EMPLOYMENT TRIBUNALS

Claimant: Ms G Woods

Respondent 1: Mrs Elaine Evans
Respondent 2: Mrs Elaine Evans & Dr Wilson T/A Foxleigh Family Surgery

HELD AT: Liverpool (by CVP) **ON:** 9, 10, 11 & 12 March 2021 (in chambers)

BEFORE: Employment Judge Shotter

Members: Ms S Humphreys
Ms D Woods

REPRESENTATION:

Claimant: Mr Lewis, counsel
Respondent 1 & 2: Mr J Munro, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not treated less favourably because of her protected characteristic of disability by the first or second respondent and her claim of direct discrimination brought under Section 13 of the Equality Act 2010 is dismissed.

2. The claimant was treated less favourably because of something arising in consequence of the claimant's disability, and the first and second respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. The claim of disability related discrimination brought under section 15 of the Equality Act succeeds and is adjourned to a remedy hearing.

3. A provision, criterion or practice of the respondent puts the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not

disabled, and the first and second respondent have failed to take such steps as it is reasonable to have to take to avoid the disadvantage to the claimant. The claimant's claim brought under section 20-21of the Equality Act 2010 succeeds and is adjourned to remedy.

4. The first respondent did engage in unwanted conduct related to the protected characteristic of disability and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 succeeds.

5. The claimant's claim brought under section 19 of the Equality Act 2010 is withdrawn.

6. The first and second respondent breached the implied term of trust and confidence. The first and second respondent was in fundamental breach of contract sufficiently serious to amount to a fundamental breach. The claimant did not affirm the contract and she resigned as a result of the breach. The claimant was unfairly dismissed and her claim for constructive unfair dismissal is well-founded and adjourned to remedy which is to be listed with the parties' agreement.

REASONS

Preamble

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The documents that the Tribunal was referred to are in a main bundle of 390 pages, in addition to the claimant's witness statement signed and dated 25 January 2021, supplemental witness statement unsigned and dated 16 January 2021.

3. On behalf of the first and second respondent the following witness statements were produced; Rebecca Whiting unsigned and dated 5 March 2021, Lindsey Westwell, unsigned and undated, and Elaine Evans (the second respondent) unsigned and dated 10 March 2021. In addition, the Tribunal was provided with separate document consisting of an agreed list of issues.

4. The claimant is Bipolar and it was agreed with the parties that she could have as many breaks as she wanted during the hearing, and at the end of oral closing submissions Mr Lewis thanked the Tribunal on behalf of the claimant for giving her a fair hearing.

The pleadings

5. In a claim form received on 6 June 2019 following ACAS early conciliation between 24 March 2019 and 24 April 2019, the claimant, who at the time was employed as receptionist from 12 May 2017 until resignation without notice on 22 February 2019, brought complaints of constructive unfair dismissal and disability discrimination. The claimant is Bipolar, and the respondent concedes she falls within the definition of section 6 of the Equality Act 2010.

6. With reference to the constructive unfair dismissal claim the claimant relies on an alleged "final straw" being the grievance meeting held on the 11 February 2019. The claimant claims the following:

6.1 Constructive unfair dismissal contrary to section 95(1)(c) of the Employment Rights Act 1996 ("the ERA");

6.2 Direct disability discrimination relating to the claimant's Bipolar disorder contrary to section 13 of the EqA. The claimant initially made reference to actual comparators. She now relies on a hypothetical comparator but asks the Tribunal to take into account the lack of action taken by the respondent against Stephane Puglsey and Anne Robinson when drawing up the hypothetical comparator.

6.3 Discrimination arising from disability under section 15 of the EqA in respect of which the claimant relies on allegations 1(a) to (i) in the list of issues.

6.4 Failure to make reasonable adjustments under section 20-21 of the EqA, the provision, criteria or practice ("PCP") being:

(a) suspension of employees following an incident of alleged gross misconduct,
(b) Invoking/applying the second respondent's disciplinary procedure.

6.5 The reasonable adjustment sought was (a) not to invoke the disciplinary proceedings at all, and if invoking them, to deal with the disciplinary proceedings speedily.

6.6 Indirect discrimination under section 19 of the EqA relying on the PCP's above.

6.7 Harassment under section 26 of the EqA set out in 1 (a) to (i) of the agreed list of issues.

Agreed issues

7. The parties agreed the issues as follows. The numbering set out in the list of issues has been duplicated by the Tribunal in the reserved judgment and these are the issues it decided after hearing all of the evidence, oral submissions and applying the law.

Harassment – s.26

1. Did the Respondent(s) engage in the following "unwanted conduct":

(a) Suspending the Claimant and the manner of her suspension (as indicated in paragraphs 13 to 15 of the PoC).

(b) Not communicating with the Claimant whilst she was suspended, adequately or at all (as indicated in paragraph 16 of the PoC).

(c) Inviting and requiring the Claimant to attend a disciplinary hearing (as indicated in paragraph 17 of PoC).

(d) Delay in responding to the Claimant's requests following the disciplinary hearing (as indicated in paragraph 18 of PoC).

(e) Releasing an occupational health report regarding the Claimant, without her consent, to third parties (i.e. to Peninsula and/or Rebecca Whiting) (as indicated in paragraph 19 of the PoC).

(f) Belatedly dropping the disciplinary case against the Claimant (as indicated in paragraph 20 of PoC).

(g) Failing to deal with the disciplinary proceedings speedily, as required by the Employee Handbook (as indicated in paragraph 21 of the PoC).

(h) Requiring the Claimant to return to work on insufficient notice being given (as indicated in paragraph 22 of PoC).

(i) Not dealing satisfactorily with the Claimant's grievance (as indicated in paragraph 23 of the PoC), specifically:

(1) Not answering the Claimant's points of grievance.

(2) Ms Evans denying to the Claimant that she had interviewed staff jointly or together, when it was known or obvious to the Claimant that Ms Evans had done.

(3) Ms Evans telling the Claimant that Ms Evans had informed staff that the Claimant was returning back to work, when the Claimant knew the same was not true (i.e. that Ms Evans had not in fact done that).

2. If so, did it "relate" to the Claimant's disability?

3. If so, did it have the purpose or effect of (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Direct Disability Discrimination – s.13

4. Did the Respondent(s) treat the Claimant less favourably by any of the alleged matters set out at paragraph 1 above?

5. If so, did the Respondent(s) subject the Claimant to such treatment "because" she was disabled by bipolar (i.e. was that at least one of the material/effective reasons)?

Discrimination arising from a Disability – s.15

6. Did the Respondent(s) treat the Claimant unfavourably by way of the alleged matters set out above at paragraph 1?

7. If so, did the Respondent(s) subject the Claimant to such treatment because of "something" arising in consequence of the Claimant's disability (namely the Claimant's behaviour on 3 and 4 September 2018)?

8. If so, can the Respondent(s) show that the unfavourable treatment was a proportionate means of achieving a legitimate aim (namely that the Claimant was invited to a disciplinary and medical capability hearing as she had been physically and verbally abusive towards staff on 3 and 4 September)?

Failure to Make Reasonable Adjustments – s.20

9. Did the Respondent(s) apply the following provision, criterion or practice, which put the Claimant at a substantial (i.e. more than minor) disadvantage in comparison with employees who are not disabled:

   (a) To suspend the Claimant/employees following an incident of alleged gross-misconduct.

   (b) To invoke/apply the Second Respondent's disciplinary procedures

   The Claimant asserts that the suspension and disciplinary proceedings caused her additional stress and anxiety which aggravated her bipolar and/or were more difficult to navigate as a result of her bipolar, which is not something a non-disabled person would have to contend with.

10. If so, did the Respondent(s) have the necessary knowledge (actual or constructive) that the PCP(s) put the Claimant at that disadvantage?

11. If so, would it have been reasonable for the Respondent(s) to have made the following adjustments:

   (a) Not to invoke the disciplinary proceedings at all.
   (b) If invoking them, to deal with the disciplinary proceedings speedily.
   (c) Not to suspend the Claimant at all.
   (d) To communicate adequately with the Claimant during her suspension.

Indirect Discrimination – s.19

12. Did or would the Respondent(s) apply the above PCP(s) to persons who do not share the Claimant's protected characteristic?

13. If so, did or would the PCP(s) put persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it?

   The Claimant asserts that the suspension and disciplinary proceedings would cause those with bipolar additional stress and anxiety which would further aggravate their bipolar and/or be more difficult to navigate as a result of their bipolar, which is not something a non-disabled person would have to contend with.

14. If so, did the PCP(s) put the Claimant at that same particular disadvantage?

15. Can the Respondent(s) show that the PCP(s) were a proportionate means of achieving a legitimate aim (namely in order to protect its employees and patients that attend the practice and ensure that there was a safe working environment)?

Constructive Unfair Dismissal

16. Did the Second Respondent breach the implied term of trust and confidence by virtue of the matters above set out above?

17. If so, did the Claimant resign in response to that breach?

18. If so, did the Claimant affirm the contract or otherwise waive the breach?

Remedy

19. Is the Claimant entitled to compensation for financial loss? If so, at what level?

20. Is the Claimant entitled to compensation for injury to feelings? If so, at what level?

21. Is the Claimant entitled to an ACAS uplift?

22. Is the Claimant entitled to interest?

Evidence

17 The Tribunal heard evidence under oath from the claimant, who it found to be a credible witness supported by contemporaneous evidence when giving straight-forward evidence.

18 On behalf of the respondent it heard from Rebecca Whiting, previously employed by the respondent as a practice nurse, Lindsey Westwell, receptionist and Elaine Evans, practice manager for the second respondent and the person responsible for disciplining the claimant. Rebecca Whiting gave clear and straightforward evidence which in large reflected that given by the claimant and she was found to be a credible witness whose evidence could be relied upon. Lindsey Westwell was an angry witness; she did not want to be giving evidence at the hearing and made this clear to all.

19 Lindsey Westwell could not recall whether she was asked to write a separate statement or joint statement with Rebecca Whiting and the Tribunal concluded, on the clear documentary evidence before it, one statement was written with both having input during the day. Lindsey Westwell was not found to be an altogether entirely credible witness, exaggerating her evidence to assist the respondents, for example, she contradicted Rebecca Whiting's evidence concerning the incident involving the claimant's alleged act of violence towards her. On cross-examination Lindsey Westwell's version of events was that the claimant was becoming more aggressive and took hold of her hands, angry and aggressive "shouting saying they don't understand and I don't want them to know…she reared up with me with her hands and pinned me to the floor, so forceful and angry." Lindsey Westwell denied having hold of the claimant's hands. Rebecca Whiting's version was Lindsey Westwell had hold of the claimant's hands trying to calm the claimant down and when Lindsey Westwell asked the claimant about her parents the claimant became agitated again. In her witness statement Rebecca Whiting confirmed it was at that point the claimant "grabbed" Lindsey Westwell's hands and pushed her to the floor and when she was told to stop the claimant stopped. Both witnesses agreed the claimant's behaviour was out of character, and the Tribunal is in no doubt that the incident understandably caused them concern and distress.

20 Elaine Evans did not always give credible evidence, for example, in her witness statement she alleged the claimant had "grabbed" Rebecca Whiting "by the neck" and "grabbed" Lindsey Westwell by the hands, bending her fingers back pinning her to the floor." Rebecca Whiting's evidence was that the claimant "grabbed" the collar of her uniform and there was no allegation the claimant had grabbed any person by the neck. Elaine Evans' evidence on cross-examination that when the claimant returned to work she tried to resolve issues and facilitate the claimant's return was not credible for the reasons set out below. Elaine Evans denied she had informed the claimant Rebecca Whiting and Lindsey Westwell had provided separate witness statements maintaining she was provided with copies. The Tribunal accepted Elaine Evans' evidence on this point taking into account the fact that the statement titled "Timeline of Events" was a joint document and separate statements taken from Rebecca Whiting and Lindsey Westwell, two key witnesses were not taken.

21 The Tribunal has considered the documents to which it was taken in the bundle, the agreed chronology incorporated into the finding of facts, written and oral submissions, which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and it has made the following findings of the relevant facts having resolved the conflicts in the evidence.

Facts

22 The respondent is a general medical practice based in Leigh run by two partners, the second respondent and Dr Wilson employing 8 people during the relevant period. The first respondent is the practice manager and she had worked in this position since May 1993. Lindsey Westwell on cross-examination confirmed Dr Wilson was in charge and if there were serious problems Dr Wilson was the person to deal with them. It is notable Dr Wilson did not deal with any of the matters which gave rise to these proceedings, and she was not a witness in the case.

23 Rebecca Whiting was a practice nurse employed by the respondent between September 2017 and October 2019 and she had experience of mental health issues including Bipolar. Lindsey Westwell was and remains employed as a medical receptionist and she had been employed by the respondent since 2018.

Respondent's policies and procedures relevant to this claim.

24 The respondent issued a number of policies and procedures including a disciplinary and grievance procedure set out within an Employee Handbook, which formed part of the claimant's contract of employment and had contractual effect. The claimant is not relying upon a fundamental express breach of her contract of employment, but makes reference to the contractual terms as a basis of her allegation that the respondent was in breach of the implied contractual term of trust and confidence.

The Capability Procedure

25 The Capability Procedure was largely concerned with levels of performance and the employee being given time to improve. At paragraph C1 under the heading "Personal Circumstances/Health Issues" reference was made to "personal circumstances may arise which do not prevent you from attending for work but which prevent you from carrying out your normal duties (e.g.…. general ill health). If such a situation arises, we will normally need to have details of your medical diagnosis and prognosis so that we have the benefit of expert advice." Reference was made to obtaining a medical report

and “when we have obtained as much information as possible regarding your condition and after consultation with you, a decision will be made about your future employment with us in your current role or, where circumstances permit, in a more suitable role.”

26 There was no contractual right to suspend under the Capability Procedure, however, the claimant was put on paid leave immediately when her suspension was brought to an end, in order that steps could be taken under the capability procedure.

The Disciplinary Procedure

27 The Disciplinary Procedure set out a number of rules “in the interests of the whole organisation” including at paragraph 4c that “disciplinary action, where necessary, is taken speedily and in a fair, uniform and consistent manner.” Paragraph 4d provided “on some occasions temporary suspension on contractual pay may be necessary in order that an uninterrupted investigation can take place. This must not be regarded as disciplinary action or penalty of any kind.”

28 Under paragraph D Serious Misconduct reference was made to the penalty being “dismissal without notice…any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct. The non-exhaustive list of examples included “physical violence or bullying.” It is undisputed that the claimant’s behaviour on the 3 and 4 September 2018 could have amounted to gross misconduct.

29 Within the disciplinary procedure the practice manager was the only person authorised to dismiss.

30 Under “General Notes” reference was made to the following; “gross misconduct offences will result in dismissal without notice” and the right to appeal.

Capability/Disciplinary Appeal Procedure

31 At paragraph 1 the procedure provided “You have the right to lodge an appeal in respect of any capability/disciplinary action taken against you.” There was no reference to any right of an appeal if disciplinary action was not taken.

Grievance Procedure

32 The Grievance Procedure provided that employees had the right to raise a formal grievance in writing which would result in a grievance meeting.

33 Within this procedure provision was made for a grievance hearing, following which “you will be notified of the decision, in writing, normally within ten working days of the meeting, including your right of appeal.” There was reference to the right to appeal.

Equal Opportunities Procedure

34 Under this procedure reference was made to the respondent maintaining a “neutral environment in which no employee or worker feels under threat or intimidated.”

The claimant's contract of employment

35 The claimant commenced her employment on the 12 May 2017 as a medical receptionist. She was issued with a Statement of Main Terms of Employment on 12 May 2017 and acknowledged receipt of the Employee Handbook on this date.

36 The contract referred to a Capability and Disciplinary Procedures in the following terms; "The disciplinary rules that form part of your contract of employment and the procedure that will apply when dealing with capability or disciplinary issues are shown under the headings 'Capability Procedures' and 'Disciplinary Procedures in the Employee Handbook to which you should refer". In separate paragraphs reference was made the appeal procedure and grievance procedure also found in the Employee Handbook.

Respondent's knowledge of the claimant's Bipolar disability

37 At the commencement of her employment the claimant completed a Confidential Work Health Assessment NHS England (Dental and GP) on the 12 May 2017 disclosing she suffered from stress and anxiety in the past and Bipolar "all under control no issues." The claimant confirmed the medication she was taking. Elaine Evans was aware the claimant was disabled with Bipolar from the 12 May 2017, the date she disclosed this condition and her disability remained under control with no issues until the events which gave rise to these proceedings.

38 As at the 12 May 2017 the first and second respondent was fixed with knowledge of the claimant's Bipolar disability, which was kept confidential from the staff including Rebecca Whiting and Lindsey Westwell. However, as a practice nurse experienced in mental health issues Rebecca Whiting was in the position to recognise the possibility of Bipolar as a mental impairment during the incidents of 3 and 4 September 2018, and if she had any doubts guidance could have been sought from Dr Wilson, who possessed knowledge of mental health conditions.

39 The claimant was an excellent employee with no issues, well-liked and respected and she enjoyed her job. The claimant had controlled her Bipolar condition through medication and self-management successfully for a period of twenty-one years, and that remained the position when working for the respondent until the 3 and 4 September 2019, when incidents took place which ultimately resulted in the claimant's resignation and this claim being brought.

The incident of 3 and 4 September 2018

40 The first respondent, Elaine Evans, was not present during the incident on 3 and 4 September 2019, and when she returned to work on the 10 September 2019 the claimant was not at work due to her Bipolar.

41 Lindsey Westwell and Rebecca Whiting reported to Elaine Evans the incidents that had taken place involving the claimant a few days earlier. This was the first time the first and second respondent dealt with this matter. No steps had been taken between the 4 and 10 September 2019. Dr Wilson was made aware in passing on the 3 September 2019, but did nothing. The Tribunal finds it surprising that when this incident took place no action was taken by the second respondent, and it appears at no stage the claimant was referred to one of the doctors on duty in the practice including Dr Wilson's whose absence in this litigation is marked.

42 Elaine Evans asked Lindsey Westwell and Rebecca Whiting to produce a written statement. There is an issue whether they were told to produce it separately or together, and the Tribunal concluded they were not asked to produce separate witness statements. Both decided to produce it together to save time because they were short staffed. On the 10 September 2018, Lindsey Westwell and Rebecca Whiting six days after the last incident, produced a timeline of events by adding to the document throughout the day in-between working. The "Timeline of Events" record what transpired on the 3 September 2018 as follows:

41.1 The claimant arrived to work on the 3 September 2018 and her car window and door was left open in the pouring rain. The claimant accepts that this was the case and she was acting strangely, which she believed at the time, was attributable to Bipolar.

41.2 The claimant was in reception acting "strangely…very loud, giggling, hyper, clumsy, erratic in her behaviour." In oral evidence on cross-examination the claimant admitted she had shouted "just raised her voice" she accepted she had laughed uncontrollably and "I probably said 'I'm probably still drunk from the other day."

41.3 Lyndsey Westwell wrote "a premier health admin member came over to the desk to ask what the commotion was about. GW's reply was "I'm still fucking pissed," admin member laughed and went back over to premier health." In oral evidence the claimant disputed she had sworn. A statement was also produced by an unnamed reception staff from another practice which corroborated the uncontrollable laughing and the claimant "appeared to be under the influence of something/intoxicated although I could not smell alcohol." There was no reference to the claimant swearing.

41.4 Rebeca Whiting came into the practice at 9am by which time the claimant had been in work since 7.15am and witnessed the claimant being "very hyper, giggling, shouting, extremely loud behaviour at front desk and at back reception." When asked if she was "okay" the claimant replied, "I think I'm drunk form the weekend" and "started uncontrollably laughing." She reported the claimant fell out of a chair, was asked to be quite and questioned whether she thought she should go home, which the claimant dismissed. Rebecca Whiting reported how she told the claimant "cannot be at work as risk to herself and patients due to her behaviour and how she appeared to be behaving, definitely not her normal self." She asked the claimant whether she had been drinking on medication "as this could also be causing the drastic change in usual behaviour. GW did not disclose anything re meds."

41.5 Rebecca Whiting and Lyndsey Westwood recorded the claimant said; "Its lucky the pharmacist isn't here because I would have knocked her fucking block off" and both confirmed that was the case in oral evidence before the Tribunal. The claimant's evidence was that she had no recollection, and she would not use that sort of language.

41.5 The timeline made it clear Dr Wilson was not at work and running late. In the claimant's witness statement, she recorded how Dr Wilson was arriving as she was being driven out of the car park by her daughter.

41.5 Rebecca Whiting and Lyndsey Westwood set out the impact the claimant's behaviour had on them and they were largely concerned about the claimant's safety and well-being rather than their own, together with the effect of her behaviour on other practices and patients.

4 September 2018 timeline

41.6 At 7.40 the claimant went into work still ill. She rang Lyndsey Westwood "very distressed" and told her that her Bipolar had come back. This timeline as at the 10 September 2018 put the first and second respondent on notice that the claimant's behaviour could be down to Bipolar.

41.7 Rebecca Whiting came into work at 7.50 and found the claimant in reception "looking distressed and dishevelled" and when asked if she was okay the claimant reported "I think shits going to kick off today" stating her Bipolar was troubling her. Rebecca Whiting was put on notice that the claimant's behaviour was likely to be attributed to her Bipolar, and as a qualified nurse she would have appreciated the consequences of this, when Lyndsey Westwood would not, as confirmed in oral evidence under cross-examination given by both. The claimant was saying things like; "I'm not mental, I don't need sectioning…extremely erratic…paranoia" and sent Lyndsey Westwood and not the second respondent a text "Really bad here, hurry up."

41.8 Rebecca Whiting recorded how the claimant wanted to explain to her "how it felt all those years ago when nobody understood her." She got Rebecca Whiting "by the scruff of her uniform at her neck and gritted her teeth shouting in her face 'Why does nobody fucking understand me. GW held RW at the scruff (minutes) glaring at her looking very troubled. Did let go them broke down crying and howling that nobody understood her and she was not mental…screaming we cannot tell her parents as they will section her." In oral evidence Rebecca Whiting confirmed she did not feel personally at risk, and her concern was largely that she would fall against the filing cabinet and hit her head.

41.9 At 8.15 Lyndsey Westwood turned into work, the claimant was taken into the back and Rebecca Whiting joined them when Lyndsey Westwood asked the claimant about her parents "At which point GW grabbed hold of LW's hands and she pulled her fingers back forcing her onto her knees on the floor and practically pinning LW to the floor. Waling and screaming "you don't understand repeatedly. RW witnessed this, LW then swore at GW asking her to stop it. GW then broke down again sitting in the chair at the back desk. Then started saying look I am bringing myself down, shaking and tapping her hands and legs." The claimant denies that this incident happened. Lyndsey Westwood in verbal evidence confirmed the incident took place as recorded in the timeline, and her belief was that the claimant had no intention at the time to inflict pain.

41.10 Rebecca Whiting recorded how the claimant asked her "do you understand me now don't you" when I agreed she got onto her knees sobbing, wrapping her arms around RW's legs." The claimant was described as "extremely distressed, extremely loud, hyper, agitated, shouting" and she went "ballistic" when AB another receptionist suggested the crisis team was called. AB had mental health problems herself." The claimant left the workplace and drove herself home, and later that day there were telephone conversations about her medication. At the liability hearing it was suggested the claimant may have been locked in the back room; the claimant stated she had not been locked in, Rebecca Whiting confirmed this had not been the case and as far as the Tribunal was concerned this was the end of the matter concluding the claimant was not locked in a room as maintained by Mr Lewis.

41.10 Lyndsey Westwood and Rebecca Whiting set out their "concern [was] for GW safety. Concerned for patients' safety. Concerned for our own safety due to physical contact. Shocked…Making decisions on instinct have not experienced this in the work place before so we did as we thought best at the time."

43 On her return to work the first respondent commenced an investigation having concluded the claimant's actions amounted to gross misconduct due to the seriousness of the incidents, and she did not want the claimant to return to work and so the Tribunal found on the balance of probabilities.

44 A statement was typed by Stephanie Pugsley, an employee of the second respondent, on 12 September 2018. Stephanie Pugsley recorded how after the incident she had texted the claimant apologising for mentioning the crisis team, and she had discussed the claimant's medication with a doctor, and also with the claimant's daughter. Stephanie Pugsley wrote; "Thursday myself and the nurse spoke to the dr who advised Champix could be the main reason and she needs to stop them asap and needs to be assessed by a dr as well. Dr asked me to ring colleague to ensure of her safety. Spoke to her that afternoon and appeared to be in a manic episode." She recorded "PT daughter asked her if she should try and get there to the doctors which I advised following speaking with the Dr that yes she needed to get her seen to ensure the medication she is taking is the correct dose. Daughter also informed me that they had taken the Champix medication away from her."

45 The Tribunal concludes, on the evidence before it, that on or before the 12 September 2019 the second respondent was aware through its employees that the claimant's behaviour on the 3 and 4 September 2019 could be attributable to a combination of her Bipolar and medication. The Tribunal does not know the name of the doctor who advised Stephanie Pugsley about the claimant.

46 The claimant was absent from work with Bipolar illness and submitted a MED3 confirming she was not available for work and no adjustments were suggested.

47 By the 12 September 2019 Elaine Evans knew the claimant's behaviour could have been attributed to Bipolar and there were issues with her medication. She took no steps to investigate the position despite the provisions set out in the Capability and Procedure at paragraph C1 that expert advice on a medical diagnosis could be obtained. Elaine Evans was more concerned about allowing the claimant to continue working in the business and the risks that involved, perceiving her behaviour to be gross misconduct as opposed to an issue of capability. Elaine Evans took the view at the time that on no account was the claimant to return to work in the business.

Claimant signed fit to return to work on 3 October 2018

48 The claimant remained absent unfit for work until signed fit for work on 3 October 2018. Elaine Evans was not happy with the prospect of the claimant returning to work, and she made contact with the claimant asking her to come in to work at 9am on 3 October 2019 instead of her normal early start having made the decision to suspend pending a disciplinary hearing. The claimant believed she was to attend a return to work meeting and start work, and Elaine Evans had not put her on notice that she intended to discuss the events of 3 and 4 September with a view to suspending and disciplining her. The Tribunal finds Elaine Evans, whether she was following legal advice from consultant or not, gave no thought to the claimant's mental health and well-being despite the fact she was fully aware the claimant's behaviour may be directly attributable to Bipolar. There was nothing to stop Elaine Evans between the 12 September 2018 to 3 October 2018 obtaining an occupational health report on the circumstances surrounding the claimant's behaviour, and holding a capability meeting with a view to managing the claimant's disability in the future. The Tribunal found on the balance of probabilities Elaine Evans

did not want the claimant to return to work as she believed the Bipolar condition was no longer under control and could cause difficulties for the practice.

Suspension meeting 3 October 2018

49 The suspension meeting on the 3 October 2018 was the first meeting between the claimant and Elaine Evans following the incident. The claimant was asked to give an explanation of the events which she did, stating she felt "giddy" on the 3 September and did not know if this "was the influence of drinking Sunday or Bipolar think it was a combination of both…Feels disgusted at behaviour on Monday." With reference to the 4 September 2018 the claimant described how she tried to open up, felt anxious and could not think straight…stayed in the back room a physical and emotional wreck. It's part of Bipolar. Felt really bad felt let everyone down."

50 The note taken of the meeting by Elaine Evans recorded that the claimant had held Lyndsey Westwood's hand, "EW did not realise squeezing so tight in hand and apologised and let it go!) Gill was becoming uncontrollable… this had happened before and Gill ended up being sectioned" three times twenty-one years ago…received test later from Steph saying to contact the crisis team to stop taking the Champix, or did the Champix have something to do with how Gill was feeling! After Tues 4 September not had contact with anyone only when came in with sick note."

51 The claimant discussed with Elaine Evans the changes made to her medication, how she went to see GP for sick note and the medical advice she received; "informed GP of what had happened regarding mental health – slight relapse and that medication had been changed…saw mental health on Thursday 27 Sept. Happy that you stay on the same medication and have blood tests every six months instead of the usual 12 months." The claimant referred to medication being reviewed every 6-months. "However, has been informed on very low dose anyway, by Mental Health." The triggers before episodes were discussed; these were family related and stresses at work were not a trigger factor according to the claimant.

52 After the claimant had explained her position, raising the issue of medication and the medical advice received, which was she was well enough to return to work, Elaine Evans ignored the explanation given as she had no intention of allowing the claimant back into work as there were now issues with Bipolar condition. Elaine Evans had decided to suspend and discipline the claimant, whatever explanation was given, and she was unconcerned suspension and investigation under the disciplinary procedure would have an adverse effect on the claimant's mental health. Elaine Evans made the decision to suspend the claimant and proceed down the route of a disciplinary hearing based on the evidence she already had, evidence which brought into question whether the disciplinary route was the correct way forward as opposed to taking action under the respondent's capability procedure. The Tribunal found the suspension was an ill-considered reaction and arose out of Elaine Evan's view that she did not want an employee who had suffered a recent Bipolar incident in the workplace. One option for Elaine Evans would have obtained a medical report dealing with all of the issues raised by the claimant and her colleagues, particular the effect of changes in medication and control of the Bipolar. The most sensitive way of ensuring the claimant was out of the workplace on full pay would have been for example, to have placed the claimant on some form of paid leave with her consent whilst the medical position was investigated, a step taken by the respondent later on in the chronology by which time the claimant's mental health had deteriorated so badly she was admitted to hospital under the Mental Health Act. Had the respondent taken this step early in the process there would little

delay, the disciplinary investigation leading to a disciplinary hearing would not have gone ahead and the effect on the claimant's mental health minimal according to the evidence (including Dr Kumar's report) before the Tribunal.

53 At the end of the meeting the claimant was told she was suspended pending disciplinary investigation, and handed a pre-prepared letter dated 3 October 2018 which stated "I write to confirm you have been suspended on contractual pay to allow an investigation to take place following the incidents of Monday 3rd September and Tuesday 4 September 2019. As your employer we have the duty to fully and properly investigate this matter. Suspension from duty on contractual pay is not regarded as a disciplinary action. It is a holding measure pending further investigations where is it undesirable for an individual to remain on duty. The duration of the suspension will only be for as long as it takes to complete the investigation…you are instructed not to contact or attempt to contact or influence anyone connected with the investigation in any way…Should the investigation indicate that there is some substance to the incident you will be required to attend a disciplinary hearing." It is notable that the suspension took place after the investigation had been completed and prior to the disciplinary hearing in an attempt to keep the claimant away from the business and her colleagues, as the claimant had been warned she could not contact them despite the fact her relationships at work were very important for her mental health.

54 The claimant, who expected to take part in a return to work interview and not a disciplinary investigation, was shocked and upset by the way she had been treated and the fact she was told by Elaine Evans not to contact her colleagues. There is an issue whether throughout the meeting the radio was on, the claimant's evidence is that it was. Elaine Evans accepted the radio had been put on, but only when she went to make the claimant a drink. The Tribunal on the balance of probabilities preferred the claimant's evidence that the radio was on throughout, and it took the view that Elaine Evans had no perspective of how the claimant may view a meeting when it was clear that it was not a return to work meeting and yet the radio was on in the background. In short, Elaine Evans' asked the claimant questions about sensitive issues at a formal suspension meeting with the radio on. Elaine Evans did not give evidence that the claimant asked for the radio to be put on, and the fact it was is indicative of the spirit in which Elaine Evans insensitively approached serious mental health issues unconcerned about the affect her actions had on the claimant and oblivious to the seriousness of a Bipolar disability.

55 After the meeting Elaine Evans escorted the claimant out of the practice without giving her the opportunity to say goodbye to colleagues who she was warned she could not contact without being at risk of further misconduct allegations. Elaine Evans' heavy handed actions caused the claimant further upset, as she was embarrassed about being escorted out of the premises and this further underlined the negative perception and lack of trust Elaine Evans had in the claimant as a result of the Bipolar disability. There was no reason whatsoever why the claimant could not have said goodbye to her colleagues or continued to contact them during her suspension.

56 The claimant was in the habit of communicating with colleagues outside work, for example, Lindsey Westwell in a 3 September 2019 WhatsApp message referred to the claimant as "bushbaby xxx" and in response the claimant wrote "I'm so sorry love I've let you down big style" and described why the incident happened to which Lindsey Westwell responded "Love [heart emoji] you too bits" and later when claimant apologised for her behaviour on the 4 September she wrote "genuinely sorry for what you witnessed today I know it's awful to see." Lindsey Westwell responded "you have

nothing to apologise for, I love you xxx." Elaine Evans by her heavy-handed treatment of the claimant was preventing the claimant from exchanging WhatsApp messages with a close friend who "loved her" and was supporting her in her mental health.

Claimant's request for details of the allegations against her

57 At 14.38 on 3 October 2018 the claimant sent a WhatsApp message to Elaine Evans; "Can I please ask what the allegations are against me?" The claimant followed this up by an email sent at 17.05 on 3 October 2018. Elaine Evans responded at 18.33 "allegations were made about your inappropriate behaviour in the Surgery on Monday 3rd September and Tuesday 4th September. I will be investigating these reports." What Elaine Evans was not saying and did not do was investigate the effect on the claimant's Bipolar disability medication and its link to the events of 3 and 4 September 2018 and no further investigation took place. The Tribunal inferred that the reason for this was Elaine Evans did not want to explore whether there was a link; her objective was to ensure the claimant exited from the business one way or another as she did not want an employee disabled with an active impairment of Bipolar which may not be under control in the future working for the business. Taking disciplinary action for behaviour which on the face of it were acts of serous gross misconduct, would best achieve this objective.

58 The claimant emailed Elaine Evans on 3 October 2019 at 20.45 "would it be in order at this stage to advise that any inappropriate behaviour I may have shown was purely as a result of me undergoing a Bipolar episode on the Monday and Tuesday over which I had no control. My specialist has advised in his view the episode was as a direct result of a combination of my experiencing severe pressure the previous weekend…and the fact that I was taking "Champix" (which are a known trigger for mental health problems unless closely monitored, which I was not) in order to quit smoking… I was seeing Gary at the surgery at the time."

59 Elaine Evans did not respond to this communication. She did not seek medical evidence dealing with what the claimant was stating had caused the Bipolar episode. In not responding Elaine Evans completely disregard the effect of her behaviour as a manager on the claimant's mental health condition. Elaine Evans has been unable to provide a credible explanation for all of the instances when she ignored the claimant's communications (there were numerous occasions) and the Tribunal has drawn adverse inferences from this concluding the actions of Elaine Evans during this period were tainted by unlawful disability discrimination. Under cross-examination Elaine Evans repeatedly informed the Tribunal "I needed to understand if it was a result of her condition, her drinking or not taking medication" when she clearly had no intention of seeking this understanding which could only be obtained through medical opinion and prognosis, which the first and second respondent were very well placed to obtain. Elaine Evans in oral evidence also repeated the fact that staff "were petrified" when this was not the case, as Lorraine Westwell and Rebecca Whiting were more concerned with the claimant's mental health and not "petrified" the claimant would have another episode, and this was reflected in the WhatsApp messages and the oral evidence given at this hearing.

60 Elaine Evans' actions belied her concerns, which if genuine could only be resolved with medical evidence and Elaine Evans did not go this route until much later with the result that the claimant was left hanging at home worrying about disciplinary action, without the daily routine of work she enjoyed and access to work colleagues who were close to her and friends in her private life.

61 Throughout this period the claimant's mental health plummeted. She had no access to colleagues and friends at work who were concerned with her health; unlike Elaine Evans who showed no concern whatsoever. In oral evidence on cross-examination Elaine Evans explained she had suspended and not referred the claimant for an occupational review, she knew now but had not known about the Bipolar and whether the incidents were the result of drinking or medication. This evidence was not credible, Elaine Evans was aware of the Bipolar from the outset of the claimant's employment, and the only way the issue concerning medication/alcohol could be resolved was through medical evidence. Elaine Evans indicated she was "not worried about controlled Bipolar. I am concerned about the claimant taking medication." On the balance of probabilities, the Tribunal found Elaine Evans intended the claimant to be managed out, and this is supported by the fact she did not respond to many the claimant's communications against the backdrop of her mental health, and her sole concern was the fact the claimant committed an act of gross misconduct under the Disciplinary Procedure and she should be subject to disciplinary proceedings no matter what her mental health state was at the time of the alleged offence.

Invite to a formal disciplinary hearing

62 The claimant emailed Elaine Evans on the 11 October 2018 "Have there been any developments yet" and she received a letter of the same date inviting the claimant to a "formal disciplinary hearing" on 17 October 2018. The allegations raised two matters centred around the events of 3 and 4 September 2018 that the claimant had said "I'm still fucking pissed" and "it's lucky the pharmacist isn't here because I would have knocked her fucking block off. It is alleged that you have displayed inappropriate behaviour both physically and verbally at work. Examples are: A) It is alleged that on Tuesday 4 September 2018 you allegedly got an employee by the neck of their uniform and shouted in her face 'Why does nobody fucking understand me?' B) It is alleged on Tuesday 4 September 2018 you allegedly grabbed an employee's hand and pulled back her fingers forcing her onto her knees whilst screaming 'You don't understand.'"

63 The claimant was provided with the investigation documents, the last in date being the handwritten notes taken at the 3 October 2018 investigation meeting when the claimant was not asked about all of the allegations, and all the claimant as told was that she had behaved inappropriately on the 3 and 4 September 2018 with no additional information being provided until the disciplinary invite letter. No additional investigation had taken place after the 3 October 2018 and there was no reason for the claimant to be suspended pending a disciplinary investigation because there was no further investigation, when in reality the first and second respondent should have proceeded down the medical investigation route and did not.

64 The claimant was informed "if you are unable to provide a satisfactory explanation for all for the matters of concern set out above, your employment may be terminated in accordance with out disciplinary procedure." Understandably, the claimant was upset when she read the invite letter which made no reference to any investigation into her medical condition and the effect of medication on the Bipolar disorder despite as far back as 12 September 2018 Stephanie Pugsley provided a statement to the respondents dealing with the medical advice she had obtained, and the information provided by the claimant at the 3 October 2018 suspension meeting together with the claimant's emailed that followed.

17 October 2018 disciplinary hearing before a consultant, Rachael Waught

65 The Tribunal found the respondents failed to ensure the claimant was well enough to attend the disciplinary hearing, and there is an issue as to whether the claimant collapsed and needed help to get up the stairs to the disciplinary meeting held on the 17 October 2018. The Tribunal preferred the claimant's evidence that she had collapsed and needed to be helped. On the 16 October the claimant attended at her GP because the effects of Bipolar were getting worse, and was offered a sick note which the claimant refused. The claimant was sectioned under the Mental Health Act on the 31 October 2018. Elaine Evans evidence was that the claimant had not collapsed but she was in tears and she offered to come in with her and "fight your corner" evidence which made no sense as Elaine Evans was to have been the decision maker at the disciplinary hearing without actually attending the hearing itself. Elaine Evans was to have made her decision whether or not to dismiss the claimant without hearing from the claimant or her mitigation, acting on the advice received from Rachel Waugh who provided a case report and recorded transcript of the hearing.

66 The claimant had not met Rachael Waugh before, and it was expected that she would discuss sensitive health matters with a stranger in the knowledge that Elaine Evans was the decision maker and not Rachael Waugh. The evidence before the Tribunal was that the claimant was not well enough to attend this disciplinary hearing, which should have been adjourned pending a medical assessment. It is not appropriate for an employee disabled with Bipolar deteriorating to such an effect that she collapsed and needed help up the stairs crying before and during the hearing, to undergo a disciplinary hearing following which dismissal could take place. It is uncontroversial that the claimant's crying continued in the hearing itself, as recorded.

67 The disciplinary hearing was recorded and the Tribunal took into account the transcript which it carefully read in full. The following points arising out of the transcript are relevant:

65.1 At the meeting the claimant indicated she had not seen an anonymous statement.

65.2 The allegations were put to her, and the claimant made the point that her investigation meeting was supposed to be a return to work interview and she was not aware she was under investigation.

65.3 Mental health and Bipolar was discussed and the fact the claimant was "seriously ill". The claimant asked why nobody had asked for medical evidence.

65.4 The recording reflects the claimant was banging on the table and crying. Rachel Waugh offered the claimant a "couple of minutes" and the claimant crying, stated she wanted to carry on. In oral evidence before this Tribunal Rebecca Whiting, who has experience as a nurse practitioner of mental health issues including Bipolar, explained the claimant was banging the table to control her Bipolar and "bring myself down." This was in accordance with the claimant's oral evidence; she described how knocking her head on the wall of tapping her feet/hands/ banging the table released the effect of Bipolar.

65.5 The Tribunal found Rachael Waugh continued with the hearing when she should not have done, despite the claimant stating her bipolar has increased "since all of this started." The claimant went into great detail about when she was sectioned under the Mental Health Act, referenced the effect of Champix on her, maintaining there was "still

a dispute over Champix. “The claimant expressed her concern that she could “lost her job just for being ill.” The claimant referenced “and there’s my mental health. I want you to ask for all my medical records. Every single one of them.”

66 The Tribunal found Rachael Waugh was put on notice about the severity of the claimant’s mental health issues and how the disciplinary proceedings were adversely affecting her. This should not have taken her or the respondents by surprise given the fact the claimant was signed fit to return to work by her GP on the 3 October 2018 and by the 17 October 2018 she could not even walk up the stairs without help, was crying and banging the table.

Report and recommendations

67 Rachael Waugh confirmed to the claimant a report would be provided with recommendations, and “it should be by the end of the week at the latest” i.e. 24 October 2018. This was an important issue for the claimant, whose health was adversely affected by the disciplinary proceedings and prospect of being dismissed evidenced by the fact she chased the respondents for the outcome when it was not provided as promised.

65 The claimant chased the Elaine Evans and the employment consultants for a response, and she finally received a copy of the transcript on 19 November 2019 and not on the 24 October 2018 as promised.

66 In a letter dated 1 November 2018 the claimant was referred to occupational health, remaining under the disciplinary process. The claimant was not told the disciplinary was on hold, and emailed Elaine Evans “I have been expecting an update well before now. Please be advised I’ve just had a review…Mental Health assessment management team. Ask for a copy of this…What’s happening with regard the allegations?”

Sectioned under the Mental Health Act 31 October 2018

67 The claimant Bipolar condition had deteriorated to such an effect that she was sectioned under the Mental Health Act between the 31 October and 2 November 2018, and her partner informed Elaine Evans of this, asking if she would hurry the process along which Elaine Evans refused to do as she had a procedure to follow.

68 The first and second respondent was provided with Rachael Waugh’s findings attached to the transcript, and at paragraph 18 reference was made to the respondents putting the disciplinary hearing “on hold” as follows; “took on board RWA’s advice and the disciplinary hearing was put on hold pending an occupational health assessment.” The occupational health assessment took place on the 20 November 2018.

69 The claimant was informed for the first time the disciplinary hearing was on hold in a letter dated 9 November 2018 in which Elaine Evans requested copies of the claimant’s medical records and apologised “for the delay with the outcome to the disciplinary…you will remain on suspension until we receive a report from occupational health.”

70 There was a period from 24 October to 9 November of approximately two-weeks during which the claimant was waiting for the transcript and promised outcome following the disciplinary hearing which had been put on hold and she had not been told of this, despite the severe mental health issues that necessitated the claimant being sectioned under the Mental Health Act. There was no good reason why the claimant could not have been informed by Elaine Evans, the decision maker who oversaw all

communications with the claimant, that as soon as the decision had been made to put the disciplinary hearing on hold on or immediately after the 17 October 2018, given the consultant would have been aware from discussions at the 17 October disciplinary hearing medical evidence was required and the disciplinary hearing could not proceed without it.

71 Elaine Evans took steps to secure an occupational health report and an appointment was arranged for 20 November 2018, over one month after the 17 October 2018 disciplinary hearing. Advice was sought on reasonable adjustments some two and a half months after the incident. Contrary to the evidence of Elaine Evans and oral submissions, the occupational health report was not secured "as early as possible" as a medical report could have been obtained before the suspension meeting held on 3 October 2018.

72 In the meantime, the claimant continued pressing for a transcript of the disciplinary hearing, and took the step of approaching Rachael Waugh directly on the 13 November 2018 pointing out "It is now 13 November and I do not know what is happening with regard to the allegations that have been made against me. As you can appreciate that is not good in terms of my health this has had a further serous detrimental effect on me which has led to spending some time in hospital.". Rachael Waugh in a response indicated on the 14 November that the transcript was usually provided when the report is produced, and a copy of the transcript would be sent to the respondent. By the 14 November 2018 almost one month had passed since the 17 October hearing and the promise of the report with recommendations by 24 October 2018.

73 On the 19 November 2018 the claimant was sent a copy of the transcript by Elaine Evans who requested consent to send the transcript to occupational health. In an email of the same date the claimant queried why occupational health would need to see her disciplinary hearing transcript and she did not agree to show anyone a document "that has no bearing on my health." In a separate email the claimant asked for a transcript of a telephone conversation she had made on the 4 September "as I knew my conversation was impaired" and CCTV footage. The claimant signed the consent form to release her medical records on 20 November 2018.

74 On the 6 December 2018 Elaine Evans asked the claimant to contact her "urgently" regarding the suspension.

<u>Occupational health report 7 December 2018</u>

75 Dr Kumar provided a report dated 7 December 2018 which referenced the incidents on the 3 and 4 September 2018, adjustments made to the claimant's medication and the trigger for the deterioration in the claimant's mental health. He confirmed "unfortunately the suspension and associated worry and concern led to a significant deterioration in her conditions where she required admission for a short while to hospital. There have been additional changes to her medication with an increase in dose. Although better she still remains somewhat anxious and worried about her job."

76 Dr Kumar confirmed "she does suffer from bipolar effective disorder. I would concur that the incidents described are likely to be connected to the bipolar disorder which can lead to agitation and behavioural changes which could account for the incident described in work…**she has in the past been able to manager her condition effectively for many years and I see no reason why that should not be the case in the future…I believe**

it is important that the process is completed as quickly as is reasonably possible, which I feel will have a beneficial impact on her health" [the Tribunal's emphasis].

77 Turning to adjustments Dr Kumar concluded "in terms of the future, as this episode did occur very quickly without her realising it, it is important that an appropriate plan is put into place…In terms of her workplace, it would be prudent to consider discussing and agreeing a plan whereby if there are any concerns raised regarding the possibility of a relapse, a designated individual can take appropriate steps…"

"Face2Face Report"

78 A "Face2Face" Report dated 12 December 2010 was finalised by Rachael Waugh, the consultant, in the light of the medical evidence which included a transcript of the disciplinary hearing. The report ran to 189-pages and the following is relevant:

78.1 Rachael Waugh's findings confirmed that following on from the disciplinary hearing she had recommended the occupational health assessment produced on 7 December 2018 and "based on the information provided…RW accepts GW's mitigation that her behaviour was due to a medical condition which was exacerbated due to stress in her personal life….RWA finds that colleagues who witnessed GW's behaviour on the day **did not believe after further analysis that GW was under the influence of alcohol**…her change in behaviour was linked to a medical condition and not under the influence of alcohol at work…**RWA finds GW's behaviour on 3 September 2018 should not be classed as an issue of misconduct but as a medical issue**" [the Tribunal's emphasis]. It is notable that as early as 4 September 2018 Rebecca Whiting and Lyndsey Westwood were of the view the incident was not linked to alcohol as nobody could smell alcohol on the claimant, and it did not need a consultant to confirm the position in a report prepared over three-months after the event to put Elaine Evans on notice of this, bearing in mind Rachael Waugh relied upon the investigation carried out by Elaine Evans before the claimant's suspension in anticipation of Elaine Evans also being the decision maker at the disciplinary hearing in breach of the ACAS Code of Practice and so the Tribunal found.

78.2 It was suggested the claimant be invited to a medical capability meeting to assess reasonable adjustments and if none could be made "the Employer may need to consider terminating GW's role on the ground of medical capability." It is notable the threat of dismissal remained despite Dr Kumar's medical evidence to the effect the claimant had managed her condition in the past and was capable of managing it in the future.

78.3 With reference to the 4 September 2018 incident Rachael Waugh found the claimant displayed "inappropriate verbal and physical behaviour" and her colleagues "who were present…recognise that this behaviour was uncharacteristic for GW and acknowledge that GW's behaviour may have been due to a medical condition…this opinion is supported by evidence from the occupational health Report." A medical capability meeting was recommended with dismissal if reasonable adjustments could not be made that would allow "GW to perform her role whilst still protecting the interests and safety of the patients and other staff."

78.4 A risk assessment was recommended, and a copy of the report together with the disciplinary hearing minutes/notes should be made to the claimant. Finally, at paragraph 46 the right of the claimant to appeal "the decision that is made" was referenced.

Continuing of the claimant's suspension 13 December 2018.

79 By an email sent to the claimant on 13 December 2018 that attached a letter of the same date Elaine Evans wrote "I write further to our letter of confirming your suspension from duty on contractual pay to allow an investigation to take place. I would like to apologise for the delay in contacting you again. This is due to the fact that an investigation is taking considerably longer than I anticipated." The Tribunal finds the investigation had been complete prior to the suspension, and the delay was in part attributable to the time it took for the "Face2Face" report and recommendations to be finalised. In a second letter of the same date the "Face2Face" report was attached and reference was made to the claimant being required to "attend a medical capability hearing to understand whether there are any reasonable adjustments which can be made to help you carry out your role whilst ensuring the health and safety of staff and patients are not put at risk. If no reasonable adjustments cannot be made, we may have to consider termination of your employment on the ground of medical capability."

80 Elaine Evans did not explain the claimant was no longer being dealt with under the respondent's Disciplinary Procedure and under what procedure the suspension was continued. On the face of the correspondence the suspension continued to be a disciplinary suspension despite Dt Kumar's medical opinion that there was no reason for the claimant not to manage her disability in the future and his view that "the suspension and associated worry and concern led to a significant deterioration in her condition and…it was important that the process is completed as quickly as is reasonably possible, which I feel will have a beneficial impact on her health."

81 In a third letter sent on the 13 December 2018 the claimant was invited to a medical capability hearing to discuss "whether there are any reasonable adjustments that can be made to your job or in the workplace that would facilitate a return to work…if the hearing indicates that there is little likelihood of a return to work within a reasonable timescale and there are no reasonable adjustments that can be made or alternative employment available, then the outcome may be notice of the termination of your employment on the ground so ill health." When writing this letter Elaine Evans was aware from Dr Kumar's report that the suspension and investigation was continuing to exacerbate and drive the claimant's symptoms. The Tribunal finds the three letters sent to the claimant on the 13 December 2018 from Elaine Evans did not address or take into account the fact Dr Kumar's advice and opinion that "the suspension and associated worry and concern led to a significant deterioration in the claimant's conditions where she required admission for a short while to hospital…she still remains somewhat anxious and worried about her job."

82 In a response sent on 14 December 2028 the claimant asked Elaine Evans whether she had accepted all of the recommendations and confirmed on her part; "I'm not happy with the outcome."

83 In an email sent on 17 December 2018 by Elaine Evans the claimant was informed she had accepted the Face2Face recommendations and "the outcome will not be decided upon until the hearing has taken place. You have the right to appeal against the decision." The Tribunal found the correspondence from Elaine Evans showed no compassion towards an employee with a disability that appeared to have been exacerbated by the disciplinary process and the length of time it took. It noted that despite the claimant being informed she had the right to appeal, when she did appeal later in the chronology her appeal was not dealt with and ignored.

Medical Capability meeting 20 December 2018

84 The capability meeting took place on the 20 December 2018 before "Face2Face" consultant Sharlene Hernandez employed by a specialist third-party HR service. The claimant was accompanied by the Care Coordinator involved in the claimant's home treatment. The claimant was not informed beforehand that Rachael Waugh would not be conducting the hearing and she was taken by surprise by Sharlene Hernandez, who she had never met before and yet she was expected to discuss and divulge sensitive personal information relating to her mental health.

85 Sharlene Hernandez made it clear the hearing was a medical capability meeting and that there was a "huge difference" between a capability meeting and a disciplinary hearing. She also made it clear that as "independent" consultant she did not know the respondent's practice or how it ran, which raised a question mark over how Sharlene Hernandez could come to a view about reasonable adjustments in the respondent's workplace. The Tribunal noted that this may be a disadvantage when reasonable adjustments were to be discussed and recommendations made to the respondents. The claimant raised the issue of her private medical records and report being disclosed to a third party without her knowledge and consent, to which Sharlene Hernandez responded; "you will have to bring that up separately" on two separate occasions as she was not prepared to deal with it.

86 The claimant asked; "why hasn't my medical records been requested in the terms of going through the whole disciplinary...I shouldn't have gone through disciplinary…" Sharlene Hernandez responded: "at the disciplinary we won't automatically request your medical report…Let's pretend that no allegations were brought against you…and you were not coming into work on time, or were consistently calling in sick…and you say 'it is because of my bipolar…' the respondent would need to have a welfare meeting and get a medical report…This is a disciplinary. Nobody's gonna ask for a medical report simply because you've been -, there have been allegations raised against you. During that process you said "'It was not me, I was not in sound mind. It's because of my Bipolar.' How do we know that to be true? The only way to verify that is to get a medical report…" Sharlene Hernandez did not address why the claimant's medical records and a medical report were not obtained before disciplinary proceedings were instigated which was in fact the claimant's question, and one of the key failures by the first and second respondent in these proceedings, which brings into question how "independent" Sharlene Hernandez was, and her responses to the claimant's questions concerning the practice and Dr Wilson's expertise in mental health underlines the lack of objectivity. The fact of the matter is that the whole disciplinary process and disciplinary suspension could have been by-passed by an early referral to Dr Wilson (or equivalent expert/occupational health) who would have confirmed the medical position as did Dr Kumar many months down the line.

87 The Tribunal notes the claimant's response was that she had never hidden the fact she was Bipolar from the respondent and "the doctor that works here, yeah, specialised in mental health. If she needed guidance towards that, why couldn't she ask Dr Wilson?" Sharlene Hernandez's response was that "Face2Face" had to carry out their own investigations, and "if your employer had this meeting with you and they said 'We want proof you've got Bipolar,' you've got an argument…Because they know it 'It's on my form, you've interviewed me, you've talked about it, you know my history, why are you

asking me now to go…We [meaning Face2Face] don't know you…and we need to understand the reason why Rachael asked for that report."

88 Sharlene Hernandez confirmed "Face2Face" were "happy" the claimant was disabled, can perform her duties and the issue was whether it was safe for patients and colleagues for her to be at work, and reasonable adjustments. She stated had the claimant worked for the respondent for twenty-years "we would just say, 'Well, this is a fluke…she's had this disability for longer than 20 years, nothing has ever happened, we can put that aside. That is not the case, we don't have a history" and a process must be followed.

89 At the end of the capability meeting Sharlene Hernandez confirmed the claimant had already lodged an appeal and "whatever you write in that appeal you can't say you're not happy with-, happy what you've done here with me today-, because you've said 'Let's carry on with the meeting here today. So whatever else you raise in your appeal will be everything else you're unhappy with, except the fact we had a meeting today." The Tribunal were rather bemused by this comment, as it was clearly open for the claimant to state she was not happy with the process including the medical capacity meeting.

90 The claimant was informed she could expect an outcome as follows; "I will ask the office if I can day after Christmas…so it can get wrapped up, because I'm conscious that this is affecting you…you will want to start the New Year…" the claimant's response was that she had waited long enough, especially since she had made the position clear "from day one, as soon as I found out I was under disciplinary…I made it clear that it was due to my illness…that was in October, and we are now in December." It was agreed the claimant would be sent the report in the New Year. The claimant's response reflected the nub of this case.

91 The meeting started at 10.38 and finished 11.30am.

<u>"Shortened outcome" of the medical capability meeting 20 December 2018 recommending the lifting of the suspension</u>

92 In a letter dated 20 December 2018 sent to the claimant by Eileen Evans a "shortened outcome" of the medical capability meeting confirmed a recommendation by Sharlene Hernandez that the claimant's suspension be lifted immediately, she be allowed to return to work on 2 January 2021 and was not required to work the early shift with sole responsibility for opening the surgery. The claimant's absence between 21 December and 31 December was recorded as authorised absence for which the claimant would receive full pay. Meetings were to be arranged between the claimant and her colleagues on the claimant's return to work. Eileen Evans made it clear that "I have fully accepted Sharlene's recommendations" and she looked forward to welcoming the claimant back. The claimant was informed the full report would be sent to the claimant in the New Year. Sharlene Hernandez had drafted the letter on behalf of Eileen Evans.

93 The claimant responded in an email sent on the 24 December 2018 stating her condition had significantly deteriorated "yet you have made an assumption I'll be fit to return to work. I'm unable to cope with normality until this investigation comes to a close. I don't think you understand the full impact this procedure has had on me, my health and my family." Eileen Evans promised to seek clarification to the questions raised by the claimant in the disciplinary meeting and she arranged an appointment for the claimant with the mental health team on 20 January 2019.

The telephone conversation on 2 January 2019

94 On the 2 January 2021 the claimant did not return to work, and spoke with Eileen Evans who referred her to Sharlene Hernandez. The claimant believed Eileen Evans did not want to speak with her.

95 On 3 January the claimant spoke with Sharlene Hernandez who confirmed Eileen Evans had accepted the recommendations and the claimant still had the right to appeal until receipt of the report.

96 The claimant sent in a MED3 fit note dated 7 January 2019 confirming due to her bipolar effective disorder as she was too unwell to attend work.

"Face2Face" Report 7 January 2021

97 The "Face2Face" report was finalised on 7 January 2021. It dealt with an number of matters including the claimant's allegation that her private data had been shared with a third-party company i.e. the consultants.

98 Eileen Evans on 9 January 2019 sent the claimant a copy of the "Face2Face" report confirming it "represents my decision" informing the claimant she had five days in which to make an appeal.

99 The claimant in a separate email was also provided with the transcript of the medical capacity meeting held on 14 January 2019.

The claimant's appeal

100 The claimant appealed on the 14 January 2019 stating "I wish to appeal the disciplinary as I do not feel it was conducted appropriately and I'm still awaiting key evidence, the allegations I disagree with."

101 In a letter dated 15 January 2019 the claimant was informed by Elaine Evans the "disciplinary process had been completed and the allegation has been disbanded and there is no case to answer" and she was asked to put in writing what support she needed to return to work. The claimant's appeal was ignored and she raised a grievance.

The claimant's grievance

102 The claimant raised a "formal grievance" by email sent on 17 January 2019 "in relation to your decision to suspend me and take me down the disciplinary route. I feel we could have resolved this as far back as the 3 October given the chance. The time it has taken. Misleading advice…lack of support for an employee from my manager. I trust we can sort this out amicably and move on."

103 There was an issue at the final hearing as to whether the claimant attached a separate undated document to the email, and the Tribunal found on the balance of probabilities that she had. The grievance was essentially complaining about why she had been taken down the disciplinary route when she had made it clear the incidents on the 3 and 4 September 2018 were a direct result of Bipolar. The claimant also complained about the investigation meeting on 3 October "my first day back from my sickness period" which she understood was to be a return to work interview. Reference was made to an earlier conversation with Eileen Evans in Dr Bhat's room about her disability and the fact she had not hidden it. The claimant's complaint was about Eileen Evans, the fact that as at

3 October 2018 the matter could have been resolved had she requested medical information earlier and the claimant return to work, the "drawn out" time for the disciplinary process during which the claimant got the impression Eileen Evans did not want to speak to her. The claimant made it clear she felt "frustrated, hurt and total lack of support from you as my manager...I feel you failed to keep me updated on developments and failed to keep in touch with me at each stage of the process. I feel you showed no empathy or concern when you knew I had been hospitalised and my condition had become more severe as a result of the disciplinary." The Tribunal found the claimant had a right to feel aggrieved over the way she had been treated by the first respondent.

104 Despite the serious grievance allegations raised against Eileen Evans, a letter was sent to the claimant on 21 January 2019 that Eileen Evans would hear the grievance (against herself) accompanied by Joe Chattin, LMC Secretary "who will take notes of the meeting." In short, Eileen Evans was to be the decision maker deciding whether the serious allegations raised by the claimant had taken place and it cannot be said Eileen Evans was independent. The ACAS Code was breached in this regard and so the Tribunal found.

105 Notes were taken of the grievance meeting. Unlike the previous disciplinary and capability meeting it was not recorded and there was no transcript. From the summary provided by Eileen Evans it is clear she had read the attachment referred to above that had allegedly not been provided by the claimant according to the first respondent's evidence, and was fully aware the grievance was against her, and she was the manager who had as far as the claimant was concerned, not supported her. It is clear from the letter Eileen Evans intended to investigate a grievance brought against herself after listening "carefully" to what the claimant had to say about her, and conclude as to whether there was any basis to the criticisms.

106 In an email sent on 23 January 2019 the claimant informed Eileen Evans that she had attended an appointment with the mental health team the day before the grievance meeting and had been prescribed additional medication to help her sleep.

107 The claimant was unable to contact her colleagues and this concerned her. She wrote to Eileen Evans on the 25 January 2019 pointing out that they had not responded and ask if they could speak with her. Eileen Evans did not respond to this request until two weeks later when Eileen Evans confirmed "your colleagues are aware that they are able to communicate with you." Contact with colleagues was important to the claimant, and despite all that had gone on before including the claimant's grievance, Eileen Evans was unable to confirm in a timely fashion that as the claimant was no longer suspended her colleagues had been informed they could respond when the claimant made contact.

108 A further letter was sent to the claimant by Eileen Evans dated 29 January 2019 referring to the claimant's grievance "where you outlined several issues/concerns which you had in respect of your employment with the surgery" ignoring the fact that the concerns were with Eileen Evans and not the "surgery" in general. Reference was made to the respondent having "certain obligations in relation to you and your employment with us, which include the right to follow the correct grievance procedure, I would therefore like to take this opportunity to remind you of the importance of airing your concerns and to resolve these matters though the formal process…" Eileen Evans was aware that the claimant was still unwell, she had just been seen by the mental health team and yet the claimant was expected to air her concerns before the very person against whom she had brought the grievance and that same person would make a decision on it, despite

the fact the respondent had access to a national company of employment law consultants who were advising it.

109 Dr Wilson, who had knowledge of mental health matters, did not take part in any of the processes including the grievance hearing, and may way have understood better why the claimant felt as she did. The lack of any input by Dr Wilson has not been explained by the second respondent particularly in relation to the fact that Dr Wilson was the obvious person to have heard the grievance concerning the first respondent.

110 In an email sent 1 February 2019 the claimant pointed out to Elaine Evans "I've always been a polite, conscientious and professional person. I'm ashamed at having been suspended and put through disciplinary hearing for suffering a Bipolar episode at work. I do hope that going through the grievance process we can move forward and I can focus on the future and more importantly becoming well again." The first and second respondent would have understood by this communication that the claimant's grievance was important to her, and needed a resolution with an outcome and possibly some form of mediation to rebuild bridges between the claimant and her manager.

111 A telephone conversation took place between the claimant, who continued to be signed off work with a MED3, and Eileen Evans on the 6 February 2019 to the effect that the claimant was waiting to see a psychiatrist, "struggling to be at home on her own between four walls" and the claimant was referred to a community link worker and sent details of the Peninsula Assist Programme.

The grievance hearing 11 February 2019

112 The claimant attended the grievance hearing accompanied by an independent advocate from the "Lean of Me Project" referred to her by MIND, a mental health charity. Elaine Evans and Joe Chattin, LMC Honorary Secretary attended on behalf of the second respondent. The claimant's expectation was that Joe Chattin was there to take notes as she had been advised this was to be the case, and yet the minutes reflect he took an active role. The sole objective of Elaine Evans and Joe Chattin was to get the claimant back in to work with adjustments, and for her to put the disciplinary process behind her, and there was no attempt to investigate and decide the grievance brought against Elaine Evans.

113 Elaine Evans and Joe Chattin ignored the fundamental point raised by the claimant which was Elaine Evans should not have subjected her "to a disciplinary investigation and suspension." Joe Chattin, a stranger to the claimant, discussed her Bipolar condition and the "importance of ensuring medication compliance and the practice recognising any triggers or warning signs that G's composure was becoming unbalanced." This issue was not what the claimant's grievance was about, and Joe Chattin's input underlines the fact that Elaine Evans and Joe Chattin had no intention of dealing with the grievance itself, their objective was to "sweep under the carpet" all that had gone on with the disciplinary process beforehand. The grievance hearing was not a capability hearing and Joe Chattin's comment about the claimant's medication compliance was uncalled for and unwanted as there was no suggestion the claimant had not complied in the past, and the Bipolar incident was not a result of medication non-compliance on the part of the claimant. The grievance hearing was conducted in such a manner that it was tainted by unlawful disability discrimination and so the Tribunal found. It was an attempt to minimise the discrimination that had gone on previously, and fix the claimant with a proportion of blame for the 3 and 4 September 2018 incidents by reference to medication non-compliance on her part when this was not the case. As indicated by the Tribunal in

the conclusion below, the grievance meeting was the last straw in a history of unlawful discriminatory acts that cumulatively amounted to fundamental breaches of the implied term of trust and confidence and the fact the claimant was encouraged to return to work by Joe Chattin does not undermine the effect of the cumulative breaches.

114 The meeting concluded with Joe Chattin "explaining to G that the disciplinary process was now complete and there was no case to answer…G said she was upset by a self-perception that she had done an adverse thing and could not come back. G was told that it was in her best interest to return to work as soon as she was fit to return to work." Elaine Evans and Joe Chattin missed completely the point of the grievance; it was in the claimant's best interests for the grievance issues she raised to be investigated and dealt with properly and this did not happen.

115 At the end of the grievance meeting the claimant was informed Elaine Evans was arranging further training for the "practice staff." She was not told that the person who needed the training most, Elaine Evans, would also be undertaking that training and/or training in disability discrimination and equal opportunities. Had an independent grievance taken place, with an objective investigation, the outcome may have been further training for Elaine Evans in disability discrimination and how to avoid it in the workplace.

116 The claimant thanked Elaine Evans and Joe Chattin, and gave Elaine Evans a "big hug" at the end of the meeting. The claimant's evidence was that during the period between the grievance meeting and her resignation she was thinking about whether or not to resign, and after discussions with her family decided that the way forward for her was to resign which she did on the 22 February 2019, the "last straw" being the grievance hearing held on 11 February 2019 the claimant having concluded, with good reason, her grievance had not been addressed.

The claimant's resignation on 22 February 2019

117 In a letter dated 22 February 2019 delivered to the respondent by hand, the claimant resigned with immediate effect giving her reason as follows; "in response to the conduct of you as an Employer both in my treatment and steps taken in response to the concerns I have raised. This has not been an easy decision to make but the position you have put me in is untenable and I cannot return to work for you. The relationship has broken down irretrievably." The "last straw" was the first and second respondent's failure to deal with the grievance despite the claimant's hope expressed in her email of 1 February 2019 that by going through the grievance process "we can move forward."

118 The effective date of termination was 22 February 2019.

Applicable law: applying the law to the facts found above

Constructive unfair dismissal

80 Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

81 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of

conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer."

The implied term of trust and confidence

82 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the 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; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

83 The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

84 In the well-known case of Claridge v Daler Rowney Ltd [2008] IRLR 672, Elias P at paras 38 and 52 stated that the employee must be entitled to say; 'You have behaved so badly that I should not be expected to have to stay in your employment' and the Tribunal must be prepared to conclude that overall that the faults of the employer were so egregious that no reasonable employer could have acted in that way. In the case of Ms Woods, the Tribunal took the view that objectively assessed, the cumulative behaviour of the first respondent was such that the claimant could have reached such a conclusion when she took the decision to resign.

Suspension

85 Mr Lewis referred the Tribunal to Crawford and anor v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, CA. In a footnote Elias LJ referred to Gogay v Hertfordshire

County Council [2000] IRLR 703, CA, and warned employers against automatically imposing suspension in response to allegations involving alleged sex abuse, like that in the instant case. While Elias LJ did not wish to suggest that the decision to suspend the nurses was a knee-jerk reaction, he found it difficult to believe that the Trust could have thought that there was any real risk of the mistreatment being repeated, and the disciplinary committee should have paid close attention to the unblemished service record of the employees when assessing future risk. Suspension is often argued to be in the employee's interest as well as the employer's, employees frequently feel belittled and demoralised by their exclusion from work, which can be psychologically very damaging. Even if subsequently cleared of the charges, the suspicions against the employee are likely to linger.

86 Mr Lewis also referred the Tribunal to Mezey v South West London and St George's Mental Health NHS Trust [2007] IRLR 244, CA, the Court of Appeal went further when it upheld the High Court's decision to restrain an employer from suspending an employee pending a disciplinary hearing. M, a consultant psychiatrist, had been criticised by an inquiry into a killing carried out by one of her patients and it was agreed with the Trust that she would voluntarily withdraw from clinical work until a disciplinary hearing could take place. She was, however, to continue with her non-clinical duties. However, when the inquiry's findings were published, the Trust decided that M would be suspended with full pay from all duties, including non-clinical work. M disputed the Trust's contractual right to suspend her in these circumstances and brought proceedings in the High Court. An interim injunction was granted by Mr Justice Underhill, who held that it was arguable that the Trust's contractual power of suspension had not been validly exercised. Upholding this decision, the Court of Appeal stated that there is no reason in principle why a court should not have the power to grant an interim injunction restraining an employer, pending trial, from suspending an employee. Lord Justice Sedley explained that, contrary to the Trust's submissions, suspension is not a 'neutral act', as it changes the status quo from work to no work and casts a shadow over the employee's competence. A court should therefore be able to stay a suspension just as it can stay a dismissal. The Trust submitted that there had been a breakdown of trust and confidence affecting M's clinical judgement that no injunction could or should purport to repair. This argument was also rejected. While a breakdown in the relationship of trust and confidence used to be regarded as an insuperable barrier to an injunction preventing a dismissal, the courts have now recognised that this is not always the case. The same is true of suspension. The Trust had failed to show that the relationship of trust was so damaged that no injunction should have been granted.

The "last straw."

87 It is a well-known legal principle that the last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited cited above. The Court of Appeal in Omilaju also cited above, held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct" but it must contribute "however slightly, to the breach of the implied term of trust and confidence". In the case of Ms Woods, the Tribunal found that the last straw relied upon by the claimant was the grievance hearing and lack of outcome, which amounted to a fundamental breach in its own right taking into account the second respondent's grievance policy and the ACAS Code of Practice.

88 In the well-known Court of Appeal case Kaur v Leeds Teaching Hospitals NHS Trust. [2019] ICR 1, CA that individual grievances do not need to breach the contract of employment on their own for the claim to be established: the employee can resign in

response to a 'last straw' and base his or her claim on the totality of the employer's conduct. If the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

89 The Court of Appeal in Kaur offered guidance to Tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

89.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

89.2 Has he or she affirmed the contract since that act?

89.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

89.4 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

89.5 Did the employee resign in response (or partly in response) to that breach?

Waiver of breach

90 Weston Excavating cited above; The employee "must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

91 In the well-known EAT case of W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT an employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract. In Ms Woods case little time passed between the grievance hearing and her realisation that the grievance would not be remedied and the resignation with the result that she had not waived the breach, resignation being such a serious step to take after the claimant had attempted for a number of months from 3 October 2018 to retain on to her job with the second respondent.

Discrimination

Direct discrimination

92 S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [disability] A treats B less favourably than A treats or would treat others.

93 An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from him. Para

3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matters is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator." This is relevant to Stephane Puglsey and Anne Robinson relied upon by the claimant who were not in the same or nearly the same circumstances as the claimant, and did not assist the claimant in the make-up of a hypothetical comparator whose circumstances included the behaviour witnessed by work colleagues on the 3 and 4 September 2018 that could have resulted from drinking alcohol with the hypothetical comparator making references to still being under the influence of it.

94 Chief Constable of West Yorkshire v Vento (No.3) [2003] ICR 318 CA In Vento the tribunal considered the circumstances of four other police constables (not all of whom were male) whose situations were not identical but were not wholly dissimilar either. It concluded that the claimant had been treated less favourably than a hypothetical male comparator. The EAT held that this was a permissible way of constructing a picture of how a hypothetical male comparator would have been treated. This approach was later approved by the House of Lords in the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL. In relation to Ms Woods the Tribunal concluded Stephane Puglsey and Anne Robinson, who had allegedly sworn at work, were in a wholly dissimilar position to the claimant.

95 Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others." As can be seen from its findings of facts, the Tribunal has examined all of the facts in the case of Ms Woods to ascertain whether the claimant was treated less favourably as she alleges both in relation to the actual comparators she relied upon, and a hypothetical comparator, drawing on its findings in relation to the actual comparators, concluding on the balance of probabilities that she had not been treated less favourably.

96 The Tribunal is aware that it was not necessary for the claimant to show that the first respondent, Eileen Evans, discriminated consciously. Subconscious discrimination or unconscious discrimination is also prohibited: "Those who discriminate on grounds of race or gender do not in general advertise their prejudices: indeed, they may not even be aware of them:" Glasgow City Council v Zafar [1998] IRLR 36 (HL)). "Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated" Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL). "In some cases, the discrimination will not be ill-intentioned but based merely on an assumption that a person would not "fit in:" King v Great Britain-China Centre [1991] IRLR 513 (CA).

97 The Tribunal must therefore it is suggested enquire as to the conscious or subconscious mental processes which led the Respondent to take a particular course of action in respect of the claimant and to consider whether a protected characteristic played a significant part in the treatment as per IPC Media Ltd v Millar [2013] IRLR 707. The discriminatory reason need not even be the principal reason for the Respondent's actions; it only needs to have had "a significant influence on the outcome" as per Owen & Briggs v James [1982] IRLR 502 (CA) and Nagarajan. For direct discrimination to occur, the relevant protected characteristic needs only to be a cause of the less favourable treatment "but does not need to be the only or even the main cause". As indicated below, the Tribunal carried out this inquiry before concluding on the balance of probabilities Ms Evans' conscious and unconscious mental processes were such that the claimant's protected characteristic played a pivotal part in her treatment of the claimant.

Disability discrimination arising from disability- section 15 of the EqA

98 Section 15(1) of the EqA provides-

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably 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.

99 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

1.1 In order for the claimant to succeed in her claims under s.15, the following must be made out: there must be unfavourable treatment;

1.2 there must be something that arises in consequence of claimant's disability;

1.3 the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

1.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

100 Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

100.1 "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

100.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. In the case of Ms Woods, the Tribunal examined closely the conscious and unconscious thought process of the first respondent, concluding the explanations given were tainted by disability discrimination and the claimant's Bipolar had a significant influence on the unfavourable treatment meted out to the claimant.

100.3 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

100.4 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

100.5 This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

101 With regard to the objective justification test, when assessing proportionality, "the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer": Hensman v Ministry of Defence UKEAT/0067/14/DM.

Disability discrimination – failure to make reasonable adjustments

102 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code

of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

103 The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

104 In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

Indirect discrimination section 19 EqA

105 In order for the Claimants to succeed in establishing indirect discrimination it is necessary for them to establish the following elements pursuant to s.19 EqA 2010:

a. The alleged conduct amounted to a provision, criterion or practice ("PCP");

b. The Respondent applied or would apply the PCP to persons whom the individual Claimants do not share their respective protective characteristics of age or disability;

c. The PCP puts, or would put, persons who each respective Claimant shares the characteristic at a disadvantage when compared to persons with whom the Claimants do not share such characteristics;

d. That PCP was applied to the Claimants;

e. The PCP put, or would put, the Claimants at that disadvantage; and

f. The Respondent cannot show the PCP to be a proportionate means of achieving a legitimate aim.

Harassment

106 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

107 Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if:

A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and

•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 — S.26(1)(b).

108 The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

109 Section 26(4) EqA states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

Burden of proof

110 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

111 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts

112 Turning first to the burden of proof, the Tribunal was satisfied the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn and the burden shifted to the first and second respondent. The first respondent was unable to provide an explanation untainted by disability to a number of the allegations, and a

number of the claims brought under section 15, 20 to 21 and 26 succeed as recorde below.

Harassment – s.26

113 With reference to the first agreed issue, namely, issue 1, did the Respondent(s) engage in the following "unwanted conduct" the Tribunal found as follows on the balance of probabilities:

113.1 (a) Suspending the Claimant and the manner of her suspension (as indicated in paragraphs 13 to 15 of the PoC), the claimant was suspended pending a disciplinary hearing when she attended work expecting a return to work interview as recorded in the finding of facts above. The first respondent was aware of the issues concerning the claimant's disability and the question mark over medication, and yet she proceeded down the route of a suspension pending disciplinary hearing when it was clear a medical report was necessary, which was finally obtained from Dr Kumar on the 7 December 2018.

113.2 The fact that the first respondent applied both a disciplinary and medical suspension indicates suspensions are not always a neutral act whatever the respondent's policy states, and it depends on the circumstances in which the suspension takes place. Elias LJ in Gogay warned employers against automatically imposing suspension in response to allegations. In that case Elias LJ found it difficult to believe that the Trust could have thought that there was any real risk of the mistreatment being repeated, and the disciplinary committee should have paid close attention to the unblemished service record of the employees when assessing future risk. In Ms Wood's case the Tribunal took the view the disciplinary suspension was not a neutral act in the circumstances. The claimant in being accompanied out of the premises unable to say goodbye to her colleagues, was belittled. Further, she was demoralised by the lengthy exclusion from work, which was psychologically very damaging culminating in a deterioration of her mental health condition.

113.3 In the claimant's case the 3 October suspension was decided before the first respondent had heard the claimant's explanation, evidenced by the production of a pre-prepared suspension letter and the decision to proceed to a disciplinary hearing with little investigation there was having already take place, including one "statement" made by two of the key witnesses piecemeal as they were going about their daily tasks. The way in which the suspension came about and the first respondent's handling of the claimant on the 3 October 2018 including escorting the claimant out of the building and instructing her not to make contact with colleagues, was conduct that violated the claimant's dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for her, exacerbated by the fact that the first respondent was the claimant's manager, the claimant enjoyed her work and had close friendships with at least one of her colleagues.

113.4 Mr Lewis submitted it was "blindly" obvious from the first fit note provided to the second respondent on 12 September 2018 there were issues with the claimant's mental health, the "Time-Line" joint statement reinforced that. The Tribunal accepted it was wrong of the first respondent to suspend the claimant in this context invoking the disciplinary hearing in the specific context of this case taking into account the later authorised leave granted to the claimant, who had acute mental health issues during

this period, which was free from stigma and the worry of facing a disciplinary hearing over events beyond the claimant's control.

113.5 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect holding that it was and the act of harassment had objectively taken place.

113.6 On the balance of probabilities, the Tribunal found the first respondent's treatment of the claimant had the purpose of violating her dignity and creating the hostile environment because she was disabled with a Bipolar condition, which the first respondent believed was no longer under control, she had no understanding of and made assumptions about, unsupported by expert medical opinion. The Tribunal found this to be the case in relation to all of the allegations referenced below found against the respondents concluding the first respondent's conduct had the purpose or effect required under section 26(1)(b) of the EqA taking into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect concluding that it was.

113.7 (b) Not communicating with the Claimant whilst she was suspended, adequately or at all (as indicated in paragraph 16 of the PoC), the Tribunal found there were a number of occasions when the first respondent had not communicated with the claimant as recorded in its findings of facts, for example, on the 3 and 11 October 2018 and the first respondent has not provided a satisfactory explanation for this. Taking into account the factual matrix as set out above, the Tribunal came to a view on the balance of probabilities that the first respondent's attitude to the claimant and her responses were based on her perception of the risk the claimant posed to the respondent's business and staff and early on in the process it appeared the claimant was being managed out in the knowledge that her Bipolar was deteriorating to such an effect that after the disciplinary hearing the claimant was sectioned under the Mental Health Act.

113.8 (c) Inviting and requiring the Claimant to attend a disciplinary hearing (as indicated in paragraph 17 of PoC), the Tribunal repeats its observations above. The Tribunal agreed with Mr Lewis that the first respondent should have gathered up all of the medical evidence, as the claimant requested, circumventing the lengthy disciplinary suspension, and not wait until weeks after the disciplinary hearing when Dr Kumar's appointment was arranged for 20 November 2018, his report produced on the 7 December 2018 and the suspension lifted on 20 December with the claimant "being allowed" to return to work on 2 January 2019.

113.9 (d) Delay in responding to the Claimant's requests following the disciplinary hearing (as indicated in paragraph 18 of PoC), the Tribunal repeats its observations above noting the claimant was promised the report would be provided by 24 October 2018 and yet she was still chasing this up until the transcript was received on 19 November 2018. More importantly for the claimant, taking into account her deteriorating mental health, a copy of the 12 December 2018 Face-to-Face report was provided on 13 December 2018 some two and a half months after the disciplinary suspension and approximately one and half months after the report was promised. In a number of cases such a delay in responding to requests may not be prejudicial, in the claimant's case it was particularly damaging due to its effect on her mental health condition. In law the respondent is required to take the claimant as it finds her ("the eggshell skull rule", a well-established principle in Tort.) The effect of the delay may (and the Tribunal put it no higher than this)

have been ameliorated had the first respondent made contact with the claimant on a regular basis in a sympathetic and understanding manner but she did not. It is notable after she was informed the claimant had been sectioned under the Mental Health Act, the claimant's partner asked the first respondent to hurry the process along, and she refused to do so as she had a procedure to follow. It is marked that the first respondent's preoccupation with process did not extend to following the correct grievance procedure underlining her uncaring attitude towards the claimant's mental health; the nub of the claimant's grievance complaint.

113.10 (e) Releasing an occupational health report regarding the Claimant, without her consent, to third parties (i.e. to Peninsula and/or Rebecca Whiting) (as indicated in paragraph 19 of the PoC), the Tribunal found that this was not an act which fell under section 26 of the EqA. There was no satisfactory evidence Rebecca Whiting had sight of the report and it found that she had not, and in respect of Peninsula, the consultants were unable to advise without the occupational health report and the claimant was aware from the 17 October 2018 disciplinary hearing chaired by Rachael Waugh that a report would be prepared, and on the 1 November 2018, was referred to occupational health. The Tribunal concluded on the balance of probabilities that the first and second respondent had not violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her when the occupational health report was provided to Peninsula in order that it could advise. Further, providing a copy of the report in this way did not have the purpose or effect of (i) violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b). The claimant had at no stage made it clear the report was not to go to Peninsula, and conduct was not unwanted by the claimant assessed subjectively. When the Tribunal explored this allegation with Mr Lewis he conceded that it was "not a strong point."

113.11 (f) and (g) Belatedly dropping the disciplinary case against the Claimant (as indicated in paragraph 20 of PoC), the Tribunal found by 3 or 17 October 2018 at the latest, the respondents should have realised it was a medical capability issue and not disciplinary/conduct matter given the fact the claimant was not under the influence of alcohol at the time, there was an issue with medication and her behavior was out of character according to all of the witnesses. This position was confirmed later in the occupational health report. The disciplinary case (which should never have been taken in the first place) was "dropped" belatedly on the 13 December 2018 despite the claimant's observations about the cause of her behavior which she expressed throughout, coupled with her deteriorating health. Mr Munro submitted the claimant was "scrapping the barrel" with this allegation. The first respondent acted under advice and it was difficult to see how "belatedly" dropping a case related to disability and gave rise to less favourable treatment given the first respondent was following a procedure. The Tribunal took the view the disciplinary case should never have been brought in the first place and when it became apparent early one that there were issues with the claimant's disability followed by Dr Kumar's report, the first respondent did not drop the disciplinary proceedings, even when the advice from the consultants was that a capability hearing should take place.

113.12 (g) Failing to deal with the disciplinary proceedings speedily, as required by the Employee Handbook (as indicated in paragraph 21 of the PoC), as indicated above, the Tribunal was of the view there should not have been disciplinary hearing and had the first respondent obtained an occupational health report from the outset disciplinary proceedings would not have followed as evidenced by what transpired after Dr Kumar

provided his report on 7 December 2018 informing the first and second respondent that the suspension and disciplinary investigation "is continuing to drive and exacerbate her symptoms." The "Face2Face" Report dated 12 December 2018 recommended the claimant was invited to a medical capability meeting to assess reasonable adjustments and if none could be made terminating the claimant's employment on the ground of medical capability, acknowledging that the claimant's behaviour may have been due to the Bipolar medical condition. Nevertheless, the claimant disciplinary suspension and the possibility of a disciplinary outcome remained. Elaine Evans had not informed the claimant she was no longer being dealt with under the respondent's Disciplinary Procedure and did not take into account the fact Dr Kumar's advice and opinion that "the suspension and associated worry and concern led to a significant deterioration in the claimant's conditions where she required admission for a short while to hospital…she still remains somewhat anxious and worried about her job." By the 20 December 2018 the claimant was informed her suspension had been lifted and she would be allowed to return to work in the New Year.

113.13 Taking into account the fact that the disciplinary investigation commenced and was completed on or before the claimant's suspension, and the disciplinary process was not dealt with speedily by the first respondent in breach of the second respondent's Disciplinary Procedure which provided it was "in the interests of the whole organisation…disciplinary action, where necessary, is taken speedily and in a fair, uniform and consistent manner." Even if part of the delay can be attributed to the actions of the third-party consultant this does not account for the first claimant's inactivity on her return from holiday in September when she was allegedly investigating the allegations, and failure to expeditiously inform the claimant she was no longer under suspension or the threat of a disciplinary sanction/dismissal after the production of the 12 December 2018 taking into account Dr Kumar's opinion.

113.14 The Tribunal concluded on the balance of probabilities that the first and second respondent had violated the claimant's dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for her when it failed to expeditiously action Dr Kumar's advice and/or the recommendations in the 12 December 2018 Face-to-Face report.

113.15 <u>(h) Requiring the Claimant to return to work on insufficient notice being given (as indicated in paragraph 22 of PoC),</u> the Tribunal found on the balance of probabilities that this was not an act which fell within section 26 of the EqA. The claimant was informed on the 20 December 2018 she would be returning to work on the 2 January 2019 and in the meantime placed on fully paid authorised absence. The first respondent had confirmed to the claimant that she had fully accepted the employment consultant's recommendations and the claimant was aware reasonable adjustments would be made when she returned to work. There was no assumption on the first respondent's part that the claimant would be "fit" as alleged by the claimant at the time and the claimant's fitness for work was a separate matter to suspension being lifted with a view to return to work, the outcome sought by the claimant throughout the disciplinary process. The Tribunal took the view that the first respondent cannot be criticised for her treatment of the claimant when she attempted to facilitate a return to work, and the claimant's objectively assessed oversensitive response underlines the breakdown in the trust and confidence she had in the first respondent as a result of what had transpired since the 3 October 2018.

113.16 As indicated above, the EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour. The Tribunal concluded that a return work was sought by the claimant, and the fact the respondent specified the 2 January 2019 does not undermine this taking into account the claimant's subjective perception and her oversensitivity on this issue, the Tribunal found it was not reasonable for the conduct to have that effect. There can be instances where the claimant when alleging the acts violated his or her dignity, the act of alleged harassment had not objectively taken place despite the claimant's subjective view that it had, and requiring the claimant to return to work on the 2 January 2019 was such an instance.

113.17 (i) Not dealing satisfactorily with the Claimant's grievance (as indicated in paragraph 23 of the PoC), specifically:

(1) The first respondent had not answered the Claimant's points of grievance which the Tribunal found to have been the case, as set out in the findings of facts set out above, despite the first respondent's awareness that the serious allegations raised concerned actions the resolution of which were fundamental for the claimant's return to work. The conduct had the purpose or effect of (i) violating the claimant's dignity and it created an intimidating, hostile, degrading, humiliating or offensive environment for her, and the Tribunal found it was objectively reasonable to have that effect given the importance of the issues raised to the claimant, which were "swept under the carpet" by the first and second respondent.

(2) The first respondent had denied to the Claimant that she had interviewed Rebecca Whiting and Lyndsey Westwood jointly or together, when it was known or obvious to the Claimant that a joint statement titled "Timeline of Events" had been produced. The joint statement was not taken by the first respondent but produced piecemeal during the working day. On the balance of probabilities, the Tribunal found this allegation does not amount to unwanted conduct given the first respondent had not, as a matter of fact, interviewed staff together and her actions do not fall under section 26 of the EqA.

(3) Ms Evans telling the Claimant that Ms Evans had informed staff that the Claimant was returning back to work, when the Claimant knew the same was not true (i.e. that Ms Evans had not in fact done that), the Tribunal found the evidence in relation to this allegation was confused and unsatisfactory. The Tribunal struggled to understand how the first respondent's conduct was unwanted when she informed staff the claimant was going to return to work, bearing in mind one of the claimant's concerns was the perception by staff of her behavior and her need to return to work for contact with colleagues. The second respondent's actions in this regard did not fall under section 26(1)(a) as it did not have the proscribed effect, in this regard the claimant was being oversensitive and the Tribunal found on the balance of probabilities that the act of harassment had not objectively taken place despite her subjective view that it had.

Direct Disability Discrimination – s.13

114 With reference to the issue did the Respondent(s) treat the Claimant less favourably by any of the alleged matters set out at paragraph 1 above, the Tribunal found that it did

not and a hypothetical comparator would have also been discipled and dismissed preferring Mr Munro's submissions on this point, in contrast to the claimant who was disciplined and then dealt with under the second respondent's capability procedure when the disciplinary proceedings were dropped.

115 The Tribunal found Elaine Evans intended the claimant to be managed out until she received medical advice from Dr Kumar and legal advice from the Face-2-Face the consultant following the disciplinary hearing. The Tribunal's finding in this regard is supported by the fact Elaine Evans did not respond to many the claimant's communications against the backdrop of a severe mental health condition, and her sole concern was the conclusion that the claimant committed an act of gross misconduct under the Disciplinary Procedure and should be subject to disciplinary proceedings no matter what her mental health state was. This has been the respondent's position throughout this litigation, reiterated by Mr Munro who referred to the well-known case of British Homes Stores and Burchill during closing submissions.

116 The case management order sent to the parties on 17 September 2019 recorded at paragraph 6 the claimant was relying on two actual comparators, Stephanie and Ann (surnames not given at the time), who she believed committed the same conduct as she had and were not disciplined.

117 An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from her. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator." This is relevant to Stephane Puglsey and Anne Robinson relied upon by the claimant were not in the same or nearly the same circumstances as the claimant. In identifying the appropriate pool for comparison, it is important to note that there must be no material difference between the circumstances relating to each case; s.23(1) EqA 2010 and there was no evidence before the Tribunal that the material circumstances were the same or nearly the same, for example, using foul language and swearing when the claimant was disciplined for a myriad of offences not least aggression towards two employees.

118 The claimant's claim of direct discrimination falls down on the comparator exercise and as the direct discrimination claim is dismissed, there is no requirement for the Tribunal to consider the final issue under this head, namely, if so, did the Respondent(s) subject the Claimant to such treatment "because" she was disabled by Bipolar (i.e. was that at least one of the material/effective reasons)? If the Tribunal was wrong on this point and the claimant was treated less favourably than a hypothetical comparator as set out in paragraph 1 above, the Tribunal would have gone on to find, on the balance of probabilities, the first and second respondent subjected the claimant to such treatment because she was disabled by Bipolar for the reasons already set out in relation to the harassment complaint.

Discrimination arising from a Disability – s.15

119 Mr Lewis submitted the unfavourable treatment alleged above under the heading "harassment" (as found by the Tribunal) arose from the same alleged facts and they arose, directly or indirectly, as a consequence of the claimant's disability.

120 It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability, and the claimant has demonstrated this on the balance of probabilities. The claimant's out-of-character behaviour on the 3 and 4 September 2018 arose in consequence of her Bipolar disability and the first and second respondent's unfavourable treatment of the claimant was directly caused by the claimant's behaviour as described above. Objectively assessed the claimant's treatment primarily by the first respondent was unfavourable from the time the first respondent returned from holiday to learn about the incidents through to her dealing with the grievance raised against her save for the exceptions referenced above, namely, setting the 2 January 2019 as the return to work date and disclosing Dr Kumar's report to the employment consultants.

121 Under the guidance provided by Mrs Justice Simler in Pnaiser referenced above, having identified the unfavourable treatment primarily by the first respondent who was the decision maker throughout, the Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of the first respondent and the Tribunal concluded she was both consciously and sub-consciously biased against the claimant directly because of the Bipolar disability which in the first respondent's view, was no longer under control and posted a threat to the second respondent's business, staff and patients. That is not to say the first respondent was not justified in having concerns given the extreme nature of the claimant's behaviour, however the way she went about dealing with the issue was firmly rooted in her bias against people with active Bipolar symptoms at work. It was this bias and lack of understanding which the first respondent took no steps to address until much later on in the process, significantly influenced the unfavourable treatment suffered by the claimant which resulted in serious health consequences the first respondent had been warned against. The possibility that the claimant's Biopolar was not under control and this could be the case in the future, significantly influenced the unfavourable treatment, and amounted to an effective reason for or cause of it. In the case of Ms Woods, the Tribunal examined closely the conscious and unconscious thought process of the first respondent, concluding the explanations given were tainted by disability discrimination.

122 When exploring the reason for the claimant's treatment by the first respondent the Tribunal is aware that the first respondent's motive was irrelevant and the focus of this part of the enquiry is on the reason or cause of the impugned treatment: see Nagarajan cited above.

123 In conclusion, with reference to the issue, namely, did the Respondent(s) treat the Claimant unfavourably by way of the alleged matters set out above at paragraph 1 the Tribunal found it did in respect of 1(a), (b), (c), (d), (f), (g) and i(1), and the first respondent subject the claimant to such treatment because of "something" arising in consequence of the Claimant's disability, namely the claimant's behaviour on 3 and 4 September 2018.

Proportionate means of achieving a legitimate aim

124 With reference to the issue, can the respondents show that the unfavourable treatment was a proportionate means of achieving a legitimate aim, (namely that the Claimant was invited to a disciplinary and medical capability hearing as she had been physically and verbally abusive towards staff on 3 and 4 September), the Tribunal found it was not a proportionate means of achieving a legitimate aim for the claimant to have been invited

to a disciplinary hearing. It was a proportionate means of achieving a legitimate aim for the claimant to be invited to a medical capability hearing after medical evidence had bene obtained.

125 The Tribunal accepts the first and second respondent are under a duty to protect its employees and patients that attend the practice and ensure there was a safe working environment and the claimant's behaviour on the 3 and 4 September 2018 was at risk of breaching that duty. It was a legitimate aim for the respondents to take the necessary steps to secure the practice, employees, service users and other third parties in the future given the claimant's aggressive behaviour and threat towards the pharmacist.

126 The key issue in relation to the section 15 EqA claim is the objective justification test, and when assessing proportionality, the Tribunal must analysis the working practices and business considerations involved, having particular regard to the business needs of the second respondent: Hensman cited above. Taking this into account, including the fact the second respondent's business was public facing involving patients (a number with mental health issues), staff and other users including suppliers, the Tribunal concluded it was legitimate for the claimant to be invited to a medical capacity hearing but not legitimate for her to be subjected to disciplinary proceedings and it was not a proportionate means of achieving a legitimate aim which was to discipline and threaten to dismiss for gross misconduct to avoid the repeat of a Bipolar incident in the workplace.

127 Mr Munro submitted in relation to the allegations generally that the respondents were entitled to take the steps they did including the claimant's suspension given her serious misconduct which gave rise to a potential dismissal, and the first respondent took professional advice which she followed. Mr Munro confirmed the first respondent accepts with reference to the suspension and handing the claimant a letter of suspension, things could have been done differently and the claimant's disability was "the elephant in the room" known to the first respondent but was not a factor, it having only "crossed her mind." The Tribunal did not agree with this analysis as the evidence before it was the claimant brought up the issue of her disability and the cause of her behaviour with the first respondent regularly and in no uncertain terms. In short, the claimant's disability was not an "elephant in the room;" it was forefront in the mind of the first respondent and claimant and did not go unmentioned.

128 The Tribunal found in the circumstances of this case it was proportionate and legitimate for a medical capability hearing to have taken place, albeit it should have been conducted with no delay and much earlier than 20 December 2018, an occupational health report being commissioned soon after the incident with the claimant being placed on paid leave as an alternative to a disciplinary suspension, all being less discriminatory options that would have made a difference to the claimant's mental health and prospects of returning to a job and people she enjoyed working with.

129 Mr Lewis submitted the burden was on the first and second respondent to show the actions against the claimant were proportionate; a balancing act taking into account what was appropriate and reasonably necessary in order to pursue a legitimate aim. Mr Lewis believed there were other options that were less discriminatory; investigating the claimant's capability with an informal resolution through mediation as opposed to suspension and disciplinary proceedings. The Tribunal agreed, with the caveat that it was legitimate for the respondent to keep the claimant away from the workplace by placing her on paid leave as opposed to a disciplinary based suspension, pending

medical advice including adjustments within the workplace to be discussed at the capability meeting.

130 Mr Munro submitted that the claimant's actions were "shocking" and "serious enough" for the respondents to have taken the steps that they did. The Tribunal agreed Mr Munro's description of the claimant's behaviour, however, it is the first respondent's actions which followed that attracted criticism taking into account the fact that had Dr Kumar been instructed immediately it would have taken him approximately three weeks to provide the report as set out in the factual matrix, and a medical capability meeting could then have taken place soon after, with the result that the claimant could conceivably have returned to work soon after she was signed fit for work on 3 October 2018 circumventing the disciplinary proceedings in their entirety. Mr Munro submitted that the title of the suspension could have been changed but this was a matter of semantics. Mr Munro missed the point; the claimant was suspended facing a disciplinary hearing as the investigation had already taken place. This was the context and in direct contrast of an authorised paid absence pending a medical report and capability hearing where there was no issue, based on Dr Kuman's medical opinion, with the claimant managing her Bipolar disability in the future.

131 Mr Lewis further submitted that issue (i) relating to the claimant's grievance was a strong in that the first respondent did not deal with the grievance points raised by the claimant and there was no outcome in writing with none planned in breach of the ACAS Code. The claimant also appealed and this was never dealt with, the claimant being told by Mr Chattin at the grievance meeting to move on, which was no resolution from the claimant's perspective. The Tribunal agreed. The first and second respondent cannot objectively show its actions were proportionate when the claimant's grievance and appeal were not dealt with, taking into account that Dr Wilson was the best person placed to hear both, particularly given the fact that the grievance raised a number of serious issues against the first respondent and yet she took it upon herself to decide it. There were alternatives available to the respondents that were non-discriminatory and neither have made out a case of objective justification save for the capability investigation and meeting.

Failure to Make Reasonable Adjustments – s.20

132 With reference to the issue, namely, did the Respondent(s) apply the following provision, criterion or practice, which put the Claimant at a substantial (i.e. more than minor) disadvantage in comparison with employees who are not disabled, the Tribunal found there existed two PCP's namely:

(a) suspending the claimant/employees following an incident of alleged gross-misconduct, and

(b) invoking/applying the Second Respondent's disciplinary procedures,

that caused the claimant additional stress and anxiety which aggravated her bipolar and/or were more difficult to navigate as a result of her Bipolar, which is not something a non-disabled person would have to contend with. One example extracted from the findings of facts above was the manner in which the disciplinary hearing was conducted and continued despite the fact the claimant was obviously so unwell that she collapsed and had to be helped up the stairs to the hearing room crying which continued in the hearing itself.

133 If so, with reference to the issue did the Respondent(s) have the necessary knowledge (actual or constructive) that the PCP(s) put the Claimant at that disadvantage, the Tribunal found the respondents had actual knowledge from the 12 May 2017 and the first respondent had knowledge that the Bipolar may be the cause of the claimant's behaviour on the 10 September 2018 following the production of the 'Timeline of Events' at the earliest, Stephanie Pugsley's statement typed on 12 September 2018 and the suspension meeting on 3 October 2018..

134 With reference to the issue, if so, would it have been reasonable for the Respondent(s) to have made the following adjustments the Tribunal found it would have been reasonable in all of the circumstances for the reasons already stated:

(a) Not to invoke the disciplinary proceedings at all, and
(b) If invoking them, to deal with the disciplinary proceedings speedily.
(c) Not suspending the claimant at all, however the Tribunal found it was reasonable to place the claimant on paid sickness absence pending medical advice and a capability meeting due to the serious nature of the claimant's behaviour on the 3 and 4 September 2018.
(d) The first respondent to have communicate adequately with the claimant during her suspension, and not ignore correspondence in the knowledge that the claimant's mental health was deteriorating as a result of the process.

135 Mr Munro submitted the first and second respondent had already made a reasonable adjustment by not dismissing the claimant and the Tribunal should "tread carefully." Mr Munro's submission was not persuasive; there can be more than one reasonable adjustment and those relied upon by the claimant (a) to (d) were reasonable taking into account her Bipolar disability and the effect of the first respondent's actions on it to such an extent that had the reasonable adjustments been put in place it is more likely than not the claimant would have returned to her job.

Indirect Discrimination – s.19

136 With reference to the issue, did or would the Respondent(s) apply the above PCP(s) to persons who do not share the Claimant's protected characteristic, the Tribunal found as set out above that it did on the balance of probabilities. Mr Lewis indicated during closing submissions that if the Tribunal found in favour of the claimant on the section 15 and section 20 to 21 complaints there is no requirement for it to consider the section 19 complaint. Accordingly, the Tribunal has treated that complaint as withdrawn. Had it not been for Mr Lewis' submission it would have also found in favour of the claimant in relation to the indirect discrimination complaint for the reasons already set out above, accepting the suspension and disciplinary proceedings would cause those with Bipolar additional stress and anxiety which would further aggravate their Bipolar and/or be more difficult to navigate as a result of their Bipolar, which is not something a non-disabled person would have to contend with. The PCP(s) put the Claimant at that same disadvantage and the respondent was unable to show that the PCP(s) were a proportionate means of achieving a legitimate aim (namely in order to protect its employees and patients that attend the practice and ensure that there was a safe working environment) on the balance of probabilities for the reasons already stated.

Constructive Unfair Dismissal

137 With reference to the first issue, namely did the second Respondent breach the implied term of trust and confidence by virtue of the matters above set out above, the Tribunal found that it did. An act of disability discrimination gives rise to a fundamental breach of contract, and in the claimant's case the first respondent's actions from the outset entailed disability discrimination as found above, for which the second respondent is vicariously liable.

138 If so, with reference to the second issue, namely, did the Claimant resign in response to that breach the Tribunal found the claimant resigned as a result of a cumulative breach of contract culminating in the last straw being the failure to deal with the claimant's grievance and appeal against the discriminatory actions of the first respondent. Mr Munro submitted that the first respondent believed the grievance hearing had gone well and there was nothing to suggest the claimant wanted matters to be dealt with the first respondent having taken a view that the less said the better "especially when dealing with Bipolar." Mr Munro referenced the "hug" arguing that it was a break in causation and then nothing happened until the claimant spoke to her family and resigned despite the claimant's evidence before this Tribunal that it was a job "she loved." The Tribunal did not agree having found on the balance of probabilities the manner in which the grievance hearing was conducted amounted to a breach of contract, and the "hug" did not denote the claimant had accepted all that had gone on before at the hands of the first respondent.

139 Much has been made on the claimant thanking Elaine Evans and Joe Chattin, and giving Elaine Evans a "big hug" at the end of the meeting, by Mr Munro. The Tribunal took the view that nothing hangs on this. Hugging people merely reflects how important it was for the claimant that Elaine Evans, as her line manager and the practice manager, got on with and liked her. This attitude of the claimant only served to emphasise the extent to which Elaine Evans' treatment of the claimant throughout the disciplinary process was upsetting, hence the grievance raised against Elaine Evans. It was conceded on cross-examination that there was no intention to confirm the outcome of the grievance hearing in writing on the part of the respondent. The claimant was not informed of this, and there was no written outcome letter, further evidence of the fact that the meeting was not a grievance hearing in the true sense, and despite earlier indications to the first respondent, the second respondent was not complying with its own procedures or indeed, the ACAS Code of Practice.

140 Mr Munro has also made much of the claimant's email dated 15 February 2019 when she wrote "I promised to get back to you today, I've not been well this week and…I'll get back to you next week with how we can move forward." The Tribunal does not accept the claimant had agreed to return to work, and her reference to "how we move forward" was to the grievance and any reasonable adjustments to be discussed. The claimant's evidence was that during the period between the grievance meeting and her resignation she was thinking about whether or not to resign, and after discussions with her family decided that the way forward for her was to resign which she did on the 22 February 2019, the "last straw" being the grievance hearing held on 11 February 2019 the claimant having concluded, with good reason, her grievance had not been and would not be addressed.

141 The Tribunal referred to the Court of Appeal case Kaur that individual grievances do not need to breach the contract of employment on their own for the claim to be established:

the employee can resign in response to a 'last straw' and base his or her claim on the totality of the employer's conduct. If the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign. The Tribunal found in the case of Mrs Woods after the breach of contract arising from the first respondent's acts of disability discrimination on the 3 October 2018 the first and second respondent committed a series of acts that amounted to a breach of the implied term of trust and confidence cumulating in the grievance hearing held on 11 February 2019.

142 The Court of Appeal in Kaur offered guidance to Tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

142.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation, the Tribunal found it was the failure to deal with the claimant's grievance. The first respondent had not answered the Claimant's points of grievance which the Tribunal found to have been the case, as set out in the findings of facts set out above, despite the first respondent's awareness that the serious allegations raised concerned her actions the resolution of which were fundamental for the claimant's return to work. The conduct had the purpose or effect of (i) violating the claimant's dignity and it created an intimidating, hostile, degrading, humiliating or offensive environment for her, and the Tribunal found it was objectively reasonable to have that effect given the importance of the issues raised to the claimant, which were "swept under the carpet" by the first and second respondent.

142.2 Has he or she affirmed the contract since that act, the Tribunal found the claimant had not.

142.3 If not, was that act (or omission) by itself a repudiatory breach of contract, the Tribunal found it was, and if it is wrong on this point it was nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence.

142.4 Did the employee resign in response (or partly in response) to that breach, the Tribunal found the claimant had so resigned.

143 An important point to draw from Kaur is where there is a last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign. The focus of enquiry was whether the act that precipitated the employee's resignation, i.e. the grievance hearing, was part of a cumulative breach (as opposed to a one-off), rather than on whether past breaches had been waived taking into account the entire factual matrix and background to in the case. Mr Munro's submission that the "short timetable of events destroys the claimant's case from start to finish" was not persuasive as reflected in the Tribunal's findings of fact and conclusion that disability discrimination had taken place at various intervals.

144 With reference to the third issue, namely, if so, did the Claimant affirm the contract or otherwise waive the breach, the Tribunal found that she had not and resigned soon after it became apparent to her the second respondent was not prepared to deal with the

serious matters she raised in relation to the first respondent. Mr Lewis submitted that there was no issue of affirmation, the breaches took place over a period of time and during this period the claimant was ill. Mr Munro submitted the claimant needed to point to a particular breach and act on it without delay acknowledging the last straw does not need to be a fundamental breach but in a long chain of events starting from her conduct which had "shocked" people and taking part in the disciplinary process throughout, which she accepted consenting to take part in the disciplinary hearing which she attended. The Tribunal did not agree the claimant had affirmed the breach; she objected to the disciplinary process including at the hearing when reference was made to the Bipolar, issues in medication and that she may have "lost her job just for being ill…and there's my mental health. I want you to ask for all my medical records. Every single one of them."

145 Finally, Mr Munro submitted the claimant had contributed towards her dismissal by her conduct on the 3 and 4 September 2018, and that she had "ambushed" to respondent making "overdramatic points." The Tribunal struggled with the concept of a claimant contributing to a discriminatory dismissal and both parties were invited to make further oral submissions on this point as the issue of contribution had not been included in the list of issues and came as a surprise. It was agreed if contribution (which is ordinarily dealt with at liability stage) was an issue, the parties would deal with it at remedy and case management orders have been made separately for exchange of written submissions and case law on this point.

146 In conclusion, the claimant not treated less favourably because of her protected characteristic of disability by the first or second respondent and her claim of direct discrimination brought under Section 13 of the Equality Act 2010 is dismissed.

147 The claimant was treated less favourably because of something arising in consequence of the claimant's disability, and the first and second respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. The claim of disability related discrimination brought under section 15 of the Equality Act succeeds and is adjourned to a remedy hearing.

148 A provision, criterion or practice of the respondent puts the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, and the first and second respondent have failed to take such steps as it is reasonable to have to take to avoid the disadvantage to the claimant. The claimant's claim brought under section 20-21of the Equality Act 2010 succeeds and is adjourned to remedy.

149 The first respondent did engage in unwanted conduct related to the protected characteristic of disability and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 succeeds.

150 The claimant's claim brought under section 19 of the Equality Act 2010 is withdrawn.

151 The first and second respondent breached the implied term of trust and confidence. The first and second respondent was in fundamental breach of contract sufficiently serious to amount to a fundamental breach. The claimant did not affirm the contract and she resigned as a result of the breach.

152 The claimant was unfairly dismissed and her claim for constructive unfair dismissal is well-founded and adjourned to remedy which is to be listed with the parties' agreement.

13.5.2021

Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 May 2021

FOR THE SECRETARY OF THE TRIBUNALS