying 'can I give her a call and let her know what I was doing!!!'*. It was the claimant's evidence that she told Margaret Patrick when she came to her house in November 2014 that she was depressed and that Margaret Patrick had replied '*You're the last person I would have thought would be depressed*'. Margaret Patrick denied that conversation had occurred and denied visiting the claimant at home other than shortly after her brother died.

36. Margaret Patrick did not appear as a credible witness. She gave short, almost curt answers to questions, without fuller explanation. She appeared guarded. She was defensive when answering questions in cross examination. She attempted to reply to a question asked of her in cross by asking the claimant a question. Although the Tribunal appreciated that she may not have been aware that it was not appropriate to ask such a question when under cross examination, it was noted that her tone towards the claimant appeared aggressive and argumentative. Her responses were curt. She did not seek to be open in her answers. For these reasons, where there was a dispute in evidence between the claimant and Margaret Patrick, the evidence of the claimant was preferred. For that reason, and because the claimant's position was supported by the emails which she sent at the time in Bundle 2, the Tribunal accepted that Margaret Patrick had visited the claimant's home around November 2014.

37. The claimant's position was that in November 2014 the claimant told Margaret Patrick that she had been diagnosed with depression (that being distinct from telling them that she was depressed). On the claimant's own evidence, at best, at that time the claimant told Margaret Patrick that she was '*depressed*'. That was consistent with the claimant's recollection of Margaret Patrick's reply being '*You're the last person I would have thought would be depressed."* Informing

of a state of being depressed is not the same as informing of a diagnosis of depression. This was only a few months after the claimant's brother's sudden death. On her own evidence, after November 2014 the claimant continued to work without any absences or any discussion about her having depression until stated in her Med 3 form in July 2017. There was insufficient evidence before the Tribunal to conclude that by their observation of the claimant the respondent ought to have known that the claimant's day to day activities were being significantly affected by an impairment. The claimant's evidence was that she '*didn't tell them'* that she had depression until July 2017. It was noted that that evidence was contradictory to the statement in the claimant's grievance letter that '..*you were all aware of my depression and my reliance on anti-depressants for three years now*...".

38. The claimant's evidence was that she had started as an employee with the respondent '12 years ago'. That was when she gave her evidence in 2019, meaning a start date of 2007. Her position in the ET1 was that her employment began in 2006. She clarified that in her evidence that she initially worked on a self-employed basis. In the ET3, the R's position is that the start date was 1 August 2009, the claimant having worked for them on a self-employed basis until then. The claimant was not cross examined on her start date. There was no documentary evidence before the Tribunal such as a statement of terms and conditions or a contract setting out the claimant's start date. The claimant's revised Schedule of Loss (Bundle 4 @20) calculates the unfair dismissal basic award on the basis of 10 years' service to 15/12/17. Mr Maguire did not comment on the that calculation of the basic award being erroneous with regard to the claimant's length of service. On that basis, the Tribunal found the claimant's start date as an employee of the respondent to be in August 2007, with the claimant having worked on a self-employed basis from 2006 until August 2007.

39. There were a number of aspects of the claimant's evidence which were not addressed in the evidence from the respondent's witnesses. The claimant gave evidence that Sandy Blaney had appeared at her home in July 2017 to pick up her laptop and ask for computer passwords. That evidence was not addressed by Sandy Blaney. On the claimant's own evidence, she was heavily medicated at that time and did not have a clear recollection. She could not say if that had occurred before or after she had written her grievance letter. There was no mention of that incident in any documentary evidence before the Tribunal. For those reasons, the Tribunal did not attach significance to that evidence.

40. In her grievance letter of 18 July 2017 (Bundle 1 at 51 – 53), the claimant refers to events on 11 July 2017 as being '*my final breaking point*'. The claimant was unfit from work from that date. That date was a breaking point for the claimant in terms of her mental health. She was no longer able to work. For that reason, the Tribunal took the claimant's reference to '*my final breaking point*' to be in respect of the claimant's health and her mental state. The Tribunal did not take that reference to mean that the events of 11 July 2017 were the 'last straw' for the claimant in the context of the constructive dismissal claim i.e. with regard to the last event in a series of events which taken cumulatively were a breach of contract.

41. It was notable, and considered to be very significant, that at no time after the claimant made her grievance did the respondent seek to provide any reassurance to her about her continuing employment with them. The grievance response sought to address the 10 points in the claimant's grievance, at least in terms of a statement of the respondent's position on the issues raised. It was a process driven approach. The respondent did not address what the claimant set out in her letter of 18 July 2017 as being '*her final breaking point'.* The claimant was right that the '*other'* referred to by Morag Blaney in her conversation with Steve Maguire on that day was the claimant. The fact of Morag Blaney discussing the claimant with Steve Maguire is not in itself indicative of problem. The claimant clearly considered it to be indicative of an issue and received no reassurance otherwise. The claimant took from Morag

Blaney having a conversation with Steve Blaney about her, following on from the conversations she had heard her have with him about other employees, to be an indication that the respondent were seeking to manage her out of the business. There was no recognition of that in the respondent's dealing with the claimant's grievance. There was no explanation given to the claimant on what the conversation had been about.

42. There was no evidence before the Tribunal to show that the respondent had approached the grievance in the round, or with a view to resolving the issues. The clear messages in the grievance letter were that the claimant had a mental health condition and was struggling with her workload. In failing to address those issues, the respondent failed in their duty of care towards the claimant. The respondent's failures led the claimant to feel unvalued by the respondent and feel that there was no place for her with them.

43. The claimant was consistent in her evidence that all she had sought in raising her grievance was to have a '*chat'* and to seek to resolve the issues. Under cross examination on 13 November 2019 the claimant was asked if there was any particular thing had happened to cause her to resign. Her response was

> "*What went on was after the appeal the only letters I received were to go in for an attendance review meeting – a counselling meeting – because, knowing the culture and the way the business is conducted there wasn't any policy in place, no one approached me in the normal manner they would have previously – how are you Georgina? Is there anything we can do? No one made any in roads whatsoever to have a conversation with me. I knew Mr Maguire was controlling all the paperwork and wrote the letters. He was going to be present. I wouldn't have the chance to speak to my employer face to face nor they a chance to speak to me. I had been disallowed that opportunity previously. I also had made a subject access request."*

44. It was clear from the claimant's evidence that prior to her resignation she had formed the impression from the respondent's behaviour towards her that they did not want the employment relationship to continue. There was no evidence from the respondent's witnesses on their position in respect of the claimant's evidence that at the first grievance meeting on 2 August she had asked Sandy Blaney if she could '*get my job back'* and he had shrugged his shoulders in reply. The claimant's evidence was that '*I was asked to resign'*. When asked if she was clear about her understanding, her reply was '*Yes. I was told that the only recourse I had was to resign'*. When asked if that was what she took as being asked to resign, her answer was '*Yes'*. The claimant's evidence just subsequent to that was significant. She went on to say '*It wasn't just the fact of being asked to resign. There was a whole change in attitude towards me. Had I been in the situation with anyone else I'd say 'Could we sit down and chat. What can we do? They did nothing like that. They didn't give me any idea that they wanted to keep me. There was no clear, true attempt on their behalf to do so."* Her evidence on the meeting in the Holiday Inn was *'I really wanted them to communicate with me about my illness and consider how we could go forward. I was extremely ill. All of the time I was in fear of losing my job."*

45. The claimant's evidence on the time when she believed there was a change in attitude towards her was significant. Her position was that she '*wouldn't have started making notes of change if I'd not noticed a change in attitude towards me. An attitude of if we constantly browbeat her she'll walk away."* The claimant's evidence was that '*Previously in 2014 there was constant communication with Mrs Patrick by email, phone and text. She asked if she could come and see me, of course she could, that was all in 2014. When it came to July (2017) there was no such communication – none about when are you likely to come back. It was never known for me to be off for any length of time. I expected them to say Georgina, we've got your sick line for 28 days, are you ok? Are you going to come back before then? Any communication. There was none. There was a process, a way of dealing with things. There was no intention of taking into account my illness or making any adjustments whatsoever for me to get back to work."* The Tribunal concluded from that

uncontested evidence that the breakdown of the working relationship between the claimant and Margaret Patrick had started before the claimant had raised her grievance in July 2017. That is clear from the terms of the letter of 18 July 2017 itself. That timing is important in establishing the causation of the breakdown in the working relationship.

46. The claimant was asked why she did not reconsider her resignation following the letter from the respondent of 24 November 2017 (Bundle 1 @ 80 – 81). Her evidence was "*For all the reasons said. I'd known the employer for a long time. I know how they normally deal with these things. The normal chain of events. To me there was a smoke screen. Mr Blaney by that stage hadn't even asked how I was. I hadn't been asked about my feelings on going back to work, if that was open to me, it didn't seem to be. They mentioned it was a counselling meeting and an Attendance Meeting. There wasn't an Attendance Policy in place prior to me raising this grievance. Having overheard the conversation on my breaking point, on 11th July, I heard the comments on performance management about other people. I took that they were now scrutinising everything I was doing. There was triple comments on things I had dealt with in the past. I truly felt that they wanted to dismiss me on grounds of capability, that would have been next. Counselling meeting, attendance, am I capable of doing my job.*"

47. Although the claimant's evidence was that her letter re. the grievance appeal outcome (Bundle 2 @ 20), which she intended to read at a meeting with the respondent, was not given to them, the Tribunal considered the content of that letter to be significant in respect of the claimant's perception of events at the time and the reason for her resignation.

48. Amanda Lees gave her evidence in a straightforward manner, without any avoidance or reticence. The Tribunal found her to be generally credible and reliable. The Tribunal accepted her evidence that the claimant had '*wanted help writing a grievance letter to her employer'*. It was noted that Amanda Lees' evidence was that 'it *was a family business and I was concerned for how it would play out'* and that at the time of writing her grievance letter the claimant was '*very, very upset and stressed'.* The Tribunal accepted her evidence that the claimant *wanted 'to resolve her concerns'* and for '*something to change.'* The Tribunal accepted her evidence that at the meeting on 22 August 2017 the claimant '*could barely speak, she was so upset'*. The Tribunal considered that to be in line with how they perceived the claimant was from the recordings of the meeting played in these proceedings. The Tribunal accepted her evidence that on the conclusion of the grievance appeal, '*the thing that Georgina couldn't accept was that by not upholding her grievance they were in effect calling her a liar.*'. Amanda Lee's evidence was that she had '*formed the impression on that day (22 August 2017) that it was clear there was no support for Georgina.'* She considered the respondent's approach in dealing with the grievance to be *'overly defensive.'* In relation to the appeal outcome letter, her evidence was *'…I appreciate it's difficult to work through but it's quite strong language for a grievance appeal letter and not the language I would use myself. If I was doing a grievance and wanted genuinely to get over the issues raised I would be saying in the letter 'please come back to work and we will work through these things. It was all in the moment, not about Georgina's wider health and well being.'* Her evidence on the conduct of the grievance process was that she *'felt strongly that it was a box ticking process and they were going through the process.*' and that *'There was no genuine concern, no genuine consideration of how they might accommodate her return to work. They were just going through the process.'* Her evidence was *'If someone had just said Georgina, come back and we'll talk about this. We'll support you. That didn't happen.'*

49. Amanda Lees gave evidence that she thought there had been some attempt by the respondent to obtain a medical report on the claimant. She could not

recollect the detail of that. There was no documentary evidence before the Tribunal that there had been any attempt by the respondent to obtain a medical report on the claimant during the course of her employment with them. For that reason, the Tribunal did not find Amanda Lees to be entirely reliable in her recollection of that.

50. The Tribunal found Dr Ewing- Day to be an impressive and entirely credible and reliable expert witness. The Tribunal took into account his professional qualifications as set out in his reports. It was clear from his evidence that he had used appropriate multi- modular resources to assist his assessment of the claimant's psychological state and his diagnostic opinion. The Tribunal took into consideration his evidence that the claimant's memory of more recent events would be more accurate and that it would be reasonable to assume that the claimant's mental health condition may have some impact on her memory (although he had not carried out a formal assessment of that). There was no contrary medical evidence relied upon by the respondent. The Tribunal placed significant weight on Dr Ewing- Day's evidence on his assessment of the claimant. That included his evidence that there were objective factors (e.g. from the GP records) to support the claimant's subjective position. Dr Ewing-Day's evidence was that there were no indications in the claimant leading him conclude that he should carry out a malingering test. The Tribunal accepted Dr Ewing Day's evidence that engagement in charitable work, such as the claimant's work with a food bank during 2020, is a valuable part in returning to work as it allows for flexibility while building psychological worth. The Tribunal accepted his evidence in respect of the length of treatment which the claimant would require to enable her to return to work and his position that recovery would be difficult for the claimant while going through this Employment Tribunal procedure.

51. It was the position of all of the respondent's witnesses that Mr Maguire had prepared their witness statement, after discussion with him, and these had then been sent to the individuals to make any changes. By the time of the CMPH in

November 2020, it was clear that Mr Maguire would be giving evidence to the Tribunal. It was agreed that when the Final Hearing recommenced, Mr Maguire's evidence would be heard before the evidence of the other of the respondent's witnesses. In these circumstances, and where Mr Maguire was also the respondent's representative before the Tribunal, Mr Maguire was directed to ensure that he take necessary steps to ensure that his own evidence did not influence the position of the other of the respondent's witnesses.

52. Given his involvement in the case, and representation of the respondent before the Tribunal, Steve Maguire was the first of the respondent's witnesses. Steve Maguire's position in his evidence was in general consistent with the contemporaneous documents. The Tribunal did not consider Mr Maguire to be credible in his evidence that the claimant was '*no more upset than any other employee going through a grievance process'*. That evidence was not consistent with his decision to invite the claimant to the meeting on 22 August because of concerns about how she would be affected by receiving a letter.

53. Mr Blaney's position in cross examination and when asked questions by the Tribunal was that he relied heavily on Mr Maguire. It was clear from his evidence that although it was his decision to proceed as he did, he had in effect washed his hands of the decision-making process. He was reticent in his answers to questions in cross examination, much of which he answered with '*yes'* or '*no'*, without offering explanation. On numerous occasions his response to questions put to him was '*I can't recall'.* When questioned what he meant by that he changed his evidence to '*it didn't happen'*. He was adamant that the Grievance Policy was in place but could not say by what means. For these reasons, Sandy Blaney was not found to be entirely credible or reliable in his evidence. Mr Blaney had no understanding of what it meant for a policy or procedure to be 'in place'. His evidence was that the grievance procedure was '*in place*' but he could not say if or how it, or any other policy, was communicated to employees. In general, his position was that he was inexperienced in dealing with matters and that he had followed guidance given by Mr Maguire.

54. It was the claimant's clear evidence during the proceedings in November 2019 that at the meeting on 2 August 2017 she had asked Mr Blaney if she could '*have her job back'* (that being on the basis that she did not know if she was still employed by the respondent) and that Mr Blaney had '*shrugged his shoulders'* in response and said nothing. That evidence was known to the respondent but was not addressed in the respondent's witnesses' evidence. For that reason, the Tribunal made a finding in fact that that had occurred and attached significance to it.

55. It was undisputed that Steve Maguire had drafted all the letters, including the decision letter. Mr Blaney's evidence was that he had read the letter agreed with it and signed it. The impression he gave to the Tribunal was that the whole process was out of his hands. From that evidence, the Tribunal inferred that the decision on the claimant's grievance was taken by Steve Maguire, and Sandy Blaney agreed with that decision. There was no evidence at any stage of the process of there being any attempt to reconcile the differences between the claimant and Margaret Patrick. It was undisputed that the claimant had been spoken to about a number of matters, such as a £200 fine and her tax code. It was clear that the claimant was upset at these issues being raised with her and that the respondent considered them to be entitled to raise them with her. An employer is entitled to discuss issues with its employee in a reasonable manner. The grievance progressed only to make a decision on each of the claimant's 10 points in her letter of 18 July 2017. There was no evidence of the consideration of the whole picture, in the context of seeking to continue the employment relationship.

56. Sandy Blaney's evidence was that there had been training for staff on equal opportunities, but that he did not attend that training. There was no evidence before the Tribunal of any Equal Opportunities Policy being in place and it was Sandy Blaney's evidence that no such policy was in place.

57. The respondent cannot be criticised for seeking to bring in an external advisor to provide guidance on employment matters. In this case, in circumstances where the claimant was impacted by her mental health condition and where

the process followed on the advice of the external advisor was a marked change from the informal way in which matters had previously been dealt with by the respondent, Mr Maguire's involvement was significant to the claimant and was a material factor in the breakdown of the claimant's employment relationship with the respondent. It was also significant that the claimant had previously had some responsibility for HR matters and there was no evidence before the Tribunal of any communication to the claimant on how her duties would be affected by HR services now being outsourced. There was no evidence of any discussion with the claimant on what Steve Maguire's role for the respondent would be. In circumstances where the claimant had previously had some responsibility for HR matters, and where there was no job description of the claimant's role, there ought to have been clarification to her of the role of the external HR advisor.

58. It was clear to the claimant at the time, and was not in dispute, that Mr Maguire had drafted the respondent's letters to the claimant subsequent to her raising her grievance. The claimant considered the tone of those letters to be formal and very different from the normal communication from the respondent and took a negative inference from that. It was her evidence at the Tribunal that she felt threatened by the formality in which the respondent dealt with the grievance process.

59. The Tribunal did not attach significance to the evidence from Donna Sweeny or Laura Aird other than their evidence that the claimant was a private person, which was not disputed. The Tribunal accepted the claimant's position that their evidence on other matters e.g. whether the claimant had worn flip flops on the day she departed for holiday, was not material to the issues for determination by the Tribunal. Their evidence was considered to be relevant by Tom Preston during the grievance. Mr Preston was straightforward in his evidence. He did not seek to avoid questions in cross examination and answered in an open fashion. The Tribunal found him to be a credible and reliable witness. His position in cross examination was consistent with his witness statement. The Tribunal accepted his reasons for taking into account the evidence of Laura Aird and Donna Sweeny, being that he took their position

into account when deciding who to believe. Mr Preston's evidence in cross examination was that he considered their evidence to be relevant because they had both stated that the claimant had worn flip flops on the day before she began her holiday and, on the basis of there being a number of witnesses against the claimant, had preferred their position. That is not to say that the claimant was not truthful, but where a decision was being made as to whose version of events to believe, it is reasonable to conclude which set of events to believe on the basis that that version is corroborated by a number of people. The Tribunal considered that to be a reasonable basis for a conclusion, but not relevant to the resolution of the claimant's grievance issues.

60. At the proceedings in February 2021 the Tribunal was directed to a draft Attendance Policy and Disciplinary Policy (Bundle 4 @ 48 – 56). There was no evidence that either of these had been communicated to the claimant, either before or after she had raised her grievance. There was no evidence that these draft Policies had been communicated to any of the respondent's employees. When asked, Mr Blaney could not say how or if the Grievance Procedure had been communicated to the respondent's employees, or where they could access it. Mr Blaney sought to impress that the Grievance Procedure was '*in place'*, as distinct from having been drafted, but could not say how it came to be in place. Aside from a mention in the letter to the claimant acknowledging her grievance letter (Bundle 1 @ 54), there was no evidence before the Tribunal of any internal Grievance Procedure being applied in the handling of the claimant's grievance. There was no Grievance Policy or Procedure before the Tribunal. There was no evidence of any Grievance Policy or Procedure having been sent to the claimant. Had a Grievance Policy been sent to the claimant that would have given her notice of the various stages of the process which were to be followed by the respondent in dealing with her grievance and could have provided transparency of the process, and therefore some reassurance on how the grievance was being handled.

61. There was much discussion in these proceedings about the content of a conversation which Mr Maguire had had with the claimant and Ms Lees at a break in the meeting on 22 August 2017. This conversation had been recorded

by the claimant. The claimant did not notify or seek agreement to that recording. For reasons set out in the previously issued Notes in these proceedings, the Tribunal heard recordings of that conversation during the proceedings in November 2019. The claimant relied on her own transcript of her recording (Bundle 3 @ 1 – 7). Additionally, a digital version of the conversation and a shorter digital version of part of the conversation were heard in the proceedings in February 2021. By that time, the respondent had obtained a professional transcript of the longer digital recording and that transcript was included in Bundle 4 @ 90 - 102). The Tribunal reviewed all of these and made its findings in fact on what was said. It was noted that in one recording the word '*not'* in the phrase '*that's not the best option'* is muffled.

62. What was considered by the Tribunal to be significant in respect of that conversation was that the subsequent discussions between the claimant and the respondent centred on whether or not the claimant had heard Mr Maguire telling her to resign. There was no attempt by the respondent or Mr Maguire to reassure the claimant that, no matter what she thought she had heard, it was not the respondent's position that she should resign. It was appreciated by the Tribunal that sometimes words can be said which are not meant literally or are used in context. The claimant thought that Mr Maguire had '*asked her to resign'*. Amanda Lee's evidence was that '*At some point in the meeting he did say if things are that bad why don't you just resign?*' Neither of these are an accurate recollection of what was heard in the recordings. What was undisputed is that Mr Maguire did say the word 'resign'. The Tribunal concluded that the claimant picked up on the word 'resign' and took a negative meaning from it: that the respondent wanted her to resign. The discussions and dealings with her which took place after that served to enhance that view. No action was taken by or on behalf of the respondent to seek to persuade the claimant that the respondent did not want her to resign. The Tribunal found that Mr Maguire had used the word resign but did not ask the claimant to resign. Mr Maguire had used the word resign in the context of that being a possible option for recourse for the claimant. The use of the word resign in that context in a discussion with the claimant during a break in the meeting on 22 August,

was not consistent with the position of the findings being only 'preliminary findings' at that time.

63. Bundle 4, which was prepared for the continued proceedings in February 2021, contained an email from Morag Blaney to Steve Maguire with attached comments prepared by Margaret Patrick and Morag Blaney in response to the claimant's grievance letter (Bundle 4 @ 67 – 72). It was not disputed that these comments were not disclosed to the claimant before being included in Bundle 4. It was not disputed that these comments were before Sandy Blaney and Steve Maguire at the time of the decision on the claimant's grievance being made. It was Sandy Blaney's evidence that these comments were taken into account in the grievance decision. Those views of Margaret Patrick and Morag Blaney tainted the outcome of the grievance. Those comments make it clear that those named in the claimant's grievance had carried out investigations with other employees on the issues raised. That was inappropriate.

64. The documents in Bundle 4 were not produced to the claimant until after the CMPH in November 2020. Those documents included handwritten notes taken by Mr Maguire at the Grievance Meeting on 2 August 2017 (Bundle 4 @ 73 – 77) and various other handwritten notes (Bundle 4 @ 78 – 89). The Tribunal considered it to be significant and drew a negative inference from the fact that the first time the claimant was provided with any notes of the grievance hearing on 2 August 2017 was when Bundle 4 was being prepared in 2021 (Bundle 4 @ 73 – 77). The Tribunal was not directed to the handwritten notes in Bundle 4 @ 78 – 89. There was no evidence before the Tribunal as to who had taken these notes or when they were produced. For these reasons the Tribunal could attach no weight to the content of those notes.

Findings in Fact

65. The following material facts were admitted or proven:-

66. The respondent is the holding company for a group of companies providing upholstery, curtains and blinds across Central Scotland. The Group has expanded and taken over a number of other companies. The GC Group of

companies now includes a number of brands, including Dutton and Gavin; VBS Centurion Blinds; Baileys Blinds; Rainbow Blinds; Grampian Blinds; Sunrite Blinds Aberdeen; Sunrite Blinds Edinburgh and Scotblinds. The respondent provides clients across Scotland with blinds, shutters, curtains and awnings. It has a 30,000 sq. ft production facility in Wishaw. There are 140 employees.

67. Sandy Blaney is the Managing Director and co-founder of the business, along with his wife, Morag Blaney. The respondent is a family business in that Sandy Blaney, his wife Morag Blaney, his sister Margaret Patrick and his son Lewis Blaney are all Directors.

68. At first the respondent was one of a number of companies for which the claimant worked on a self-employed basis. The claimant became an employee of the respondent in August 2007. No contract of employment or statement of terms and conditions was issued. From August 2007 the claimant was a full time employee of the respondent. The claimant was employed as Group Accountant. She was required to produce monthly management accounts, conduct year end audits and do ad hoc work in relation to the accounts. The claimant has no professional qualifications in accountancy. Prior to commencing employment with the respondent, the claimant was Finance Director for another company group. In addition to her responsibilities for preparing company accounts, the claimant was expected to have some responsibilities for HR matters. There was no job description for the claimant's role. Margaret Patrick and the claimant both had some responsibility for dealing with HR matters. There was no clear demarcation of responsibility for HR. It was not clear what the claimant was responsible for. It was not clear who the HR contact would be for employees within the company.

69. As the respondent's business grew, it was decided by the Board that they should obtain assistance on HR and employment matters from an external consultant. The respondent engaged Creideasach Employment Law Specialists to provide advice on these matters. That engagement commenced in early 2017. Prior to that time HR matters were dealt with on an informal

basis. There was no Grievance Procedure, Disciplinary Procedure or Attendance Policy in place.

70. Steve Maguire is a sole practitioner operating under the name Creideasach Employment Law Specialists. Creideasach Employment Law Specialists supplies HR and employment law advice to several businesses. Sandy Blaney was introduced to Steve Maguire by Tom Preston. Sandy Blaney knows Tom Preston as they are both members of the same golf club. Tom Preston is a Chartered Accountant. He was previously Financial Controller, then Financial Director with Harry Fairbairn BMW. From 2008 Tom Preston has advised a number of SME businesses, including the respondent, on areas such as acquisition, cashflow and discussions with banks. Sandy Blaney initially asked Tom Preston to advise on matters involving a restructure of a loan being repaid by the respondent. From then, Tom Preston's role with the respondent developed. From 2011, Tom Preston was acting as a Consultant to the respondent's business. He regularly attended monthly Management Information Meetings ('MI Meetings') which the claimant also attended. Tom Preston's role with the respondent meant that he would occasionally come into contact with the claimant. With the claimant's assistance he set up monthly management accounts, budgets and the production of weekly forecasts for each of the respondent's companies. During his time working with the claimant, Tom Preston found the claimant to be entirely competent. He occasionally had concerns with regard to her workload and hitting timescales. During 2017 Tom Preston encouraged the claimant in MI meetings and privately to recruit assistance.

71. The claimant is the kinship carer for her niece, whom the claimant has looked after since she was a baby. The claimant's niece has significant learning disabilities and physical health problems. The claimant successfully managed her work and caring responsibilities throughout her employment with the respondent.

72. The claimant's brother died suddenly in July 2013. The claimant was certified as unfit for work for 2 weeks from 22 July 2013 (Med 3 Form in Bundle 1 @ 151). The reason stated in this Med 3 form was '*bereavement'*.

73. In October 2014, the claimant felt tearful, irritable and under increasing pressure at work and at home. She attended her GP on 30 October 2014 (GP records in Bundle 1 @ 150). The GP records state " '*Months' of increasing stress, stormed out of work last FRI. No medical input last years. Feels needs seen today."* The records note that the claimant was '*tearful'* and discussed having '*temper outbursts at work'*. The GP records note '*stress and depression*'. She was commenced on anti-depressant medication. She was certified as unfit for work for a period of 2 weeks.

74. On 3 November 2014 the claimant sent an email to a friend (Bundle 2 @ 4). She states in this email "…*did not phone in work this morning as Pamela posted my sick line of on Friday so thought she would have gotten it but obviously not as I got a text at 9am this morning from her saying 'can I give her a call and let her know what I was doing!!!!! Wish I knew the answer to that one I don't know if I'm doing the right thing being off.".*

75. On 10 November 2014 the claimant sent an email to a friend (Bundle 2 @ 5). She stated '*I am going back to work tomorrow!!! Boss came round Friday have agreed to go back and try it tomorrow although I have the doctors on Thursday morning."*

76. These emails reflect that Margaret Patrick had visited the claimant at her home in November 2014. In November 2014 the respondent was moving premises. For around three weeks at that time the respondent had no internet service at their business premises. The claimant did work at home during that period. Margaret Patrick visited the claimant at home and gave her a laptop so that the claimant could work from home while the office move took place. When Margaret Patrick visited the claimant at home in November 2014, the claimant told Margaret Patrick that she was depressed. Margaret Patrick replied with words to the effect of '*You're the last person I would have thought would be depressed.'* The claimant again attended her GP on 13 November 2014. The

records from that consultation note that the claimant was still stressed '*although feels slightly better. Thinks this more related to not being at work – one less stress to cope with."* The claimant was certified as unfit for work from 13 to 27 November 2014 (Med3 Form in Bundle 1 at 152). The Med 3 Form states the reason as being 'Stress at home'. The claimant had no absence from work due to ill health from that time until July 2017. Until July 2017, the respondent was not aware that the claimant was diagnosed with depression. The claimant continued to work for the respondent without them being aware that there were any health issues having a significant adverse effect on her day to day activities. There was an awareness that the claimant was suffering from effects of the menopause.

77. In 2017, the claimant began to have concerns about how she was being treated at work. A number of issues had been raised with her. The claimant felt under pressure and felt her workload was excessive. On 30 June 2017, following the claimant's attempt to have a meeting with Sandy Blaney to discuss her concerns, the claimant sent an email to herself. That email (Bundle 2 @ 14) is an accurate contemporaneous record of how the claimant perceived the situation at that time. The respondent did not have sight of that email at any time during the course of the claimant's employment with them. It states (typos included):-

> "*to me: returned to work from three days parental leave Thursday 30/6/ 2017 to be meet with the words you cannot use Bailey's sage it's corrupt (Donna) to which I replied vat needs done reply I will try to get you access to it. I asked for a meeting with Sandy to discuss how upset I have been of late and what issues were affecting my mental health.*
>
> *Sandy did meet with me but disappointingly the first thing he said was I only have 15 mins – what's up - I went on to say don't know where to start but eventually started with I think I am being kept out of the loop and the issues of Margaret not speaking to me and the sage being changed without consultation with me bit of an issue when my staff ask*

me about sage and I cannot answer them also mentioned I had documented several issues with regards me being undermined in an open office being talked about by senior management to staff in answer Sandy retorted what is it you want out of this meeting - this company is bigger than you and Margaret you know personality clash (after 12 years)? Both of you have strong personalities just sort it you do not have to like each other I said I have before without much success and I was struggling to remain professional and I have seen this sort of mental torture directed to others.

One comment made by him showed his tact on my parental leave - he said you [sic] leave is putting additional strain on the business I find that difficult to accept when I have a record of lots of hours worked outside working hours holiday leave not taken and working at home when I was sick also my reduced workload which covers leave which I documented for my (parental leave) on leaving he said I will speak to Morag.

Later that day for the first time in months Margaret let me know she was leaving and would see me Tuesday next week strange as first time we have exchanged more than a couple of words in months strange also that the micromanagement continues since the meeting with Sandy Morag is now making issues over trivial things and the micromanagement continues with Margaret now being copied into all emails sent to me (never happened before).

I will continue my diary daily as I feel that they are looking to get rid of me as getting comments like my home life interfering with work I told Sandy on the contrary my work effects my home life."

78. On 5 July 2017 at 11.59 Sandy Blaney sent an email to the claimant (copied to Margaret Patrick (Bundle 2 @ 7 & @ 10). That email stated:-

"*Good afternoon Georgina.*

Usually we go over the letter with the accountants each year and give our comments at the audit meeting. They didn't have the letter this year as the accounts (Dutton and Gavin) and we have only therefore got the letter from them. There are some issues this year that we need clarifying from you before we get back to them.

Regards."

79. The claimant felt threatened by this email. She sent an email to herself on 5 July at 13.06 (Bundle 2 @ 10). That email is an accurate contemporaneous account of how the claimant perceived events at that time. The respondent did not have sight of that email at any time during the course of the claimant's employment with them. The claimant wrote (set out including typos in original):-

"*I am sending this email to myself as not answered them back and now they are making my life even more of a misery so stressed shaking like a leaf looks like the want ride [sic] of me not the first time they have played with my mental health with bitty emails playing ping pong micromanagement and the usual underhanded lies.*

I can prove letter never sent till after audit concluded and filed I have the proof copy of the last few years in my possession always given to me. Yes, points are discussed at a meeting which I have already asked about and not answered. Noted that this email was copied to Sandy but not previous one. Looks as if I am going to be browbeaten tomorrow three against one."

80. The claimant prepared notes of what she wanted to say about her concerns at a meeting with Sandy Blaney. Those notes are in Bundle 2 @ 8 – 9 and are an accurate contemporaneous note of the claimant's concerns and how she was feeling at that time. This includes her statement "*To be clear I have no agenda other than to be a happy respected trusted and committed employee without my mental health detrimentally affecting me and my carer's responsibilities."* The claimant did not have the opportunity to discuss those

concerns on 6 July 2017. The claimant did not give those notes to the respondent while she was employed with them.

81. On 6 July 2017 the claimant met with Sandy Blaney. Morag Blaney and Margaret Patrick were also in the room. Margaret Patrick was holding a pen and paper. The claimant felt threatened. The claimant had expected an informal meeting. The claimant asked if the meeting was going to be minuted. She was told that it was not, but that notes would be taken by Margaret Patrick. The claimant asked if she could record the meeting on her phone. She was not asked why she wanted to record the meeting. She was told that they would need to refer to the respondent's new external HR advisor, Steve Maguire. The meeting then continued only to talk about work issues, without discussion on the concerns the claimant had. The claimant felt threatened by this approach. The 'clear the air' meeting to discuss the claimant's concerns did not take place. The respondent did not revert back to the claimant in respect of that meeting continuing. The claimant was not given the opportunity to discuss the issues she wanted to raise with the respondent. The claimant felt let down and threatened by that.

82. On 7 July 2017 at 10.54 the claimant sent an email to herself (Bundle 2 @ 7). That email is an accurate contemporaneous account of how the claimant perceived events at that time. The respondent did not have sight of that email at any time during the course of the claimant's employment with them. That email states (set out including typos in original):-

> "*attended meeting to do with my chat with Sandy last week (detailed notes) on file.*
>
> *Meeting started at approx. 11 AM no time given to me*
>
> *I arrived in meeting room to be faced with Sandy, Morag and Margaret Sandy started to say a clear the air meeting re-my chat last week (Margaret) already sitting with a pen and paper to take notes I asked if I would be allowed to record the meeting they said no as it was an informal chat! I commented cannot be an informal chat when you are*

going to minute it so meeting did not take place (Morag) said I am disappointed Georgina and that they would have to speak to HR who were on holiday until next week and would postpone to then I did not think that was acceptable due to my mental health and asked to speak to Morag on her own she refused.

I then was given our auditor reports (first look for me) not long enough I thought but attended meeting again saying that is the first time ever we had sat down and going over this point by point it was agreed who would read out comments and I managed to answer most of the question without issue and with the help of Sandy and Tom on a couple of occasions the meeting went all point and Sandy asked Morag twice to be quiet and let me speak as I was being interrupted constantly the meeting concluded with no further issues regards audit planning except for the timing of it (Sandy) said workload then Georgina which I said I could detail other works which got in the way (Sutherland) a year all covenants et cetera he totally understood on my explaining why a couple did not meet their individual deadlines but overall audits were delivered before final due date meeting concluded with client issue and I did ask to speak to Morag again about my issues we had an off the record chat to which I made comment that my main issue was with Margaret she said sort it out.

On leaving the office last night 5 PM (Margaret) hollered / roared from the top of the corridor to me going out fire door over 10 feet away with staff behind her… "I Want the I accounts as quick as possible this month" (I did not know what name she used) was there any need to holler this down a corridor with all the staff leaving the office at the same time very (unprofessional) another in a long list of demeaning me in front of staff.

Recorded for my sanity."

83. In the morning of 11 July 2017, the claimant overheard a conference call between Morag Blaney, Margaret Patrick and Lewis Blaney (who were in the

respondent's premises) and Steve Maguire. The claimant overheard conversations about a number of employees in respect of which the claimant understood steps were being taken to bring their employment with the respondent to an end. That assumption was not correct. The claimant then heard Morag Blaney say '*There is one other, but I am being overheard, so I will call you from my mobile.'* The claimant took that to be a reference to her. That assumption was correct. Morag Blaney then spoke to Steve Maguire on her mobile about the claimant. That discussion was not about any steps being taken to terminate the claimant's employment with the respondent. The claimant assumed at the time that the other conversation was about terminating her employment.

84. The claimant took the refence to the '*other'* to be her because on the afternoon of 11 July 2017 Morag Blaney and Margaret Patrick came to speak to her in her office. They raised a number of issues with the claimant, including mention of an issue in relation to a tax code. The claimant was concerned that that issue was being again being discussed with her because the matter had been discussed in May. The claimant understood that matter to have been dealt with and not to be subject of further discussion. The discussion became heated. Morag Blaney told the claimant and Margaret Patrick to *'act like grown ups'*. At 14.45 on 11 July 2017, the claimant sent an email to herself. That email is in Bundle 2 @ 6. The content of that email is the claimant's contemporaneous account of events. That email is an accurate reflection of how the claimant perceived events at that time. That email was not produced to the respondent during the course of the claimant's employment with them. The email states (typos from original included):-

> *"I am in tears again just been pulled up for two work issues (never before) has this happened.*
>
> *Morag and Margaret walked into my office Margaret said everything on sage so Sandy wants accounts did not even address me by name (already had been told so by Morag by email today and I answered thanks). I said I know you brought it down the corridor last week when*

I was leaving the office which then became a screaming match when she said I didn't told you when leaving Morag told both of us to stop we were grown women! Obviously, Margaret can antagonise and goad me talk to others about me insinuate that I now cannot do my job and get away with it!

The first issue brought up was Sutherland: Companies House filing late received by me approx. 16th or 19th June I was finishing management accounts so left till later that week then was off 26/27/28 June then finished vats problems with sage so took longer than normal then was off Monday the third July as before on parental leave (which I know is an issue) was dealt with that week (Morag) three times asked why it was late my job did I just forget? I said I did not know why would have to check then then said did I just forget? I may have I said, am I not allowed to make a mistake it had been dealt with.

Now feeling that I am being micromanaged (performance managed) as the audit staff et cetera et cetera already documented last week,

next was can Donna not do my foreign payments re western union funny nobody wanted to do them before not even (Morag) then went on to say payments are being made early I don't like paying early I said give me an example last month's payment was mentioned. On the 26 was that May or June which one? Give me details and I will check.

Then Morag said off the record!!!!!: that situation with your wages (tax code) (not changed) April 17 really annoyed me said (Morag) and only being brought up now!!! Why could you not pick up the phone to speak to me never mind all this email stuff and (Morag) did not like the tone of my email (copy) and why did I go to Margaret as (Morag) does wages I said I had emailed her (Morag) and after that went to Margaret to say its online may be effected. (Morag) they went on to say if you had known it was online you should have told me that's your job! That is my job payroll? Now!!!! I said I didn't know but it was obvious to

check online as I did as Morag had previously said things were moving mostly to online submission.

Next issue was back to the fines I paid £200 documented in emails (copies for file) how many times do I have to be asked about the same thing and about paying the money back to Bailey's from Sutherland blinds as previously detailed and discussed in meetings!

(Morag) now came back into office to mention again the G&T's amounts of Sutherland blinds in and out on old bank this also was discussed previously several times obviously still trying to get something on me and distrusting everything I have done lately.

I really feel ill and sick to my stomach that everything I do know is micro-checked what happened to the last 10 years of work et cetera that an issue now as well.

Emailed to myself for record of events and how I am feeling."

85. The claimant left work on 11 July 2017 around 5pm, as normal. When she got home the claimant became extremely distressed and hysterical. She saw her GP the following day, on 12 July. The claimant telephoned Margaret Patrick on the morning of 12 July and told her that she wouldn't be in work. The claimant did not give any further explanation for her absence at that time. The claimant's GP certified her as unfit for work for 28 days. The claimant provided the respondent with fit note dated 14 July 2017 (Bundle 1 @ 153). The reason for absence is stated in that as 'Reactive depression NOS'. That notified the respondent of the claimant's diagnosis of a mental health condition. In the 'Comments' section of that fit note was stated '*work and domestic stressors*.'

86. The claimant continued to be absent from work after the expiry of that fit note. The claimant provided the respondent with fit note dated 10 August 2017 (Bundle 1 @ 154). The reason for absence is stated in that as 'Symptoms of depression'. That fit note certified the claimant as unfit for work from 10 August 2017 until 24 August 2017. In the 'Comments' section was stated '*reactive symptoms*.'

87. The claimant provided the respondent with fit note dated 10 August 2017 (Bundle 1 @ 155). The reason for absence is stated in that as 'Symptoms of depression'. That fit note certified the claimant as unfit for work for a further period of 4 weeks. The claimant provided the respondent with fit note dated 21 September 2017 (Bundle 1 @ 156). The reason for absence is stated in that as 'depression'. That fit note certified the claimant as unfit for work for a further period of 4 weeks. The claimant provided the respondent with fit note dated 21 October 2017 (Bundle 1 @ 157). The reason for absence is stated in that as 'Symptoms of depression'. That fit note certified the claimant as unfit for work for a further period of 4 weeks. The claimant provided the respondent with fit note dated 21 November 2017 (Bundle 1 @ 158). The reason for absence is stated in that as 'Symptoms of depression'. That fit note certified the claimant as unfit for work for a further period of 56 days.

88. The respondent did not seek a medical report on the claimant or refer her to Occupational Health.

89. On 18 July 2017, the claimant raised a grievance with the respondent by sending her letter of that date (Bundle 1 @ 51 – 53). The claimant was assisted in drafting that letter by Amanda Lees. Amanda Lees is an experienced HR practitioner a Chartered Fellow of CIPD. She is a neighbour of the claimant's partner. The letter was addressed to '*Sandy / Morag'*. It begins:-

> "*In line with the ACAS Code of Practice on Disciplinary and Grievance Procedures, please consider this correspondence to constitute a formal letter of grievance. I hope in doing so we can deal with the issue quickly and amicably.*
>
> *As you are very much aware I have attempted to resolve the matter informally, however for the following reasons, I feel compelled to pursue a more formal route. When on 6 July 2017 at the meeting I requested, I was confronted with yourselves and Margaret. I felt very intimidated and requested we record the meeting so that I could have a true record of what was discussed. This request is reflective of my treatment in the past, and how I am finding it almost impossible to trust*

anything that is said to me. My request was forcibly denied and therefore the informal meeting did not proceed. However, after the audit meeting of the same day I asked again to speak to Morag with regard to my anxieties to which Morag's reply was she was disappointed in me for even trying to address the issues. Morag told me that I am imagining things that are just not there. I also had a prior meeting on 29 June with Sandy to put my points across, and although he granted this, on commencement he advised that he had only 15 minutes to spare I knew that this would not allow sufficient time for proper discussion on the issues. All my attempts to deal with the situation have been unsuccessful and I am left even more dissatisfied with my situation.

My final breaking point came on Tuesday morning 11th July when during the morning I could overhear conference call discussions between Morag Margaret and Lewis who were calling Steve Maguire of Creideasach 'on speaker'. I could hear every word of various people and situations being discussed, then Morag said, "There is one other but I am being overheard so I will call you from my mobile." On that basis I can only assume that the final case to be discussed referred to me. As later that the Morag and Margaret both came to my office and questioned me repeatedly on work issues previously raised, discussed, actioned and resolved and repeatedly being asked the same questions. Morag then said 'off the record Georgina' I was so disappointed about the way you dealt with your tax code .

This implied that the previous discussions were on the record which I was not advised of. I felt totally devastated and unable to function well on returning home. This contrived situation is yet another instance of an attempt to alienate and intimidate me.

I hope note by raising my grievance formally matters will be expediated in a profession and courteous manner.

The matters causing me great concern are:

90. That letter then set out ten specific points. After those ten points, the claimant's letter stated:-

> *"I must advise that the way in which I have been treated that the way in which I have been treated has led to a great deal of stress and anxiety. All I want from my work is to earn enough to support myself and my family, to be treated well and to be happy in my work without having my mental health detrimentally affecting me and my carer's responsibilities. I hardly begin to explain therefore how the actions of the few people has led to me being desperately unhappy and stressed. Because of everything that has happened to me, I got so anxious that the thought of facing another day in the office led me to breaking down. I obviously made an appointment with my GP and have subsequently been signed off sick with reactive depression.*
>
> *As my attempts to rectify matters informally have failed, I would welcome the chance to talk this through with you at a convenient time and place. I would like to be accompanied to the meeting. Although practice permits me to only be represented by a work colleague or trade union representative, it is now common practice to allow someone else as a witness. I have come not to trust the management team and fear repercussions for any other member of staff who may be brave enough to support me, so I formally request that I am permitted to have alternative representation. This may well be legal representation. I do not believe that the company should fear this, as you are aware of the role the representative plays in that they are not permitted to answer on my behalf. I would like the company to give this due consideration and advise me in writing at the same time as detailing when my grievance meeting will be convened. I look forward to a prompt response."*

91. In short, in this letter the claimant was giving the respondent information about her mental health issues, putting them on notice of issues pointing to a breakdown in the relationship of trust and confidence; stating concerns about

what she considered to be her excessive work load, making it clear that her mental health was impacting on her work, stating her perception that the respondent were seeking to end her employment relationship with them and seeking a meeting to discuss her matters of concern. In that letter, the claimant described the events on 11 July 2017 as '*my final breaking point*.' From the time of their receipt of that letter the respondent were made aware that the claimant's diagnosis of depression was long term and was having or was likely to be having a significant effect on her day to day activities.

92. The respondent's response to the claimant's letter was letter dated 24 July 2017 (Bundle 2 @ 54). That letter was drafted by Steve Maguire of Creideasach Employment Law Specialists. It is set out as being from Sandy Blaney. The claimant took the tone of this letter to be different from Sandy Blaney's normal informal style. That letter is formal in its tone. It states:-

> "*I refer to your grievance letter dated 18 July 2017.*
>
> *In accordance with the grievance procedures of employees of Goldcrest Ltd you are invited to attend a grievance hearing at 10 AM on Wednesday, 2 August 2017 at 61 Canyon Rd, Excelsior Park I will be accompanied at this meeting by Steve Maguire are outsourced HR adviser who will facilitate this meeting and ensure it meets with all legal requirements.*
>
> *This hearing is being convened to promote a fuller understanding of the issues you have raised and to enable me to come to a decision if you wish you may be accompanied by a trade union official or colleague of your choice please advise me by 5 PM on Monday, 31 July 2017 if you wish to exercise this right so I can make the necessary arrangements."*

93. The claimant was not informed of the terms of any Grievance Policy or Procedure which was intended to be followed in respect of her letter. No Grievance Policy or Procedure was sent to her. The claimant was not aware of any Grievance Procedure in place within the respondent's organisation at that time. The claimant was not informed of the terms of the Grievance

Procedure or Policy under which her grievance would be dealt. The claimant was not aware of 'the grievance procedures of employees of Goldcrest Ltd'. The claimant was not informed of what other steps the respondent was taking in investigating her grievance before that decision was made. There was no expression of concern for the claimant's health or regret that the claimant felt she had to set out her concerns in that letter. There was no offer of an informal meeting. There was no recognition of there being a difficult situation. There was no recognition of the claimant having notified the respondent of her three year history of depression and reliance on anti- depressants. There was no offer of any assistance to her. There was no suggestion that the claimant be referred to any occupational health provider for a medical report. There was no suggestion of seeking a medical report from the claimant's GP to enable the respondent to have a better understanding of the claimant's health condition and how it may impact on her at work. There was no recognition of the claimant being certified as unfit for work. The claimant was not asked if she was fit to attend the meeting. The claimant was not informed of any reason why her request to be accompanied by a friend was not agreed to. There was no reassurance offered to the claimant that there would be no repercussions for any work colleague who supported her at that meeting.

94. Margaret Patrick and Morag Blaney carried out investigations in respect of the claimant's grievance, despite both being named in the grievance. On 28 July, Morag Blaney emailed Steve Maguire with her and Margaret Patrick's comments on the matters raised by the claimant in her letter of 18 July. That email is in Bundle 4 @ 67. That email was sent to Steve Maguire and was before Sandy Blaney prior to him making a decision on the claimant's grievance. The claimant was not informed that Margaret Patrick and Morag Blaney had carried out that investigation. The claimant was not informed that those comments had been made and given to Steve Maguire and Sandy Blaney. The claimant did not have the opportunity to set out her position on those comments. In those comments, Morag Blaney and Margaret Patrick give their version of the events relied upon by the claimant in her letter of 18 July 2017. Comment is provided on events which took place on 29 June and 11 July. These notes state (Bundle 4 @ 69) '*Morag asked each individual (on*

*their own) the question Did you hear Margaret at any point [*say*] that Georgina was on happy pills to the open office?'* and in bundle 4 @ 71 (reproduced as typed):-

> "*Again everyone in the office was asked if Margaret had been aggressive or condescending towards Georgina and did she say are you still here and are those vats done.*
>
> *Alison – no Nicole – no Laura mcc – no Nicole – no Nicola – no Amanda – no gillian – on holiday Jennifer – no laura – no Donna – it was said about the vat but in a nice way so that she could get away on holiday."*

95. On 31 July the claimant sent an email to Sandy Blaney (Bundle 2 @ 15 & also @ 17). This stated:-

> *"I am in receipt of your letter to attend grievance hearing on second August, as I am not as you know a trade union member and due to the I nature of my position/grievance and the personal nature of this, I (would be unable) to have a work colleague present. I am saddened that it would appear that you are denying me, my request to even be accompanied and supported by a friend. This is extremely stressful for me, and I dread coming into the office knowing (from recent/past experience) that everyone will know my business and be aware of the circumstances of our meeting.*
>
> *I am more than aware that I will have to attend but again this would be very stressful for me. Therefore, for the reasons stated above, I would also appreciate you considering a venue out with the office premises.*
>
> *Kind regards."*

96. Sandy Blaney replied to the email by his email to the claimant sent on 1 August 2017 as follows (Bundle 2 @ 18):-

> *"Thank you for your email.*

I can assure you that the matters you have raised in your grievance letter are confidential and will be discussed with you at the hearing and potentially anyone you have cited, in the circumstances where I feel this would be appropriate to the resolution of your grievance. However, may I be clear that anyone spoken to with regard to your grievance will be made aware that the matter is confidential and may not be discussed with you directly or indeed anyone else. No employee, not connected with your grievance, will be aware of any parts of your grievance or indeed that a grievance has been lodged by you. I trust this information addresses your concerns over the meeting being held in the office and, further, I will ensure that the meeting location, within the office, will provide privacy to the hearing and its discussion.

Finally work colleagues are prevented in law from being victimised by employers as a result of attending grievance hearings, and therefore you should not be concerned about this matter in choosing a work colleague to accompany you.

I look forward to seeing you tomorrow."

97. The grievance hearing took place on 2 August 2017, in the respondent's premises. Present at that meeting were the claimant, Sandy Blaney and Steve Maguire. Steve Maguire took notes at this meeting. These handwritten notes are in Bundle 4 @ 73 - 77. No notes or minutes of the meeting were produced to the claimant during the course of her employment. The claimant recorded that meeting. She did not ask for permission to record the meeting. The claimant recorded the meeting because the respondent did not allow her to bring a friend to the meeting and she felt that she would not be able to remember all that was said. The meeting lasted approx. two and a half hours. Mr Maguire questioned the claimant on the issues set out in the ten points of the claimant's letter of 18 July. The meeting was led by Steve Maguire, with Sandy Blaney having very little input. The claimant did not feel that she had the opportunity to put over her concerns. The claimant felt that her concerns

were being dismissed. The respondent did not ask the claimant why she considered the events on 11 July 2017 to be her 'final breaking point'. Sandy Blaney did not investigate with the claimant why she thought that the respondent wanted to '*get rid of her'*. The claimant was not given any reassurance that that was not the case. At that meeting, the claimant said that she '*wished none of this had happened'*. She expressed regret that she had not had the opportunity to air her grievances with Sandy Blaney on 6 July. The claimant expressed that she wished to have an informal chat with Sandy Blaney. The claimant felt that she had had a working relationship with Sandy Blaney for ten years and that it was more appropriate for her to have a chat with him rather than via a formal meeting chaired by Mr Maguire. At that meeting the claimant asked if there was '*any hope of getting my job back*?'. Sandy Blaney shrugged his shoulders in reply. The claimant was not given any reassurance that her employment was continuing. The claimant concluded from that meeting that the respondent had already made their mind up about her grievance. The claimant was very distressed and attended her GP.

98. It was apparent to the respondent at the meeting on 2 August that the claimant was distressed. That level of distress was related to the claimant's mental health condition. Because the claimant had been so distressed, following his discussions with Sandy Blaney on 4 August, Steve Maguire decided that the best course of action would be to invite the claimant to a meeting at which the 'preliminary findings' of the investigation would be read out to her. Sandy Blaney agreed with that course of action. The claimant was not sent any notes or minutes from the meeting on 2 August. The claimant was not sent details of the procedure or process which was being followed in respect of her grievance.

99. On 9 August 2017 Sandy Blaney wrote to the claimant. This letter (Bundle 1 at 55) was drafted by Steve Maguire of Creideasach Employment Law Specialists. The claimant again took the tone of this letter to be different from Sandy Blaney's normal informal style. That letter is formal in its tone. It states:-

"*I refer to our grievance hearing of 2nd August 2017.*

I now write to update you on matters. At this time my investigations are continuing and I regret that I will be unable to determine my decision before the end of this week, as previously hoped.

However, I hope to conclude matters early next week and will contact you again then."

100. On 18 August 2017 Sandy Blaney wrote to the claimant. This letter (Bundle 1 at 56) was drafted by Steve Maguire of Creideasach Employment Law Specialists. The claimant again took the tone of this letter to be different from Sandy Blaney's normal informal style. The claimant did not receive the letter dated 18 August until 20 August, giving her two days' notice of the continued meeting. Her receipt of that letter exacerbated her mental health condition. That letter is formal in its tone. It states:-

"*I refer to our grievance hearing of 2nd August 2017.*

I now write to invite you to a continuation of this healing where it is my intention to share with you my preliminary findings concerning your grievance.

You are therefore invited to attend this meeting at 10 AM on Tuesday, 22 August 2017 at 61 Canyon Rd, Excelsior Park. I will be accompanied at this meeting by Steve Maguire, our Outsourced HR adviser, who will facilitate this meeting and ensure it meets with all legal requirements.

This hearing is being convened to promote a fuller understanding of the issues you have raised and to enable me to come to a decision. If you wish, you may be accompanied by a trade union official or colleague of your choice. Please advise me by 5pm on Monday 31st July 2017 if you wish to exercise this right so that I can make the necessary arrangements."

101. Steve Maguire prepared a statement to be read out by Sandy Blaney at the meeting on 22 August (Bundle 1 at 57 – 63). Sandy Blaney agreed with the content of that statement. That statement is set out as being Sandy Blaney's decision on the 10 points in the claimant's grievance. That statement was intended to be read out at the meeting. That statement does not indicate that it is intended to set out the 'preliminary findings' of the claimant's grievance. The format of reading out that statement does not indicate a purpose of obtaining a 'fuller understanding of the claimant's position.

102. Present at the meeting on 22 August were Sandy Blaney, Steve Maguire, the claimant and Amanda Lees. Amanda Lees is a neighbour of the claimant's partner. At the meeting Amanda Lees was asked if she had an HR background. Amanda Lees informed that she had '*quite a bit of HR experience'* but that '*today I'm here just as Georgina's friend.'* Amanda Lees has over 20 years' experience in HR and is a Chartered Fellow of CIPD. Amanda Lees was present as the claimant's friend and not in her professional capacity. Amanda Lees took notes at that meeting. The claimant recorded that meeting on her phone.

103. There was a delay of 20 minutes in starting the meeting. The claimant was anxious. When the meeting started Steve Maguire described it as '*a slightly unusual part of the process'*. He explained that he had thought that it would be best to invite the claimant to a meeting to discuss Sandy's 'preliminary findings' in recognition of '*what you'd said to me in terms of the stress that this causes'.* Although (as set out in the transcript in Bundle 4 @ 91 and in the invite to the meeting), the findings were described as 'preliminary findings', at the outset of the meeting Steve Maguire said to the claimant '*we are not really looking to have a debate as such on it'* (Bundle 4 @ 92). The meeting on 22 August progressed by Sandy Blaney reading out the statement which is in Bundle 1 @ 57 – 63. He had some difficulty reading this statement out. The claimant interpreted that as being because what he was reading out had been drafted by Steve Maguire, rather than being his own words. The terms of that statement are not consistent with it reflecting 'preliminary findings'. The format of reading out this statement is not consistent with the purpose of the meeting being to obtain a 'fuller understanding' of the claimant's issues. The statement begins (Bundle 1 @ 57)

with the words '*In coming to my determination of your grievance…'* The transcript in Bundle 4 @ 92 states Sandy Blaney's first words at this meeting as being "*Coming back to the determination of the grievance, I have reviewed the grievance letter dated 18 July 2017 and my notes of the hearing held on 2 August 2017'*. That does not give the impression of discussion or of the findings only being 'preliminary'.

104. In the statement which was intended to be read out by Sandy Blaney at that meeting, there are comments in respect of each of the claimant's 10 points. The final comments under point 1 are:-

> *'In the absence of any further information I am therefore unable to substantiate your assertion that there have been inappropriate references and incidents concerning your depression and use of antidepressants that have exasperated your illness.'*

The final comments under point 2 are:-

> *'I am therefore unable to substantiate your assertion that you have been forced to work excessive hours or that you were pressurised to return to work early from bereavement or illness. I am able to state that on the records held you do not appear to have taken your full annual leave entitlement in the last couple of years but am unable to make a determination as to the reason for this.'*

The final comments under point 3 are:-

> *'I am unable to substantiate your assertion that you were made to feel inferior and that your workload was somehow your fault.'*

The final comments under point 4 are:-

> *"I am therefore unable to substantiate your assertion that you were asked in front of the whole office, 'You still here. You done those VATs?' which tainted your holiday. If anything all staff who had a recollection of the day stated your mood was one of excitement and that Margaret had been assisting you to leave early. I am unable to take the view that Margaret had*

been less than supportive of you on this day and that her attitude towards you had been 'undermining, condescending and aggressive.'"

The comments under point 5 are:-

"You requested Parental Leave and were granted Parental Leave following due process. There does not appear to be an issue for me to determine here."

The comments under point 6 are:-

"I am unable to determine this matter as in the past you occasionally attended Management Information meetings and this practice has continued. You were absent from the most recently convened Management Information Meeting but it is my understanding that this was due to your audit commitments rather than any attempt to deliberately exclude you. On the information provided to me, by you, I have been unable to determine the nature of the information you feel has been withheld from you and what matters you feel you have been excluded from."

The final comments under point 7 are:-

"I am afraid I can not support your assertion, from this example, that Margaret sought to, or indeed did, undermine you."

The final comments under point 8 are:-

"I am therefore unable to support your assertion, from this example, that this incident represented an attempt to undermine you."

The final comments under point 9 are:-

"It would therefore appear that the raising of this matter again was not pre-meditated but rather as a direct result of a question to try and identify why your and Margaret's relationship appeared to Morag to be strained

and I therefore do not support the assertion that this was another instance of bullying behaviour."

The comments under point 10 are:-

"Whilst I find it regrettable that matters have not been able to be resolved informally, for perhaps a variety of reasons: your desire to record the meeting; Morag's belief, after the accounts meeting on 6th July 2017, that you had stated that most of your points had been addressed, etc, I nevertheless consider that the Company's Grievance Procedure exists for the purpose of resolving matters that have not otherwise been resolved. I therefore hope that you now feel you have had the opportunity to raise all matters and have had them duly and fairly determined by me.

On the basis of the points raised before me, I am unable to substantiate your assertion that your position has been diluted, undermined, that you have been kept out of the loop, and isolated both physically and verbally."

There is no indication in that statement that these findings are only preliminary findings. The claimant is not invited to make any comment on the conclusions set out in the statement. The claimant was told at the meeting that these were preliminary findings. She was asked to give the name of any other person who she thought should be spoken to.

105. When starting to read out this statement Sandy Blaney told the claimant that he had spoken with Laura Aird, Donna Sweeney, Gillian Glassford, Laura McCarthy, Margaret Patrick and Morag Blaney. There had been no statements taken by these witnesses or provided to the claimant. Prior to this meeting, the claimant was not made aware of what steps had been taken by the respondent to investigate the issues raised by her in her grievance. The claimant was not given any notes from any investigations. There was no Investigation Report.

106. Sandy Blaney did not read out the whole statement at that meeting. At the stage when Sandy Blaney had Amanda Lees asked '*So, Sandy, can I check,*

are you just basically reading from a letter that also Georgina is going to get?" The transcript in Bundle 4 @ 92 notes Steve Maguire's response as "*Yes, the points are going to be covered in the letter [voices overlap 4:09] So, but the points itself unless there was another [inaudible 4.16], obviously this is a preliminary so you will get a letter and will be a normal course where a decision is given to you, so this is just where Sandy's thought process are now, so please continue."*

107. By the stage of Sandy Blaney having read out what is the main paragraph in Bundle 1 @ 57, i.e. the comments in relation to her point 1, but without the final comments re that point 1 which are set out above, the claimant was visibly upset. Steve Maguire offered her water. Amanda Lees said (as set out in the transcript at Bundle 4 @93) '*I think what it is, is it's difficult to listen to somebody who is clearly telling lies about something that has happened, that you know has happened and I get that.'* The meeting then progressed as recorded in the transcript in Bundle 4 @ 93 – 95. Steve Maguire asked Amanda Lees who was telling lies. Amanda Lees said that the claimant *'feels vulnerable'.* The claimant said *'do you think one of them in there is actually going to say that against Margaret or anybody else? And stick up for me, no likely'.* The claimant said *'You have put me through enough.'* Steve Maguire said

> *'Georgina the key element here is it's a preliminary finding. If you are saying someone is lying here, can you tell me who and I'll check?*
>
> *This is the whole purpose behind this is to tell me this is where we've got to, we've spoken to people, I've been accompanying Sandy, but this is what they've said to us. Now if you're saying to me, well that's not, speak to somebody else, then this is the purpose behind it. If you say, that person is lying, then tell me who….'*

The claimant's response to that was *'Sorry, don't be ridiculous here.'* Steve Maguire replied 'T*ell me who is lying.'* The claimant asked for *'5 minutes'* and Steve Maguire called a recess.

108. The claimant's recording continued in that recess. During that recess, Steve Maguire came to speak to the claimant and Amanda Lees. A recording of the discussions which took place then were then produced to the Tribunal as digital voice recording 003_037 and Voice 005. The claimant's own typewritten transcript of part of that meeting is in Bundle 3 @ 1 – 7. In January 2021 the respondent instructed Central Scotland Office Services ('CSOS') to prepare a transcript of recording 003_037. That transcript is in Bundle 4 @ 90 – 102. The transcript in Bundle 4 @ 90 – 102 is an accurate transcript of what was said. That transcript notes some parts of the recording as being inaudible.

109. The transcript in Bundle 4 @ 97 – 102 sets out some of what was said in this recess. That transcript notes that some parts were inaudible. The claimant said there was a '*gang culture'* within the respondent's business. Steve Maguire sought to reassure the claimant about his role. The transcript sets out (Bundle 4 @ 99 -100) the following (with 'SM' being Steve Maguire and 'GY' being the claimant):-

> '*SM You don't have knowledge of me though, you've only met me for five minutes and you don't know how I operate. But I'll tell you that I'm funded by the business – absolutely not Sandy – but I'm funded by the business and I'll make sure if there is somebody not telling lies, it will fall, it always falls [inaudible 20.17], now I wouldn't want to fall in front of a tribunal.*
>
> *GY Sorry, I do not categorically believe that you will ever, ever find out they are lying because they could lie through their teeth with a straight face, because nobody is going to get, go against the board. Because that's what happens when you go against the board, you lose your job, you get ostracised for months, you get not spoken to, you get a gang culture.*
>
> *SM But remember Georgina.*
>
> *GY No, no, no, I am telling the truth, you get gang culture.*
>
> *SM Where do you go*

GY Yvonne down the stairs, not spoken to for – every point since she came back it's like, that is the culture of the business.

SM But Georgina I understand that you do, where'd you go if you are not happy today or the next few days what, what recourse do you have? And the recourse you have is clearly you can, well I told you would be to resign. Now that's not the best scenario, but this is the recourse, so I suggest …

GY I've consulted a lawyer already on Friday and Monday.

SM So you'll know then, they'll say, right, okay, it's tantamount to a fundamental breach of the contract, you would argue, please don't record me on this."

110. At this point in the recording labelled 'Voice 003_037' Steve Maguire can be heard saying '..*Now that's not the best scenario'.* In the recording labelled 'Voice 005' the word '*not'* is muffled.

111. There is a significant difference between the claimant's own transcript (Bundle 3 @ 5 & 6) and the same part of the discussion in CSOS's transcript (Bundle 4 @ 100). The claimant's version is:-

"you do, where'd you go if you're not happy today or the next few days. What recourse do you have and the recourse you have is clearly if you remember well I've told you it would be to resign. Now that's the best scenario. But this is not recourse, so suggest (consulted lawyer) so you'll know then will say well right ok it's tantamount to a fundamental breach of the contract you would argue please do not record me on this…"

The SSOS's version is:-

"SM But Georgina, I understand that but where do you go, where do you go if you are not happy today or the next few days, what, what recourse do you have? And the recourse you have is clearly you can, well I told you would be to resign. Now, that's ***not*** *the best scenario, but this is the recourse, so I suggest.. (****emphasis in bold added)***

GY I've consulted a lawyer already on Friday and Monday.

SM So, you'll know then, they'll say, right, okay, it's tantamount to a fundamental breach of the contract, you would argue, please don't record me on this."

112. The reference here to 'recording' was to notes being taken by Amanda Lees.

113. The claimant focused on having heard the word 'resign'. The claimant interpreted what Steve Maguire said as her being asked to resign. Steve Maguire did not ask the claimant to resign. At no time thereafter, did Steve Maguire, Sandy Blaney or Tom Preston take any steps to seek to reassure the claimant that the respondent wanted the claimant's employment relationship with the respondent to continue and they did not want her to resign, no matter what she thought she had heard or how she had interpreted what had been said.

114. The Grievance Hearing on 22 August 2017 did not reconvene after the recess. The claimant was sent the letter dated 24 August (Bundle 1 @64 – 70). That letter is set out as being from Sandy Blaney. It was drafted by Steve Maguire and is in the same terms as the statement which was intended to be read out on 22 August (Bundle 1 @ 57 – 63), with the following additional final paragraph:-

"I have to advise you that the Grievance Procedure entitles you to appeal my decision to Mr Tom Preston, c/o R*ainbow , 61 Canyon Road, Excelsior Park, within 5 working days of receipt of this letter. If you do appeal, you will be given an opportunity to explain your grievance at an Appeal Hearing at which you may be accompanied by a colleague or trade union official or indeed with the consent of Mr Preston by a family member or friend if this will provide support to you, subject to them acting in a constructive manner."*

115. No further investigations were carried out by the respondent prior to that letter being sent to the claimant. There was no Investigation Report. That letter, and the statement, are set out as being Sandy Blaney's decision on the claimant's grievance. There was no reference in that letter to the meeting on 22 August or the discussions with the claimant during the recess of that meeting. There was no expression of any concern about the claimant having raised these issues. There was no suggestion that any other investigations would be carried out by the respondent. There was no recognition that the claimant had been certified as unfit for work because of reactive depression. There was no indication of any concern for the claimant's welfare. There was no indication that the respondent wished to facilitate the claimant's return to work. There was no recognition that the claimant was experiencing difficulties at work. There was no recognition of her position that her workload was excessive. There was no suggestion of any offer of mediation or any other route to resolving the situation and enable the claimant to return to work. The letter set out Sandy Blaney's understanding that there was a dispute between the claimant and Morag Blaney on certain matters and that the relationship between them had deteriorated. There was no solution offered to that situation. There was no clarification of the duties of claimant's role. There was no offer to meet with the claimant to discuss her duties and establish if any assistance or training was required. The claimant was not asked why she had not taken her annual leave entitlement in the previous years. There was no suggestion of any discussion or procedure to carry holidays over into the next leave year where annual leave could not be taken. There was no suggestion of any investigation being carried out on any matters in the workplace which could be affecting the claimant's health. There was no suggestion of the claimant being referred for an Occupational Health report or of obtaining a medical report from her GP or any treating Consultant. There was no suggestion of any redress for the claimant. The claimant was not sent any notes or minutes from that meeting.

116. The claimant notified the respondent on 25 August that she would be appealing the grievance decision (Bundle 1 @ 70). That letter stated:-

"*In response to your reply dated 24th August received by email 25th of August.*

I have concerns over the actual detail contained within the reply as my documentation differs on almost all the points.

Please treat this letter as a formal grievance appeal and escalate it accordingly."

117. Steve Maguire drafted the letter sent by Tom Preston to the claimant on 6 September 2017 (Bundle 1 @ 72). That letter acknowledges the claimant's appeal and asks for the claimant to provide her grounds of appeal by noon on 13 September 2017. The claimant set out her grounds for appeal to in her letter also dated 25 August but which was received by the respondent on 13 September 2017 (Bundle 1 @ 73). That letter is in the same terms as that at Bundle 1 @ 70, with the following as an appendix:-

"G*rounds for appeal as requested 6th September continued / written and submitted 13/9/2017*

I categorically refute that all points raised by me have been answered in an honest manner, as I know that my grievance is the honest truth and all my points are true facts as detailed in my grievance and previously documented by me.

That at no time have you discussed me returning to work, or addressed my illness, quite the contrary having previously asked me to resign.

That my main grievance being (breaking point) detailed on my grievance and documented by me at the time it occurred has not been answered fully.

That what you state are not significant points I do, and categorically dispute your findings are accurate and factual.

I have not been provided with the minutes of the first meeting I attended, please provide these."

118. The Appeal was heard by Tom Preston. The Appeal Hearing took place at the respondent's premises on 14 September 2017. Present at the Appeal Hearing were the Steve Maguire, Tom Preston, the claimant and (for part of the meeting) Amanda Lees. The claimant agreed to continue the Appeal Hearing after Amanda Lees had to leave. After Amanda Lees left, much of the discussion at the Appeal Hearing centred on whether Steve Maguire had asked the claimant to resign. Steve Maguire denied having asked the claimant to resign. The claimant said that she was sure that he had asked her to resign. The claimant's recollection was questioned. The claimant was given no reassurance that, no matter what she thought she had heard, the respondent did not wish her to resign. There was no indication to the claimant at the appeal hearing that there was any recognition by the respondent of her mental health difficulties, of the difficulties she was experiencing at work or of the difficulty of the situation. There was no suggestion of any solution or mediation or any other option to facilitate her return to work.

119. After the Appeal Hearing, Tom Preston spoke to Margaret Patrick. Margaret Patrick confirmed her version of events. The claimant was informed of the outcome of the appeal by letter from Tom Preston dated 27 September 2017 (Bundle 1 at 74-75). As set out in that letter, Tom Preston's decision centred on him finding that Margaret Patrick was '*candid and clear minded regarding events in which she was cited'* and '*that Mr Maguire had attended alongside Mr Blaney at the subsequent investigations with staff and he was able to confirm, to my satisfaction, that comments attributed to your work colleagues concerning their account of events, as referenced in Mr Blaney's letter, were indeed accurately recorded."*

120. This appeal decision letter does not address all the claimant's grounds for appeal as set out in her 'appendix' sent to the respondent on 13 September. Tom Preston reached a conclusion on who was telling the truth based on this evidence. There was no reference to the claimant's health or the impact of that on her work situation. There was no recognition of the claimant having gone through the grievance and being unsuccessful at appeal. There was no recognition of her having issues in the workplace. There was no suggestion

of any process being put in place to resolve matters and enable the claimant to return to work. There was no suggestion of any attempt of mediation between the claimant and Morag Blaney or any other. The claimant was not sent any notes or minutes from the appeal hearing.

121. Steve Maguire drafted the letter from Sandy Blaney to the claimant dated 29 September (Bundle 1 @ 76). That letter states:-

> *"I refer to your current absence from duty due to ill health.*
>
> *In this connection, I would be obliged if you could attend an informal meeting on Thursday 5th October 2017 at noon, to discuss this matter further. The purpose of this informal meeting is to obtain a better understanding of your sickness and to ascertain if there is anything that we, as your employer can do, to aid your return to work in the short term. I will be accompanied at this meeting by Steve Maguire, HR Advisor, whose role will be to facilitate the meeting.*
>
> *This meeting will be held at 61 Canyon Road, Excelsior Park.*
>
> *Should you be unable to attend or would wish another location, such as your home, please contact me as soon as possible on <MOBILE NUMBER REDACTED> to arrange a suitable alternative.*
>
> *I look forward to seeing you then."*

122. This was the first indication to the claimant from the respondent of them seeking to investigate her health difficulties. The claimant took the tone of that letter to be formal and non-conciliatory. She believed (correctly) that the letter had been drafted by Steve Maguire. She did not believe that the respondent were seeking to resolve the work place differences. There was no recognition in that letter that the claimant's grievance had not been upheld. There was no expression of concern for the claimant's ongoing ill health. There was no recognition in that letter that the claimant had raised concerns about working relationships. There was no indication of any steps such as mediation to seek to resolve the difference and repair the damaged working relationships. There was no recognition of the claimant's position that her workload was excessive. The claimant cancelled that meeting and didn't attend any meeting with the respondent thereafter.

123. Steve Maguire drafted the letter from Sandy Blaney to the claimant dated 13 October (Bundle 1 @ 77). That letter is in very similar terms to the letter of 29 September. It states:-

> *"Following your cancellation of our last scheduled meeting, and my now return from holiday, I again write with reference to your current absence from duty due to ill health.*
>
> *In this connection, I would be obliged if you could attend a re-scheduled informal meeting on Friday, 20th October 2017 at 11am, to discuss this matter further. The purpose of this informal meeting is to obtain a better understanding of your sickness and to ascertain if there is anything that we, as your employer can do, to aid your return to work in the short term. I will be accompanied at this meeting by Steve Maguire, HR Advisor, whose role will be to facilitate the meeting.*
>
> *This meeting will be held at 61 Canyon Road, Excelsior Park.*
>
> *Should you be unable to attend or would wish another location, such as your home, please contact me as soon as possible on <MOBILE NUMBER REDACTED> to arrange a suitable alternative.*

I look forward to seeing you then."

124. The claimant cancelled that meeting. On 18 October 2017 Steve Maguire sent an email to the claimant (Bundle 1 @ 78). That email stated:-

"*I have been asked by Sandy to confirm that the counselling meeting has been rescheduled for Friday 27th October 2017 at 11am.*

We hope your health is continuing to improve and look forward to seeing you then."

125. The claimant's health was not improving and no indication had been given to the respondent that her heath was improving.

126. On 20 November the claimant wrote to respondent resigning from her employment (Bundle 1 at 79). That correspondence was sent by the claimant to Sandy Blaney. Her email to him is headed '*Payroll No 96 – Resignation with immediate effect – subject to implied contract."* It states:-

"*I am hereby giving you notice in terms of my (implied) contract to resign from my post. My implied contract I believe requires four weeks' notice and hence it will expire on 15 December 2017.*

I am still unable to work due to the stress and anxiety of your behaviour to me and have sent you six lines covering my recent absence and will cover my absences to the expiry of my notice.

I feel that the way in which I have been treated by the company leaves me no option but to resign it is clear you do not want me in the company and we have been unable to resolve our differences.

I also feel I have been discriminated against for taking time off for family matters which appears to be part and parcel of why you don't want me in this business.

Please send my P 45 and wage slips to my home address please make the payments of salary and accrued holiday pay to my bank."

127. The respondent replied by letter sent as being from Sandy Blaney but drafted by Steve Maguire dated 24 November 2017. That letter stated:-

"I write further to receipt of your email dated 20th of November 2017 but received on 21 November 2017 at 17.06.

As you are aware your period of ill health commenced on 12 July 2017 and is ongoing.

By letter dated 18 July 2017 you submitted a 10 point grievance letter to the company. By letter dated 24th of July 2017 I invited you to attend a grievance hearing on 2 August 2017. On 2 August 2017 a grievance hearing was convened by myself. By letter dated 9 August 2017 I wrote to you to update you on matters and that I required more time to determine your grievance as I was conducting further investigations as a result of points you had raised before me in the grievance hearing. On 22 August 2017 I reconvened the grievance hearing with you in order to set out my preliminary findings. By letter dated 24 August 2017 I set out my determination of each of your points of grievance, having spoken with your colleagues: Laura Aird; Donna Sweeney; Gillian Glassford; Laura McCarthy; Margaret Patrick and Morag Blaney, and in conclusion was unable to substantiate any of your grievances raised. By letter dated 25 August 2017 you exercised your right to appeal to Mr Preston. On 14 September 2017 a grievance appeal hearing was convened by Mr Preston. By letter dated 22 September 2017 you were informed by Mr Preston that he was unable to uphold your appeal.

Since the conclusion of the appeal process, I wrote to you on 29 September 2017 to invite you to an informal meeting on Thursday, 5 October 2017. The stated purpose of this meeting was to obtain a better understanding of your sickness and to ascertain if there is anything that we, as your employer, can do to aid your return to work in the short term. Regrettably, you cancelled this meeting. By letter dated 13 October 2017, following my return from holiday, I invited you

to attend a rescheduled informal meeting with the same purpose as stated above. Again, you cancelled this meeting.

I set out the above information as I take great issue with the content of your resignation letter in which you state that the way in which you have been treated by the company leaves you with no option but to resign. I and Mr Preston took a great deal of time to attempt to substantiate the allegations made within your original grievance letter dated 18 July 2017, but were unable to do so. Since then, as shown above, I have attempted to meet with you to aid your return to work, but you have provided me with no opportunity to achieve this objective as you simply cancelled any meetings I have arranged with this purpose in mind.

I would like to provide you with an opportunity for reflection by offering you an opportunity to retract your resignation letter and engage with the Company's Attendance Procedure. I would therefore request that you contact me by no later than ***noon on Wednesday, 29 November 2017****. In the circumstances we are you failed to make contact I will be left with no other option but to accept your resignation."*

128. The respondent did not seek to find out why the claimant had cancelled the meetings. The letters are not in a reconciliatory tone. There is no recognition that the claimant's grievance has not been upheld or that she may have continuing issues in the workplace. There is no recognition of the effect of the dispute on the claimant's health. There is no indication that the respondent wishes their employment relationship with the claimant to continue. The claimant was not aware that the respondent had any attendance procedures. She did not receive any communication that any such procedure was in effect.

129. On 29 November 2017 the claimant sent an email to Sandy Blaney confirming her resignation (Bundle 1 at 82). That email is headed '*Georgina letter received Monday 27 November'* and states:-

"*Good morning Sandy.*

Further to the above, I stand by the terms of my letter and I am sorry but I do not consider that the offer here is going to achieve anything, as having no previous knowledge of the company's attendance procedures. Furthermore, before my grievance decision and appeal having been asked to resign, transcript (recording) provided to Steve, leads me to believe there has been no genuine intent on your part to achieve a mutually agreeable resolution."

130. At no time during the course of her employment did the respondent seek a medical report on the claimant or refer her for any Occupational Health assessment.

131. At no time after their receipt of the letter from the claimant dated 18 July 2017 (bundle 1 at 51 – 53) did the respondent seek to discuss with the claimant that she had notified them of her three year history of mental health problems. At no time after their receipt of that letter did the respondent investigate the impact of that condition on her employment or any steps which should be taken by them in recognition of that condition. At no time after their receipt of that letter did the respondent address the issues which the claimant had raised about her workload. At no time after their receipt of that letter did the respondent seek to reassure the claimant that they wished her employment relationship with them to continue.

132. The claimant's letter in Bundle 2 @ 26 is a contemporaneous record of how the claimant felt on receiving the outcome of the grievance appeal. That letter was not sent or read to the respondent. The claimant had intended to read that letter to them at a meeting (as stated in her handwritten note on that letter). That letter states:-

"*It came as no surprise to me that the company's findings of my grievance were that it was all refuted and denied.*

To understand my lack of surprise you would have to understand the culture of this company regarding they are dealing with HR issues - rather than show any duty of care, the approach is to systematically

bully an employee into submission, to the point that leaving becomes the only option."

And

"*No one from the company has been in touch to ask after my well-being or return to work, enough said! I have been so badly affected by this experience and my bad treatment, that I am currently seeking counselling (suggested by my GP) and am unlikely to be able to seek or gain suitable employment for some time."*

133. The claimant and Amanda Lees met with Steve Maguire in a Holiday Inn. That meeting was intended to be a meeting for the purposes of a protected conversation. It was not a meeting to discuss reconciliation of the workplace issues or to seek a means by which the claimant could return to work for the respondent.

134. The events set out above impacted on the claimant's mental health. The claimant has been unfit for work since the termination of her employment with the respondent.

135. The claimant has sought to mitigate her losses. The claimant has sought alternative employment in accounting / finance roles (Bundle 4 @ 204 – 207). She has not been successful in obtaining alternative employment. The claimant's mental health conditions have affected the claimant's capability to work and her capability to search for alternative employment, as set out by Dr Ewing Day in his March 2020 report (Bundle 4 @ 3 – 10, particularly at paragraphs 47 – 57. During 2020 the claimant carried out some unpaid voluntary work for a local food bank. Dr Ewing Day's opinion is that the claimant will require a period of psychological treatment of between 6 – 12 months for an adequate dose of therapy. He estimated the waiting time for that treatment to be circa 18 weeks. Dr Ewing Day again examined the claimant in January 2021 and provided an updating report (Bundle 4 @ 45 – 47). His opinion is that the claimant presents with Moderate Depressive Disorder, with secondary Adjustment Disorder with mixed Anxiety and Depression. Dr Ewing Day's

conclusions are drawn using his professional expert opinion and based on a multi- modular assessment.

136. The claimant's date of birth is 10 September 1962. The claimant's gross annual salary was £45,500. Her gross monthly pay salary from the respondent was £3971.67. Her net monthly pay was £2532.18. The claimant's Schedule of Loss is in Bundle 4 @ 34 – 36. The respondent contributed to the claimant's Nest pension. The respondent's pension contributions in respect of the claimant were as set out in the schedule in Bundle 4 @ 43. At the time of termination of employment, the respondent's contribution rate was 1% of the claimant's gross annual salary. That would have increased to 2% for the tax year 2018/19 and to 3% from 6 April 2019. The claimant has been in receipt of Carers Allowance from 18/12/17, at a rate of £62.70 per week. The claimant has not been fit for work since July 2017.

137. The claimant was examined by Dr Ewing Day MA (Hons), DClinPsyc, CPsychol(Clinical Psychologist) for the purposes of preparing his report of 10 March 2020 (Bundle 4 @ 3 – 10) and 18 January 2021(Bundle 4 @ 44 – 47). Dr Ewing Day concurs with the earlier opinion of Dr Stirling (Consultant Psychiatrist) diagnosing the claimant with Moderate Depressive Disorder. Dr Ewing Day also diagnosed the claimant with Adjustment Disorder with Mixed Anxiety and Depression. His opinion is that both conditions are secondary to her treatment by the respondent and subsequent loss of employment. These conditions have had a lasting effect on the claimant's ability to work and to search for employment.

Submissions

138. The claimant chose not to make any submissions.

139. Mr Maguire spoke to his written submissions, in which he addressed each of the identified issues.

Knowledge

140. Mr Maguire invited the Tribunal to find that the only occasion when Margaret Patrick had visited the claimant at her home was in July 2013. He relied on the respondent's position that the medical certificate from that time had not been received and that the claimant worked at home at that time because of lack of internet connection, due to the office move. He relied on Margaret Patrick's evidence that the claimant had not informed her that she had depression at that time and evidence from Laura Aird and Donna Sweeny that the claimant was a very private person. He relied on the claimant's position in her evidence in chief that '*I did not tell them, but having a history over 4 years I was exhibiting all the signs of a depressed person, not speaking, not focused. It was not the environment to go to the Board to say I am depressed. It was not something they would entertain very well*.". His mission wondered did not know and could not reasonably be expected to know at any time during the course of the claimant's employment that the claimant had a disability.

141. In respect of the period after the respondent's receipt of the claimant's sick claim stating 'Depression NOR' and their receipt of the claimant's grievance letter of 18 July, it was the respondent's position that they were not aware of the effect of the claimant's mental health condition on the claimant's day-to-day activities, and so did not have knowledge of disability status.

Section 20

142. Mr Maguire addressed each of the PCPs relied upon by the claimant.

143. Reliance was placed on evidence showing that there was no blanket ban on employees taking unpaid leave and invited the Tribunal to find that the respondent does not operate a blanket ban on unpaid leave.

144. Reliance was placed on evidence from himself and from Sandy Blaney that at the outset of the Grievance Hearing the claimant was offered to have a friend present and that the claimant chose to proceed without being accompanied. He relied on the claimant then having been accompanied by Amanda Lees.

145. Reliance was placed on evidence of flexibility of hours worked by the claimant and the respondent's proposal to formally vary the claimant's hours of work.

146. Reliance was placed on evidence that all employees having responsibility for taking their own annual holiday entitlement, with the only limit on the claimant being that she should not be on annual leave at the same time as Margaret Patrick.

147. Reliance was placed on evidence that all of the respondent's employees and Directors are paid SSP only during sickness absence.

Section 26

148. Reliance was placed on the evidence of Sandy Blaney and Tom Preston. Reliance was placed on Amanda Lee's confirmation that the claimant was told that she could take a break at any time, could interject at the end of each point and was provided with the opportunity to meet with Sandy Blaney. Reliance was placed on the claimant being asked if she was comfortable to continue with the appeal hearing after Amanda Lees left and saying that she did want to continue. Reliance was placed on the process followed in dealing with the claimant's grievance and its determination. It was submitted that the grievance was handled in accordance with the ACAS Code of Conduct.

Section 27

149. It was submitted that the claimant was not subjected to any detriment in consequence of raising a complaint under the respondent's grievance procedure and that, to the contrary, the respondent went to great lengths to determine the claimant's grievance.

150. Reliance was placed on the claimant having being granted parental leave (26 – 28 June 2017) and having been involved in the same matters before and after having made her request for parental leave (5 June 2017). It was denied that the claimant was subjected to a detriment in consequence of having made an application for parental leave.

Section 15

151. It was noted that the claimant was unable to articulate what she was relying on in respect of her claim under section 15 and that the claimant's position was

that she was relying on the same matters relied on otherwise in her claims. Reliance was placed on the guidance in *Pnaiser v NHS England* [2016] IRLR 170, EAT and in *City of York v Grosset* [2018] ICR 1492, CA. It was submitted that the claimant was not treated unfavourably because of something arising in consequence of her disability. In the event of the tribunal not being with Mr Maguire on that point it was further submitted that any unfavourable treatment because of something arising in consequence of her disability was a proportionate means of achieving a legitimate aim. Mr Maguire's position was that he was unable to specify the legitimate aim because of the lack of specification from the claimant.

Constructive Dismissal

152. Mr Maguire noted that in her claim for constructive dismissal the claimant relies upon the actions of the respondent in respect of matters set out in her letter of 18 July 2017 and the respondent's conduct in the grievance procedure. It was noted that the claimant relies on the respondent's actions being in breach of the implied term of trust and confidence. Reliance was placed on the general principles set out in *Western Excavating v Sharp* 1978 IRLR 27, CA, as advanced in *Mahmud v BCCI SA* 1997 IRLR 462 HL and in *Baldwin v Brighton and Hove City Council* 2007 IRLR 232, EAT.

153. It was noted that the test of whether the employer has committed a fundamental breach of the contract of employment is to be judged according to an objective test and not by the range of reasonable responses test (*Tullet Prebon plc V BGC Brokers* [2011] EWCA Civ 131; *Bournemouth Higher Education Corporation V Buckland* [2010] ICR 908 CA. It was noted that it was confirmed by the EAT in *Leeds Dental Team V Rose* [2014] IRLR 8 that it is not necessary to show a subjective intention on the part of the employer to destroy or damage the relationship to establish a breach. Reliance was placed on the comments of Mr Justice Browne Wilkinson in *Wood v WM Car Services Ltd [*1982] ICR 666 EAT:-

> "*The tribunal's function is to look at employer's conduct as a whole and determine whether it is such that its effect judged reasonably and*

sensibly is such that the employee cannot be expected to put up with it."

154. It was noted that conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal, commonly referred to as 'the last straw' (*Lewis v Motorworld Garages Ltd* 1985 IRLR 465 CA). The EAT's comments in Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589 was noted:-

"*In cases where there has been previous conduct in breach, which has not been affirmed, and then a further innocuous act, which tips the employee into resignation, the employee may still, colloquially, think of the most recent conduct as 'the last straw'."*

155. The Tribunal was invited to consider Margaret Patrick's evidence on visiting the claimant at home; whether Mrs Patrick exerted any pressure on the claimant to return to work; the circumstances surrounding the day of the claimant's departure on holiday; whether the claimant received any support from Mrs Patrick; the circumstances surrounding being kept informed of issues with the SAGE upgrading and her awareness of the claimant's depression.

156. Reliance was placed on Laura Aird's evidence on discussion concerning the claimant's health and medication; the circumstances surrounding the day of the claimant's departure on holiday and the discussion on VAT.

157. Mr Maguire asked the Tribunal to prefer the evidence of Margaret Patrick, as supported by Laura Aird and Donna Sweeney, on these matters.

158. It was submitted that the respondent's stance and approach was 'perfectly acceptable' in relation to any refusal to allow the claimant to record a meeting on 6 July 2017 and in Morag Blaney and Margaret Patrick attending in the claimant's office on 11 July 2017. It was submitted that the respondent spent a significant amount of time in dealing with the claimant's grievance. It was

submitted that Mr Blaney and Mr Preston determined the claimant's grievance in accordance with all the available information put before them. It was submitted that at no time was the claimant asked to resign by Mr Maguire. Reliance was placed on the recordings and various transcripts provided to the Tribunal. It was submitted that Mr Blaney's actions under the Attendance Policy, following the conclusion of the grievance process and providing the claimant with the opportunity to rescind her resignation, demonstrate that the respondent was wishing to retain the services of the claimant. It was submitted that the respondent's actions was not calculated or likely to destroy or seriously damage the relationship of trust and confidence. It was submitted that the respondent's conduct instead demonstrates an intent to be held to the contract and to facilitate the claimant's return to work and that there was no fundamental breach of contract at any time which entitled the claimant to resign.

Notice Pay

159. Reliance was placed on the evidence that the claimant served the respondent with four weeks' notice from 20 November 2017 to the end of the contract on 15 December 2017. Reliance was placed on the claimant being certified as unfit for work for that period and being entitled only to SSP for that period. Reliance was placed on the wage slips in Bundle 1 @ 93 – 95. It was submitted that no additional money is due to the claimant.

Holiday Pay

160. Reliance was placed on the evidence of Margaret Patrick that holidays are not carried over from year to year, unless previously agreed. Reliance was placed on the lack of evidence from the claimant on any agreement to holidays being carried over from previous leave years. It was submitted that no additional sums are due to the claimant in respect of accrued but untaken holidays in leave year to termination date or otherwise.

Burden of Proof

161. The burden of proof is on the respondent in respect of their position that during the course of the claimant's employment with them they did not know or could

not reasonably be expected to know that the claimant had the protected characteristic of disability. In respect of the claimant's claims under the Equality Act and in respect of the constructive dismissal claim, the burden of proof is first on the claimant. In respect of each of those claims, the Tribunal required to consider the strength of all the evidence, presented to it by both parties, and decide whether the claimant has made out her case, on the balance of probabilities. The standard of proof applied in Employment Tribunal cases is the civil standard of proof of 'on the balance of probabilities'. Mr Justice Denning in *Miller v Minister of Pensions 1947 2 All ER 372,KBD,* explained the civil standard proof in these terms:-

> *"[The degree of cogency] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.*'

162. Section 136 of the Equality Act 2010 applies to any proceedings brought under that Act. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that contravention occurred' (s136(2)). This statutory position follows the development of case law. The Court of Appeal had provided guidance on the standard of proof in civil cases (including Employment Tribunals) in *Igen Ltd (formerly Leeds Careers Guidance) and ors -v- Wong and other cases 2005 ICR 931, CA*, revising the guidance in *Barton*. In approving the Barton principles, the Court of Appeal said:-

> *"The statutory amendments clearly require the ET to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the*

complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."

163. This relates to what is known as the 'shift' in the burden of proof. The guidance provided by the EAT in *Barton -v- Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 (*referred to in *Igen)* is as follows:-

"(1) Pursuant to s.63A of the Sex Discrimination Act 1975 , it is for the Applicant who complains of (sex) discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondents have committed an act of discrimination against the Applicant which is unlawful … These are referred to below as 'such facts'.

(2) If the applicant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. …

(4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word is 'could'. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw … from an evasive or equivocal reply to a questionnaire …

(7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account … This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the applicant has proved facts from which inferences could be drawn that the Respondents have treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.

(9) It is then for the respondent to prove that he did not commit, or, as the case may be, is not to be treated as having committed that act.

(10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(11) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.

(12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

164. The Court of Appeal in *Igen* decided that in considering what inferences or conclusions can be drawn from the primary facts, the ET must assume that there is no adequate explanation for those facts. The Equality Act 2010 section 136(2) clarifies that the Tribunal must assume there is no explanation at the first stage. The Court of Appeal in *Igen* concluded that i*t 'may be helpful for the Barton guidance to include a paragraph stating that the ET must assume*

no adequate explanation at the first stage'. In that way the *Barton* guidance has been amended by *Igen.*

165. The approach in *Igen* was approved in by Lord Justice Mummery in *Madarassy v Nomura International plc 2007 ICR 867, CA*. Both that case and *Igen* were approved by the Supreme Court in *Hewage v Grampian Health Board 2012 ICR 1054, SC*. That is the approach which has been applied by the Tribunal in this case, and is in accordance with the Equality Act section 136(2).

166. The Tribunal took into account that if an employment tribunal does make findings of fact from which an inference of discrimination could properly be drawn, it will be an error of law for it not to do so and thus avoid the stage two enquiry of requiring the employer to disprove the inference (*Country Style Foods Ltd v Bouzir 2011 EWCA Civ 1519, CA*)

167. The Tribunal approached its considerations of the claimant's claims under the Equality Act in terms of the Burden of Proof provisions as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and* ors. –v- Wong and others 2005 ICR 931, CA (as approved by the Supreme Court in *Hewage –v- Grampian Health Board* [2012] IRLR 870).

168. The claimant made claims under a number of provisions of the Equality Act 2010. In respect of some provisions of that Act relied upon by the claimant, in terms of section 136, the claimant did not prove facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the relevant provision. In respect of some other sections, the claimant did prove facts from which the claimant could decide, in the absence of any other explanation, that the respondent contravened the provision concerned. The Tribunal considered the claims made by the claimant in respect of each provision of the Equality Act relied upon by her. In respect of each provision relied upon, where the claimant had claimant proven facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the relevant provision, the Tribunal assumed that

there was no adequate explanation for those primary facts. The burden of proof moved to the respondent. The Tribunal required to assess whether the respondent had proved a non-discriminatory explanation for the primary facts adequate to discharge the burden of proof, on the balance of probabilities. The respondent required to present cogent evidence to discharge the burden of proof.

Decision

169. The Tribunal made its decision in respect of each of the agreed issues.

Knowledge

170. The Tribunal addressed:-

a. Has the respondent established that it did not know, and could not reasonably be expected to know, at any time during the course of the claimant's employment with the respondent that the claimant had a disability?

b. If not, from what date did the respondent have that knowledge?

171. The respondent has not established that it did not know, and could not reasonably be expected to know, at any time during the course of the claimant's employment with the respondent that the claimant had a disability. It was not disputed that the respondent had received the medical certificate stating 'Reactive Depression NOS' (Bundle 1 @ 153) and subsequent Med 3 forms (Bundle 1 @ 154 – 158). The respondent had knowledge that the claimant was been certified as unfit for work because of depression. It is well known that a medical certificate stating depression ought reasonably put an employer on notice that that employee may have the protected characteristic of disability. Taken in conjunction with the claimant's grievance letter, where she informed the respondent that she has had a 'three year history of mental ill health' and that it is affecting her work, the Tribunal did not accept Mr Maguire's submission that the respondent did not know or could not reasonably be expected to know the effect of that condition on the claimant.

172. From the date of their receipt of the claimant's grievance letter dated 18 July 2017 (Bundle 1 at 51 – 54), which explicitly stated that the claimant had a three year history of depression and dependence on anti depressant medication, and which followed their receipt of the sick line stating 'Reactive Depression NOS'(Bundle 1 at 153), the respondent could reasonably be expected to know that the claimant had the protective characteristic of disability. From the date of their receipt of that grievance letter, the respondents were aware of the claimant's diagnosis of a mental health condition, that she was receiving treatment for that condition (anti-depressant medication) and that the condition was having an effect on her to the extent that she had been certified unfit for work. In these circumstances the Tribunal did not accept Mr Maguire's argument that the respondent did not have knowledge of disability status because they did not know the effect of the claimant's diagnosed condition at that time. For these reasons, the Tribunal decided that the respondent had knowledge of the claimant's protected characteristic of disability from the date of their receipt of the claimant's grievance letter dated 18 July 2017 (being 19 / 20 July 2017).

173. The Tribunal accepted the respondent's position that they did not have knowledge of the claimant's disability status before 19/20 July 2017. Although the Tribunal accepted that Margaret Patrick had visited the claimant in 2014, the evidence did not show that from that date the respondent knew or ought reasonable to have been aware of the claimant's disability status. The claimant's evidence was that in November 2014 she told Margaret Patrick that she was depressed, not that she had been diagnosed with depression. There was no evidence that the respondent had received the Med 3 Form for 2 weeks from 30 October 2014. The Med 3 form in Bundle 1 @ 152 states the reason for incapacity as 'stress at home'. On the claimant's own evidence, she returned to the office in November 2014 and then worked without disclosing her mental health condition to the respondent. The claimant said in her evidence given in May 2019 that she '*didn't tell them'*. The claimant agreed to go back to work in November 2014 and did not have any sickness absences from then until July 2017. The claimant worked in her own office. She was a private person and did not discuss her diagnosis with the respondent. For

those reasons the Tribunal concluded that the respondent could not reasonably be expected to have known in the period before 19/20 July 2017 that the claimant had a diagnosis of a mental health condition which had a significant long-term effect on her day to day activities. A reference to 'happy pills' is not sufficient for the Tribunal to find that the respondent had knowledge of the claimant having the protective characteristic of disability at that time.

Equality Act s15

174. Following *City of York Council v Groset [2018] ICR 1492, CA,* the Tribunal took into account that section 15 requires an investigation of two distinct causative issues:

(1) Did A treat B unfavourably because of an identified 'something'; and

(2) Did that something arise in consequence of B's disability.

and addressed the questions relevant to the consideration of the section 15 claim, as set out in the issues above.

175. Although the claimant was unable to particularise her claim under section 15, Mr Maguire confirmed that he understood that that claim was in regard to the whole way in which the grievance had progressed.

176. The EHRC Code of Practice provides guidance on what is unfavourable treatment. At para 5.7 it states:-

> "For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

177. The respondent treated the claimant unfavourably in the way in which they handled her grievance. On the evidence, what was in the mind of the respondent in their handling of the claimant's grievance was the comments which had been received from Margaret Patrick and Morag Blaney on the claimant's grievance letter (Bundle 4 @ 67 – 72). Sandy Blaney had those comments and chose to support the position of his fellow Directors and family members rather than the claimant. On an objective test, the 'something' which was the reason for the unfavourable treatment was the decision to support those family members' position. The reason for the claimant's unfavourable treatment did not arise from the claimant's disability.

178. More specifically, the intention of the purpose of the meeting on 22 August meeting, to discuss their preliminary findings rather than set these out in a letter sent to the claimant was not unfavourable, and could have been an appropriate step to take. It was not in dispute that that step was taken because of Mr Maguire's concern at the level of upset which may be caused to the claimant if she just received those findings in a letter. The reason for the decision to have that meeting was in consequence the claimant's disability, but that decision was not unfavourable treatment of itself.

179. The unfavourable treatment was the format which was used at the meeting of setting out what was said to be the preliminary findings as being decisions, without a debate. On an objective test conducted by the Tribunal, the reason for that format did not arise from the claimant's disability. It arose from the claimant having made a grievance, Margaret Patrick and Morag Blaney making comments on that grievance and the respondent basing their findings on those comments and choosing to support those family members rather than the claimant. That unfavourable treatment did not arise in consequence of her disability.

180. For these reasons the claimant's claim under section 15 of the Equality Act 2010 is unsuccessful.

<u>Equality Act section 20</u>

181. The Tribunal addressed the following questions:-

(a) In respect of each of the provision criterion or practice ('PCP's), relied on by the claimant (as set out at paragraph 11 of the Note dated 15 May 2019):-

- What relevant PCP(s) has the claimant proved (if not admitted by the respondent)?
- In respect of such proven or admittedly applied PCP(s) of the respondent, has the claimant shown that that (or those) PCP(s) put her at a substantial (i.e. more than minor or trivial) disadvantage in comparison with persons who are not disabled?
- If so, what steps does the claimant say it would have been reasonable for the respondent to have taken to avoid that disadvantage?
- Did the respondent know, or could they reasonably have been expected to have known, (i) that the claimant had a disability and (ii) that the claimant was likely to be placed at a substantial disadvantage?
- Did the respondent fail to take such steps as it was reasonable for them to take to avoid that disadvantage?

182. These questions had to be considered by the Tribunal with regard to what had been identified as the PCPs relied on by the claimant. These were identified and set out in the Note Following Proceedings dated 15 May 2019, at paragraph 11. The Tribunal addressed each of these in turn.

c. <u>The claimant's reliance on a PCP of there being a 'blanket ban' on employees taking unpaid leave</u>

The claimant did not prove that there was a 'blanket ban' on employees taking unpaid leave. There was uncontested evidence that others had paid time off. There was no documentary evidence to support the claimant's assertion that such a ban was in place. There was no documentary evidence to support the claimant's evidence that she was

always required to make up time off. The claimant's own evidence was that she was allowed time off work to attend various medical appointments with her niece. The Tribunal accepted the respondent's position that no such PCP was applied by them.

d. <u>The claimant's reliance on a PCP of a friend not being allowed to accompany employees to internal grievance meetings.</u>

The respondent accepted that that PCP was in place but relied on it not having been applied to the claimant. The evidence showed that the claimant had agreed to proceed with the meeting on 2 August 2017 without being accompanied. Amanda Lees had been allowed to accompany the claimant at the meeting on 22 August 2017 and at the appeal hearing. The appeal hearing continued after Amanda Lees left. It was undisputed that the respondent asked the claimant and the claimant's clear position was that she wanted to continue with the meeting after Amanda Lees left. The respondent accepted her position at face value and continued with the meeting. In those circumstances the respondent took such steps as was reasonable for them to take to avoid the disadvantage which the claimant would have been put to by the application of that PCP.

e. <u>The claimant's reliance on a PCP of being required to work her contractual hours of 8am to 5pm.</u>

The evidence did not show that such a PCP was applied. On the claimant's own evidence, she was allowed flexibility in her working hours to work from home sometimes and to allow her to attend medical appointments with her niece. She did not dispute the respondent's evidence that other employees were allowed to work on other contractual hours e.g. on return to work from maternity leave. The claimant did not produce evidence that she had requested a change in her contractual hours or that that was denied.

f. The claimant's reliance on a PCP of the respondent not asking its employees to take their holiday entitlement.

It was not in dispute that this PCP was in place and was applied to the claimant. This claim could only be considered with regard to the period from which the respondent was found to have knowledge of the claimant's disability. It therefore only related to holiday year 2017. The claimant received payment in respect of accrued but untaken holidays in December 2017 (Bundle 1 @ 95). There was undisputed evidence that the claimant had taken at least some of her holiday entitlement in 2017. The claimant had not shown that the application of that PCP put her at a substantial disadvantage in comparison with persons who are not disabled.

g. The claimant relies on a PCP of the respondent paying its employees only SSP throughout their sick leave.

It was not in dispute that this PCP was in place and was applied to the claimant. The Tribunal did not accept that the application of that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled. A person who does not have the protected characteristic of disability may be unfit for work and only receive SSP for the same period which the claimant was unfit for work in 2017 (e.g. to recover from surgery).

183. For these reasons, the claimant's claim under section 20 of the Equality Act is unsuccessful.

Equality Act s26

184. The Tribunal applied the terms of section 26 to the question:-

Did the respondent engage in conduct relating to the claimant's disability 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, that conduct being alleged by

the claimant to be as set out in her letter initiating a complaint under the respondent's grievance procedure, and the conduct in the handing of that grievance.

185. The Tribunal considered this question with regard to its findings in fact from the date of knowledge i.e. from 19/20 July 2017. There was no evidence that any action of the respondent had the **purpose** of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal considered Dr Ewing -Day's evidence and the content of his medical reports to be significant. The medical reports were uncontested by the respondent. Dr Ewing- Day's undisputed position that the respondent's treatment of the claimant and her consequent loss of employment is the cause of the claimant's mental health conditions. The Tribunal attached significant weight to that. In conjunction with the evidence of the claimant and from Amanda Lees, the Tribunal found that the respondent's actions and failures in their handling of the claimant's grievance had had the **effect** of creating an intimidating, hostile and degrading environment for the claimant.

186. With regard to the terms of section 26, the Tribunal considered whether that conduct was unwanted conduct related to the claimant's protected characteristic of disability. For the reasons set out above, the Tribunal concluded that that handling was because of the comments received by Margaret Patrick and Morag Blaney on the claimant's grievance letter and the decision taken by Sandy Blaney to support those family members rather than the claimant. That was not a reason relating to the claimant's disability.

187. The claimant felt intimidated because the grievance was dealt with through Mr Maguire. The reason they engaged Mr Maguire was because it was considered that the company had grown to such a size that it was appropriate to engage an external consultant to provide appropriate expert advice. The respondent cannot be criticised for doing that. The respondent did not engage Mr Maguire's services for a reason related to the claimant's disability.

188. The way in which the grievance was handled was **related to** the claimant's disability **only** when it was decided that the preliminary findings of the

investigation would be read out to the claimant in a meeting rather than being sent to her. The decision to do that was related to the claimant's disability: it was decided that that would be the best course of action to seek to avoid the claimant being upset on receiving the letter in the post. That intention itself is reasonable but what transpired was not a discussion on the preliminary findings. The way in which the meeting progressed, i.e. by Sandy Blaney starting to read out prepared statement was not related to the claimant's disability. The meeting progressed in that way because the comments from Margaret Patrick and Morag Blaney had been accepted by Sandy Blaney and he had decided to support those family members rather than the claimant. That was not a reason related to the claimant's disability.

189. For these reasons the claim under section 26 is not successful.

Equality Act s27

190. The determination of the section 27 claim had to be considered with regard to what was relied upon by the claimant as being the 'protected act'. The Tribunal considered the following questions:-

(a) Did the claimant do a protected act in terms of section 27 of the Equality Act 2010 by

(i)Raising a complaint under the respondent's grievance procedure

(ii) Making an application for parental leave.

(b) If so, was the claimant subject to a detriment because of having done such protected act?

(c) If so, what was that detriment?

191. Section 27(2) sets out what is a protected act. Neither of the acts relied upon by the claimant were acts under section 27(2)(a) (bringing proceedings under the Equality Act 2010); section 27(2)(b) (giving evidence or information in connection with proceedings under the Equality Act 2010) or section 27(2)(d) (making an allegation of contravention of the Equality Act 2010). The Tribunal

considered whether either of the acts relied upon by the claimant were protected acts in terms of section 27(2)(c) (doing any other thing for the purposes of or in connection with the Equality Act 2010). The Tribunal considered this question with regard to the Court of Appeal's interpretation in *Aziz v Trinity Street Taxis Ltd and ors 1988 ICR 534, CA*, (although that was in reference to the previous provisions in the Race Relations Act). The Court of Appeal stated that an act could properly be said to be done '*by reference to'* the RRA if it were done by reference to the legislation *'in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act'*.

192. In raising her grievance in letter of 18 July 2017, the claimant had informed the respondent in that letter of her three year history of depression and reliance on anti depressants. That ought to have indicated to the respondent that the claimant had the protected characteristic of disability. In that sense, the claimant's act of telling the respondent in her letter of 18 July 2017 that she had a three year history of depression and reliance on anti depressant medication was a protected act in terms of section 127. The raising of the grievance itself was not a protected act.

193. The Tribunal considered whether the claimant had been subjected to a detriment by the respondent because of doing that protected act.

194. The Tribunal considered whether there were primary facts from which an inference of victimisation could be drawn. The circumstances which led to the grievance being raised were that the claimant began to have concerns and felt she was being micromanaged. There was a heated discussion between the claimant and Margaret Patrick. The claimant had concerns which she wished to discuss with Sandy Blaney but was not given the opportunity to do so. The claimant set out her grievances in her letter dated 18 July 2017. Margaret Patrick and Morag Blaney investigated the issues raised by the claimant and gave their comments to Sandy Blaney and Steve Maguire. Those comments formed the basis of Sandy Blaney's view of the claimant's grievance. He supported Margaret Patrick and Morag Blaney's position rather than that of the

claimant. There were no facts from which an inference could be drawn that the claimant suffered a detriment because she had told the respondent that she had a three year history of depression and reliance on anti-depressant medication. The claimant was not subjected to a detriment by doing a protected act.

195. The claimant also relies on her making her application for parental leave as being a protected act. An application for parental leave is not an act which is protected by the terms of section 27(2). It is not an act done 'in connection with or related to the Equality Act 2010 because the Equality Act 2010 relates to the protected characteristics set out in section 4 of that Act, i.e. age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. Making a parental leave application was not done in reliance on any of these protected characteristics.

196. For these reasons, the claimant's claim under section 27 of the Equality Act 2010 is unsuccessful.

Compensation

197. Having concluded that none of the claimants claims under the Equality Act 2010 are successful, the claimant is not entitled to any award in respect of any breach of the Equality Act 2010.

Constructive Dismissal

198. The Tribunal addressed the following question:-

> Did the respondent engage in action or a course of action which was in breach of the implied term of trust and confidence, so entitling the claimant to resign?

199. Following *Morrow v Safeway Stores plc 2002 IRLR 9, EAT*, where an employer breaches the implied term of trust and confidence, the breach is 'inevitably' fundamental. The claimant relied on a series of acts or omissions.

> The Tribunal noted the guidance from the Court of Appeal in *Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA*, where the Court of Appeal confirmed that, to constitute a breach of trust and confidence based on a series of acts (or omissions), the act constituting the last straw does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. The Court of Appeal said that the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence: an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined in this context is an objective one. Following *Williams v Governors of Alderman Davies Church in Wales Primary School [2020] IRLR 589*, where the act that tips the employee into resigning is entirely innocuous, that is not a 'last straw' case but a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it.

200. There is a clear inference which can be taken from the evidence that the relationship between the claimant and the respondent was breaking down prior to the claimant raising her grievance. The claimant had started to distrust the respondent. That was her reason for sending emails to herself (Bundle 2).That was her reason for wanting to record the meeting with Margaret Patrick and Morag Blaney. The claimant was not asked why she wanted to record that meeting. That could have been an opportunity for the claimant to air her concerns.

201. It was also clear that the claimant distrusted the respondent's representative's involvement in the case. Her distrust of the respondent's representative arose from his involvement in hearing the grievance which the claimant had raised with the respondent. Prior to Mr Maguire's involvement the respondent had operated informally. The respondent dealt with the claimant's grievance in a

formal way. The respondent did this because they had engaged the services of Creideasach Employment Law Specialists (Mr Maguire). Mr Maguire sought to bring more formality to the respondent's HR practices. The respondent cannot be criticised for engaging those services, nor for seeking to deal with an employee's grievance under a Grievance Procedure. In this case, the claimant was suspicious about the use of a formal procedure. Their letter to the claimant acknowledging her grievance letter (Bundle 1 @ 54) made reference to '*The Grievance Procedure for employees of Goldcrest Ltd'*. There was no evidence of this Procedure being communicated to the claimant. There was no evidence of the terms of any Grievance Procedure being communicated to the claimant during the course of her employment with the respondent.

202. In his cross examination by the claimant, Mr Maguire's evidence was that he had '*endeavoured to follow the ACAS Code of Conduct'* in the handling of the claimant's grievance. The Tribunal took this to be a reference to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ('The ACAS Code'). The ACAS Code sets out guidance on how grievances should be handled by employers. When dealing with a grievance issue, employers have a duty to seek to resolve issues raised. This is different from a Disciplinary process, where decisions should be made, based on the reasonable investigations which have been carried out. The respondent dealt with the claimant's grievance on the basis of making a decision on whose version of events to believe in respect of the ten points stated by the claimant. The respondent failed to deal with the claimant's grievance in the round, or to recognise her concerns and the information she had given them about her ill health. They failed to take into account the divisive effect of them taking into consideration the comments made by Margaret Patrick and Morag Blaney (after those individuals own investigations with other employees) and supporting their position rather that believing the claimant. They failed to recognise the impact on the claimant and on the prospect of a continuing working relationship in circumstances where the claimant's grievance was not upheld.

203. A feature of the ACAS Code (4.20) is that "*Fairness and transparency are promoted by developing and using rules of procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives, should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used'.* The ACAS Code defines grievances as '*concerns problems or complaints that employees agrees with their employers'*. (4.21) The guidance at 4.21 states "anybody working in an organisation with working conditions or relationships with colleagues that they wish to talk about with management they want the grievance to be addressed and if possible resolved it is also clearly in the management's interests to resolve problems before they can develop into major difficulties for all concerned." This is what the claimant was seeking to do by writing her letter of 18 July 2017.

204. The ACAS Code at 4.23 recognises that the size and resources of an employer should be taken into account when deciding on relevant cases and that it may sometimes not be practicable for all employers to take all of the steps set out in ACAS Code. It emphasises that we set out a number of elements to this being:-

- "*Employers and employee should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- *Employers and employees should act consistently.*
- *Employers should carry out any necessary investigations to establish the facts of the case.*
- *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*

- *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*

- *Employers should allow an employee to appeal against any formal decision made."*

205. The ACAS Code at 4.25 states in relation to arranging a grievance meeting "*Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.".* Under that same point, the suggested steps which should be taken by a manager in relation to preparing for the meeting include considering arranging for someone who was not involved in the case to take a note of the meeting and to act as a witness to what was said; consider whether any reasonable adjustments are necessary for a person who is disabled and / or their companion and consider whether to offer independent mediation. Although Mr Maguire was present at the meetings and did take some notes as were produced in bundle 4, his position was that those notes were for his own records. No one was taking notes or minutes of the meeting for the purpose of maintaining an accurate record to be disclosed to the claimant. There were no investigations on whether any adjustments should be made in recognition of the fact that the claimant was certified as being unfit for work because of depression and that in her letter of 18 July 2017 the claimant had informed the respondent that she had a three year history of depression and reliance on antidepressant medication. There was nothing done to ensure that the claimant was fit to proceed with the grievance process. At these grievance meetings the claimant was asked if she would like some water. She was given an opportunity to have a break, although Mr Maguire came to speak to her during what was meant to be a break on 22 August. Amanda Lees was allowed to accompany the claimant. Mr Maguire was asked why the claimant had not been referred for a medical report before the conclusion. When asked if there was consideration of referring the claimant to Occupational Health given that a sick note stating depression had been received, his evidence was '*No. Not at that stage. When we sought to utilise the Attendance Policy, at that stage generally there would*

be a referral to Occupational Health. We dealt with the grievance in the first instance.' It was clear that there was no attempt to investigate whether the claimant was fit to effectively pursue the grievance process. The respondent's position was that that grievance process should be concluded first, before making any investigations in relation to the claimant's fitness to return to work.

206. The guidance in the ACAS Code on the conduct of grievance meetings (also at 4.25) is:-

> "Managers should:
>
> - remember that a grievance hearing is not the same as a disciplinary hearing and is an occasion when discussion and dialogue may lead to an amicable solution.
> - Make introductions as necessary.
> - Invite the employee to restate the grievance and how they would like to see it resolved.
> - Put care and thought into resolving grievances they are not normally issues calling for snap decisions and the employee may have been holding the grievance for a long time. Make allowances for any reasonable 'letting off steam' if the employee is under stress.
> - Consider adjourning the meeting if it is necessary to investigate any new facts which arise.
> - Sum up the main points.
> - Tell the employee when they might reasonably expect a response if one cannot be made at the time, bearing in mind the time limits set out in the organisation's procedure."

It goes on to state:-

> "in smaller organisations, grievances can sometimes be taken as personal criticism - employers should be careful to hear any grievance in a calm and objective manner, being as fear to the employee as possible in the resolution of the problem. Following the grievance procedure can make this easier."

207. In respect of dealing with grievances about fellow employees, the ACAS code states (at 4.25):-

> "*This can be made easier by following the grievance procedure. An employee may be the cause of grievances among his or her co-employees -perhaps on grounds of personal hygiene, attitude or capability for the job. Employers must deal with these cases carefully and should generally start by talking privately to the individual about the concerns of fellow employees. This may resolve the grievance. Alternatively, if those involved are willing, an independent mediator may be able to help. Care needs to be taken that any discussion with someone being complained about does not turn into a meeting at which they would be entitled to be accompanied."*

208. The claimant had complained about Margaret Patrick. Rather than Steve Maguire or Sandy Blaney interview Margaret Patrick, Margaret Patrick and Morag Blaney carried out their own investigations, and their comments on those investigations were sent to Steve Maguire and Sandy Blaney and taken into account in the decision on the claimant's grievance.

209. The ACAS Code at 4.27 sets out guidance on the outcome of a grievance. It is headed 'Decide on appropriate action' and states:-

> "*Following the meeting decide on what action, if any to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken."*

210. In respect of appeal, the ACAS Code at 4.28 states "*where an employee feels that their grievance has not been satisfactorily resolved they should appeal."* This again shows that the emphasis in handling a grievance should be to seek resolution.

211. In dealing with the claimant's grievance, the respondent did not focus on seeking a resolution of the problem. The Tribunal accepted Amanda Lee's evidence in that regard, which was not directly addressed by the respondent's witnesses, although that evidence was heard prior to the respondent's case being presented. The respondent sought to investigate the matters raised and make decisions on what had occurred, similarly to the process in dealing with a disciplinary matter. The outcome letter made no mention or suggestion of any action being taken by the respondent to address or resolve any of the issues raised by the claimant.

212. The meeting on 22 August was not formatted to be a discussion which was in accordance with the guidance on handling grievances set out in the ACAS Code of Practice. By progressing with Sandy Blaney reading out the prepared statement it became an outcome meeting. Steve Maguire said they were '*not looking to have a debate as such'*.

213. In dealing with the claimant's grievance, the respondent failed to take into account that they had been put on notice (by the claimant's letter of 18 July 2017) that the claimant had a three year history of a mental health condition, that she had concerns about some work issues, that the claimant believed that her mental health was impacting on her work and that she was seeking a meeting to discuss her matters of concern. The respondent also knew that at the time of their dealing with the grievance raised by the claimant, that the claimant was certified as unfit for work because of depression. The respondent had a duty of care towards the claimant in these circumstances. The respondent failed in their duty of care because, in those circumstances, they failed to obtained a medical report to ascertain if and to what extent the workplace was impacting on the claimant's health and what steps, if any could be taken by the respondent to mitigate that impact. Taking into account the

size and administrative resources of the respondent, especially with regard to access to Occupational Health advisors, the respondent could have obtained a medical report from the claimant's GP, at least in the first instance. That failure to obtain a medical report was not a fundamental breach of contract and was not in itself a breach of the implied term of trust and confidence.

214. There are circumstances where disputes in a workplace become irreconcilable. Such circumstances may lead to a fair dismissal in terms of the Employment Rights Act 1996 section 98(1)(b), being 'some other substantial reason for dismissal'. In such circumstances, it is important that the employer first takes steps to seek to reconcile the differences. By the conclusion of the grievance process the situation was that the claimant had been told that she had not been believed in respect of various issues raised by her in her letter of 18 July 2017; there had been no attempt to reconcile the differences or repair the relationship between the claimant and Margaret Patrick or any other Director; there had been no indication to the claimant that any steps would be taken to address the issues she had raised with her workload; there had been no attempt to reassure the claimant that, no matter what she thought she had heard, the respondent did not want her to resign; there had been no recognition from the respondent to the claimant that the grievance process had been difficult and that difficulties in workplace relationships would require to be addressed and there had been no steps taken to seek to understand the effect of the claimant's medical condition and what steps, if any could be taken by the respondent to enable her to return to work. In their decision the respondent had reached a conclusion on the ten specific points set out by the claimant in her letter on 18 July 2017 but made no recognition of there being a dispute and no suggestion on how to go forward with the claimant continuing in her employment with the respondent. The claimant had had an argument with a Director, who was the sister of the owner of the business, which escalated to the point that another Director, who was the wife of the owner of the business, had told them to act like adults. The claimant could see no resolution to the breakdown in the working relationship, and no resolution was offered.

215. The Tribunal considered the respondent's dealings with the claimant after she submitted her grievance in the round. Following *Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA,* the series of acts which led to there being a fundamental breach by the respondent of the term of trust and confidence were:-

- Margaret Patrick Morag Blaney's presence at the meeting on 6 July, when the claimant had sought a discussion with Sandy Blaney about her concerns.
- Margaret Patrick being prepared to take notes at that meeting but informing that these would not be given to the claimant, and no minutes would be taken.
- Failure to ask why the claimant wanted to record the meeting.
- The meeting on 6 July not proceeding as an opportunity for the claimant to '*clear the air*' and instead proceeding to discuss work issues.
- Failure to revert to the claimant in respect of arranging a '*clear the air*' meeting.
- Failure to give the claimant the opportunity to have an informal chat with Sandy Blaney to discuss her issues and '*get things sorted'.*
- On receipt of the claimant's letter of 18 July 2017, failure to recognise that the claimant had informed the respondent of her three year history of depression and reliance on ant depressant medication.
- Failure to make any investigation throughout the grievance process on the claimant's fitness to go through that process.

- Failure to inform the claimant of the steps which would be followed in the procedure which was being used to progress her grievance.

- Sandy Blaney's response to the claimant of shrugging his shoulders when the claimant asked '*for my job back' .*

- The format of progressing the meeting on 22 August 2017 by Sandy Blaney reading out a prepared statement which set out decisions having been made on the ten points set out in the claimant's grievance letter of 18 July 2017, that reading being preceded by Steve Maguire saying '*we are not looking to have a debate as such.'*

- The failure to provide an Investigation Report or set out to the claimant what steps had been taken in investigation before setting these out in the format of decisions having been reached further to those investigations.

- The failure to recognise in the grievance outcome letter of 24 August 2017 (Bundle 1 @ 64 – 70) that the meeting on 22 August had been aborted.

- The fact of the grievance outcome letter being clearly in substantively the same terms as what was started to be read out to the claimant at what was said to be a meeting to discuss 'preliminary findings'.

- The failure to consider the claimant's grievance in the round when making the decision on the outcome.

- The failure to recognise or address the claimant's position in her letter of 18 July 2017 in respect of her 'final breaking point'.

- The failure to recognise in the determination of the grievance that the claimant had informed the respondent that she had a

three year history of depression and reliance on anti-depressant medication.

- The failure to offer any reassurance to the claimant that, no matter what she thought she had heard, the respondent did not want her to resign and wanted to resolve matters so that the employment relationship could continue.

- The failure to recognise in the determination of the grievance (either at the initial decision or at the appeal stage) that there was a difficult situation in the workplace between the claimant and Margaret Patrick.

- The failure to offer any method of resolution for the workplace difficulties, or reconciliation, such as workplace mediation, either in the outcome of the grievance or in the appeal outcome.

- The failure to recognise in the letters to the claimant of 29 September and 13 October that the claimant had been unsuccessful in her grievance and that there were likely to be difficulties in her ongoing relationship with those named in the grievance which would require to be resolved / reconciled.

- The reference to an Attendance Policy which the claimant was not aware of that being in effect, or of the terms of any such policy.

- By making the unfounded reference in the email to the claimant of 18 October 2017 to the claimant's health 'continuing to improve'.

- The failure to offer any reassurance to the claimant that she would be supported in a return to work.

- The failure to ask after the claimant's well being in any of the letters sent to her during or after the conclusion of the grievance process.

- The failure to give any reassurance in any of the letters sent to the claimant during or after the conclusion of the grievance process that the respondent wanted the employment relationship to continue.

216. By this series of events, the respondent acted in fundamental breach of the term of trust and confidence, entitling the claimant to resign. The claimant resigned in response to that breach.

217. Following *Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA,* the acts constituting the last straw in the context of the claimant's decision to resign were the letters after the conclusion of the grievance process. Those letters made no recognition of the claimant having gone through a difficult grievance process. They contained no recognition of the possibility that that may impact working relationships going forward. In the circumstances, it was very likely there would be an impact on working relationships, at least from the claimant's perspective. There was no indication of concern for the claimant's well being, then no basis for the reference to her health '*continuing to improve'*. In themselves, those letters did not constitute blameworthy conduct. They did however contribute, however slightly, to the breach of the implied term of trust and confidence. These letters were not entirely innocuous acts on the part of the employer. They referenced to an unknown Attendance Policy and failed to take any steps to offer reconciliation after what had undoubtedly been a difficult process.

218. Even if those letters could be considered entirely innocuous, on a subjective test (which is not the appropriate test), the claimant genuinely interpreted those letters as undermining her trust and confidence in the employer. That is clear from the terms of the claimant's unsent letter in Bundle 2 @ 26. Following *Williams v Governors of Alderman Davies Church in Wales Primary School [2020] IRLR 589*, where the act that tips the employee into resigning is entirely

innocuous, that is not a 'last straw' case but a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it. The respondent acted in fundamental breach of contract by the series of events set out above. That breach was not affirmed and the claimant resigned in response to that breach.

219. The respondent's letter to the claimant of 24 November 2017 did not negate or resolve that series of acts and failures. That letter gave no reassurance to the claimant that the respondent wished the employment relationship to continue or that any steps would be taken by them to seek to resolve the workplace differences. There was no recognition of the claimant's difficulties or of the respondent's failures.

220. For these reasons the Tribunal concluded that the respondent acted in fundamental breach of the term of trust and confidence and the claimant was entitled to resign. The claimant resigned because of the respondent's unlawful conduct. That was an unfair dismissal in terms of the Employment Rights Act 1996 section 95(1)(c) and 136(1)(c). The claimant's (constructive) unfair dismissal claim is successful. The claimant is entitled to an unfair dismissal award and compensatory award.

221. No deduction was sought in respect of any contributory action by the claimant. The Tribunal did not consider that the claimant was guilty of any blameworthy action and no deduction was applied for contribution. No deduction or increase was sought in respect of failure to follow the ACAS Code. The claimant sought to engage in the grievance process and no deduction was appropriate.

222. The Tribunal makes a compensatory award to the claimant which it considered to be just and equitable. The award is made taking into account the provisions of sections 118 – 126 of the Employment Rights Act 1996. The respondent did not argue that the claimant has failed to take reasonable steps to mitigate her loss. In the circumstances as set out in the findings in fact, the Tribunal finds that the claimant has taken reasonable steps to mitigate her loss.

223. In assessing the appropriate period of loss, the Tribunal placed significant weight on the expected timescale for the claimant's recovery as set out by Dr Ewing -Day in his medical report dated of March 2020 (Bundle 4 @ and on Dr Ewing Day's position on the difficulties of recovery while this Tribunal process was ongoing. For these reasons, the Tribunal assessed the period of loss as being from the effective date of termination, with future loss based on the period of recovery.

Notice Pay

224. The Tribunal addressed the following question:-

Is the claimant entitled to any payment in lieu of notice period, and if so in what amount, taking into account any payments made to the claimant in respect of this notice period?

225. The claimant continued to be certified as unfit for work during her notice pay. She received payment of SSP for that period. The claimant had no contractual right to be paid in full for that period. For that reason, the claimant's claim for notice pay is unsuccessful.

Holiday Pay

226. The Tribunal addressed the following questions:-

Is the claimant entitled to any payment in respect of accrued but untaken holidays, and if so in what amount?

In the year of termination of employment was the claimant entitled to carry over any holiday entitlement from any previous holiday year?

227. Regulation 13 (9) of the Working Time Regulations 1998 provides that the basic four weeks' annual leave may be taken only in the leave year in respect of which it is due and cannot be replaced by a payment in lieu, except on termination of employment. There was no evidence that there had been any agreement, or any request from the claimant, for leave to be carried over to the following holiday year. There was no evidence that the claimant was unable or unwilling to take holidays in a previous holiday year because of sickness. The claimant received payment in respect of holiday pay in December 2017 (Bundle 1 @ 95). The claimant did not give evidence on any further sums which were due in respect of accrued but untaken holidays in 2017. The claimant could not say what extent of holidays she had accrued in 2017 but were untaken. There was not enough evidence for the Tribunal to find that the claimant was due any sums from the respondent in respect of holiday accrued but untaken in 2017. For those reasons the claim for holiday pay was unsuccessful.

Awards

Failure to Issue Statement of Terms and Conditions of Employment

228. In her Schedule of Loss, the claimant sought an award for failure to provide a statement of terms and conditions. Section 38 of the Employment Act 2002 ('EA') provides that tribunals must award compensation to an employee in certain circumstances. The Tribunal makes an award to the claimant on application of that section 38 EA because the claimant is successful in her claim under section 95 ERA. No statement of written particulars has been provided to the claimant by the respondent in terms of section 1 of the ERA. In the facts and circumstances of this case, where the respondent had input from an external HR provider, on application of section 38 EA, the Tribunal considers it just and equitable to award the maximum amount of 4 weeks' pay rather than the minimum amount of 2 weeks' pay, in respect of this failure. This award is made with regard to the relevant maximum cap on a week's pay (section 38(6)). The relevant maximum cap on a week's pay is that applicable to dismissals between April 2017 and April 2018 (the claimant is awarded the

sum of (£489 x 4) **£2445.** That award is added to the compensatory award before the application of the statutory maximum cap on compensatory awards for unfair dismissal.

Unfair Dismissal

229. For the reasons set out above, the claimant is entitled to an unfair dismissal basic award and compensatory award. The relevant caps on these awards are those in respect of dismissals on or after 6 April 2017. The maximum amount of a week's pay in calculation of the basic award is £489. The maximum basic award is £14,670. The relevant cap on the compensatory award for unfair dismissal is £80,541, or the lower of that statutory cap or 52 weeks' gross pay calculated at the time of dismissal.

230. The claimant is entitled to an unfair dismissal basic award calculated on a factor of 1.5 with regard to her age at effective date of termination (55), her number of complete years service (10) and her week's pay (with application of the relevant cap at the effective date of termination of employment, being £489). The claimant is entitled to an unfair dismissal basic award of (1.5 x10 x 489) £7,335.

231. Section 207A(2) TULR(C)A 1992 provides:-

> "*If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'*

232. It was not the respondent's position that any deduction should be applied for any failure by the claimant to follow the ACAS Code. It was not appropriate to

apply any such deduction. The claimant had sought to resolve her issues through a grievance process.

233. That section applies to these proceedings. Section 207A(4) TULR(C) A 1992 makes it clear that the reference in s 207A(2) and (3) to '*a relevant Code of Practice*' is to any Code which '*relates exclusively or primarily to procedure for the resolution of disputes*' The Tribunal considered whether any increase should be applied in terms of this section. The (constructive) unfair dismissal claim related to the ACAS Code. The respondent failed to comply with that Code to the extent that it did not focus on seeking to resolve the claimant's grievance, rather than reaching a decision in respect of the 10 points set out in her letter of 18 July 2017. The Tribunal considered that failure to be unreasonable. The Tribunal decided that it was just and equitable to increase both basic award and the compensatory award by 15% to reflect that unreasonable failure. In doing so, the Tribunal took into account that the respondent had sought to follow a process in handling the claimant's grievance. They had met with her and provided an appeal stage. The Tribunal followed the guidance from LJ Underhill in *Lawless v Print Plus* EAT 0333/09, that the relevant circumstances to be taken into account (although that related to now repealed DDP statutory provisions) varied. His guidance was that relevant factors may include the size and resources of the employer. Relevance would depend on whether the factor aggravated or mitigated the culpability and/or seriousness of the employer's failure. Relevant factors should include:-

- whether the procedures were applied to some extent or were ignored altogether
- whether the failure to comply with the procedures was deliberate or inadvertent, and
- whether there were circumstances that mitigated the blameworthiness of the failure to comply.

234. Following *Abbey National plc v Chagger 2010 ICR 397, CA,* the Tribunal considered the size of the total award awarded to the claimant. It was noted that on application of the statutory maximum cap on unfair dismissal basic awards and on application of the maximum cap on compensatory awards, the effect of the uplift would in real terms only relate to the element of the award which is subject to the Recoupment Regulations (as set out below).

235. The Tribunal applied an increase of 15% to both the basic award and the compensatory award. The respondent had sought to apply a grievance procedure and were not deliberately seeking to fail to comply with the ACAS Code. The maximum increase of 25% was not appropriate. The respondent had sought assistance from an external HR advisor. The focus of a grievance procedure in terms of the ACAS Code should be on seeking resolution to issues raised by an employee. In their handling of the claimant's grievance, for the reasons set out above, the respondent showed that they did not focus on resolution of the claimant's grievances. Instead, their focus was on making a determination on the 10 points in the claimant's grievance letter. This lack of focus on resolution was the root of the breach of contract. For these reasons, an uplift of 15% was applied to both the basic award and the compensatory award.

236. On application of Section 207A(4) TULR(C) A 1992 the claimant is entitled to an unfair dismissal basic award of (£7,335 + (15% of £7335)) **£8,435.25.**

237. Section 124A ERA provides that any adjustment to the compensatory award made in accordance with section 207A TULR(C)A 1992 or increased under section 38 TULR(C)A 1992 is applied immediately before the application of the statutory cap on maximum unfair dismissal awards (section 124 ERA).

238. The Tribunal calculated the compensatory award which was just and equitable to be made to the claimant, on application of sections 123 – 124 ERA 1996. The Tribunal first decided on the appropriate period of loss. Significant weight was put on the medical reports from Dr Ewing Day. On the basis of Dr Ewing Day's position in his reports (particularly Bundle 4 @10), the Tribunal accepted that the claimant has been unfit for work since the termination of her

employment, that she will require a course of psychological treatment and anti depressant therapy '*to provide her with the best chance of re-engaging with employment'*, that 't*he length of treatment would most likely fall between 6 – 12 months for an adequate dose of therapy to be provided*', that 't*here would be a considerable wait for psychological treatment (ca. 18 weeks)*' and that, in Dr Ewing Day's opinion, 'e*ven with an adequate psychological intervention, it is likely that Ms Young would still experience difficulties with a return to employment at her previous levels of seniority and functioning.'* That position was as at March 2020. Taking into account delay in provision of treatment caused by the COVID pandemic, the Tribunal considered it to be just and equitable to calculate the claimant's compensatory award with regard to the whole period of time since the effective date of termination of her employment with the respondent (15 December 2017), until the conclusion of these Tribunal proceedings, plus a period of 18 weeks (4.5 months) to allow for commencement of appropriate therapy, plus a period of 12 months for conclusion of effective therapy, plus a period of 3 months to reflect a period of search for alternative employment.

239. The claimant had set out in her Schedule of Loss her net loss of income since termination date. The respondent did not dispute those figures. The claimant's monthly net pay as set out in her ET1 and agreed in the ET3 is £2532.18. The claimant's net weekly wage was (2532.18 x 12 / 52) £584.35. The period from 15 December 2017 until the conclusion of these proceedings (on the basis of this Judgment being issued on or around 26 March 2021) is 39.5 months. The Tribunal calculated the period of loss as follows:-

Past Loss	39.5 mths @ £2532.18	£100,021.11
Wait for Treatment	4.5 mths @ £2532.18	£11,394.81
Treatment	12 mths @ £2532.18	£30,386.16
Search for Employment	3 mths @ £2532.18	£7,596.54
Total Wage Loss	59 mths @ £2532.18	£149,398.62

239. In doing so, the Tribunal took into account the evidence that there may be a further delay in treatment due to the impact of the COVID pandemic, that the treatment period may be less than 12 months, that the impact of the pandemic may affect the claimant's search for suitable employment and that the claimant may not obtain employment at a similar rate of pay as previous. The Tribunal assessed the compensatory award which was considered to be just and equitable.

240. The Tribunal took into account the claimant's uncontested evidence in respect of the respondent's pension contributions. The Tribunal applied the Presidential Guidance on Principles for Compensating Pension Loss Fourth Edition (2nd revision) The claimant's pension loss was calculated using the contributions method. The respondent and the claimant contributed to a defined contribution scheme (DC). The claimant's pension loss is calculated on the basis of loss of employer pension contributions on the basis of the contribution rates set out by the claimant in Bundle 4@ 43. The same periods of loss as are taken into account in the calculation of wage loss are applicable. It is assumed that the claimant will gain future employment with auto enrolment to a pension scheme with minimum 3% employer contributions. The calculations are with regard to the claimant's gross pay with the respondent. That is set out in the ET1 and agreed in the ET3 as being £3791.67 per month. The calculation of pension loss is as follows:-

15/12/17 – 5/4/18	3.5 months @ 1% of £3791.67	£132.71
6/4/18 – 5/4/19	12 months @ 2% of £3791.67	£910.00
6/4/19 – 5/4/21	24 months @ 3% of £3791.67	£2730.00
Past Pension Loss	(£132.71 + £910 + £2730)	£3772.71
Future Loss	19.5 mths @ 3% of £3791.67	£2, 218.13
(4.5 mths + 12 mths + 3 mths)		
Total Pension Loss	£3772.71 + £2,218.13	£5,990.84

Compensatory Award = (£149,398.62 + £5990.84) £155,389.46

Uplift @15% = £23,308.42

Compensatory Award plus uplift and award for failure to issue terms and conditions = (£155,389.46 + £23,308.42 + £2445) £181,142.88.

241. On application of Section 124(1ZA) ERA, the upper limit of the compensatory award is now the lower of the equivalent of a year's salary (i.e. 52 x the claimant's week's pay') or the relevant set amount in relation to dismissals between April 2017 and April 2018. That relevant set amount was £80,541. Following *Pentland Motor Co Ltd v McKenzie, E*AT 0014/16, this limit only applies to the compensatory award. The calculation of a week's pay is with regard to the gross amount and is not subject to any limit.

242. The Tribunal applied the guidance of the EAT in *University of Sunderland v Drossou 2017* ICR D23, EAT. The claimant's week's pay for the purpose of calculation of the statutory maximum compensatory award includes employer pension contribution. Pension contributions are part of the reward for service. The claimant's gross weekly pay was (£45,000 / 52) £865.38. As at the effective date of termination of employment, the respondent employer pension contributions were £37.92 (Bundle 4 @ 43).

243. The claimant's week's pay was (£865.38 + £37.92) £903.30. In application of section 124(1ZA) ERA, the relevant maximum cap on the compensatory award is the lower amount of £80,541 and (£903.30 x 52) £46,971.60. The maximum compensatory award payable to the claimant is **£46,971.60.**

Recoupment Regulations

244. The Tribunal required to take into account the provisions of the Employment Protection (Recoupment of Benefits) Regulations 1996 ('the Recoupment Regulations'). These provisions apply to the part of the compensatory award which covers past wage loss in the period which the claimant received recoupable benefits. The claimant has been in receipt of Income Support and Carers Allowance during the period of loss until the conclusion of these

proceedings. Carers Allowance is not a recoupable benefit in terms of the Recoupment Regulations. Income Support is a recoupable benefit in terms of the Recoupment Regulations. The claimant has been in receipt of Income Support at the rate of £73.10 per week from 22/ 01/ 18. The prescribed period in terms of the Recoupment Regulations is from 12 December 2017 to 5 April 2021 (on the basis of the conclusion of these Tribunal proceedings being when this Judgment is issued on or around 5 April 2021). That is a period of 39.5 mths @ £2532.18 = £100,021.11). The prescribed element of the compensatory award relates to the prescribed period from 12 December 2017 to 5 April 2021 and is £100,021.11.

245. Regulation 4(2) of the Recoupment Regulations provides that where the amount of the compensatory award is reduced either because of the employee's contributory fault or (as in this case) because it exceeds the prevailing statutory limit, the prescribed element must be reduced proportionately. In *Mason v Wimpey Waste Management Ltd and anor 1982 IRLR 454, EAT*, (decided with reference to similar provisions in the Protection (Recoupment of Unemployment Benefit and Supplementary Benefit) Regulations 1977) an employment tribunal assessed the claimant's monetary loss at £7,712, of which £5,918 was referable to the period from the date of dismissal to the conclusion of tribunal proceedings. The statutory maximum for a compensatory award was then £5,200, so the tribunal took this to be the prescribed element since the whole sum clearly referred to the period between dismissal and the final tribunal hearing. The EAT held that it should have reduced £5,918 — the 'original' prescribed element — by the same proportion as the reduction from £7,712 to £5,200 for the total compensatory award, which would have produced a revised figure for the prescribed element of £3,991. This was beneficial to the claimant, since it is only the prescribed element of the compensatory award that is subject to recoupment.

246. The Tribunal calculated the proportionate prescribed element, relative to the compensatory award prior to the statutory maximum cap on that award being applied.

Total Monetary Award ('MA')

(Compensatory + Basic)	£46,971.60 + £8,435.25
£55,406.85	
Prescribed period	17/12/17 - 25/03/21
Prescribed Element ('PE')	£100,021.11

Compensatory award on application of relevant statutory maximum cap = £46,971.60

Proportionate reduction to Prescribed Element is (£100,021.11 x £46,971.60/£55,406.85) = £84,793.70.

Proportionate Prescribed element = (£100,021.11 - £84,793.70) £15,227.41. The total monetary award of £55,406.85 exceeds the proportionate prescribed element of £15,227.41 by £40,179.44.

247. For these reasons, the proportionate prescribed element of £15,227.41 from the total monetary award of £55,406.85 should not be paid to the claimant by the respondent until the relevant government department serves a recoupment notice on the respondent advising of the amount of benefit paid to the employee, or notification is given that there will be no recoupment. On service of a recoupment notice, the amount specified in that notice will then fall to be paid by the respondent to the relevant government department. Any balance falls to be paid by the respondent to the claimant once the respondent has received this recoupment notice, or notice that there will be no recoupment, a copy of which will be sent to the claimant.

Employment Judge: C McManus
Date of Judgement: 30 March 2021
Entered in register: 20 April 2021
and copied to parties