# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **CLAIMANT** | **V** | **RESPONDENT** |
|---|---|---|
| **Ms J Bravo** | | **United Services Club (Rainham Kent) Limited** |

**Heard at:** London South Employment Tribunal **On:** 11, 12, 13 and 14 May 2021

**Before:** Employment Judge Hyams-Parish
**Members:** Mr R Shaw and Ms J Saunders

**Representation:**
**For the Claimant:** In person (assisted by her partner, Mr William Smith)
**For the Respondent:** Mr Ridgeway (Counsel)

# JUDGMENT

**The unanimous Judgment of the Employment Tribunal is as follows:**

**(a) The claim of constructive unfair dismissal is well founded and succeeds.**

**(b) The claim of disability discrimination (harassment) is well founded and succeeds.**

**(c) The claim of direct discrimination fails and is dismissed.**

# REASONS

## Claims and issues

1. By a claim form presented to the Tribunal on 27 November 2018, the Claimant brings claims of constructive unfair dismissal and disability discrimination.

2. The Claimant alleged that she resigned in response to the Respondent's failure to deal with grievances which she raised. The last straw for her was receiving the decision on her appeal against a previous grievance outcome. She alleges that the Respondent misrepresented what happened at the appeal hearing, but also that the Respondent failed completely to engage with the grievance. They didn't deal with all of her complaints, didn't deal with it in a timely manner and didn't provide her with the documentation she requested. Her claim is brought on the basis that the Respondent's behaviour collectively and over time amounted to a fundamental breach of contract - but also that the last straw itself was a fundamental breach of contract and that was the reason for her resignation.

3. At the outset of the hearing, the Claimant was asked for clarification of her disability discrimination claim. The Claimant, through Mr Smith, made clear that the discrimination claim related solely to the comment referred to at paragraph 18 below and the Respondent's failure to investigate it. Both were alleged to be acts of direct discrimination and disability related harassment.

## Practical and preliminary matters

4. During the hearing, the Tribunal heard evidence from the Claimant and her witnesses, Teresa Dennis and Mr William Smith. The following witnesses gave evidence on behalf of the Respondent:

    4.1. Steve Spencely, Committee Member and Bar and Finance Manager.

    4.2. Bob Buckingham, Committee Member.

    4.3. Sally Carey, Committee Member.

    4.4. Daniel Clint, Committee Member, grievance officer.

4.5. John Hinde, Committee Member and President.

4.6. Josephine Pope, Committee Member.

5. During the hearing, the Tribunal was referred to documents in a bundle extending to 202 pages. References to numbers in square brackets in this Judgment are to page numbers in the hearing bundle.

6. An oral decision was given in this case in the afternoon of the fourth day of the hearing. These written reasons are provided at the request of the Respondent, made in writing immediately following the conclusion of the hearing.

## Findings of fact

7. The Respondent is a social club which is run for the community by a management committee ("the Committee"). The Committee is made up of the President, Vice President, and thirteen other members. All committee members are volunteers. The club employs a secretary and a small number of other employees, such as bar staff.

8. The Claimant was employed by the Respondent as its Secretary. She commenced her employment on 21 September 2009. The role of Secretary involves the processing of wages, preparing VAT returns and submitting these to HMRC, preparing weekly accounts using the Sage software package, dealing with Club correspondence, arranging hire of the Club's Hall, dealing with the daily cashing up and banking functions, together with general administrative tasks which arose from time to time.

9. The club is essentially run by the Committee. It meets on a monthly basis. Finance and HR, or matters that are more confidential, are dealt with by a smaller sub-committee called the Bar and Finance Committee.

10. The Claimant did not experience any problems in her role until 2015. On 9 June 2015, the Claimant wrote a letter to Mr Hinde personally (not the Committee) complaining that she had been told by others to "*watch her back*" and that Mr Hinde was "*gunning for her*". The Claimant discussed her concerns with Mr Hinde and they agreed to try to resolve/improve matters informally. On that basis, the letter was never shown to the Committee.

11. By letter dated 7 January 2018 [93] the Claimant wrote to the Committee complaining about the way she had been treated at a Bar and Finance Committee meeting held on 12 December 2017. That letter included the following extract [sic]:

***I have previously written to Mr Hinde about the way I was being***

> ***treated in 2015. I met with him to discuss my concerns and he made them worse and I felt the need to write to him on 16/5/15 (copy attached) about the way I was being treated by Mr Hinde and now informed that the committee were united against me.***
>
> ***I wanted that letter to be read to the Committee. I was convinced by Mr Hinde that he would resolve my issues. He also confirmed that he would prefer for the letter not to be read out at the Committee meeting. This I accepted on the understanding I was treated correctly from then.***
>
> ***It is with some sadness that I am left with no other choice than to write to you again. Over a period of time, it has reverted to 2015 and in some cases, it is worse.***
>
> ***The final straw came when I recently attended a Bar and Finance Committee Meeting on 12/12/17 including Mr Hinde, Mr Spencely and Mr Buckingham. At this meeting I was so badly treated that I consider myself a victim of bullying.***

12. The letter, which was not sent to the committee until 25 January 2018, went on to complain that the Claimant had not been made aware of all activities at the club, she was not allowed to put her view across at the meeting, she was intimidated, and her words were ignored or twisted. She also alleged that unsubstantiated accusations were made against her.

13. At the end of the above-mentioned Bar and Finance Committee meeting, the Claimant told committee members that she had discovered a lump on her breast. The Tribunal concluded that those present at the meeting were certainly of the understanding, from what the Claimant had said, that she suspected it was breast cancer.

14. By 9 January 2018, the Claimant's diagnosis of breast cancer had been confirmed. At the end of a committee meeting on this day, the Claimant told members that she had been diagnosed with breast cancer. She followed this up by letter dated 12 January 2018 confirming what she had told Committee members at the meeting on 9 January 2018 [101].

15. On 31 January 2018, the Claimant wrote again to the Committee, complaining that her letter of 7 January had not been acknowledged or responded to in any form [102]. The letter also said the following [sic]:

> ***….can you please explain why the letter is being made public. It would appear that at least one of the sources is Mrs Hind. Apparently, I had no right to write a letter of complaint. I would like that point expanded. How can the members of the committee deny me an investigation and assume that I am guilty when I am the victim. I think this confirms the bullying culture within the United Services.***
>
> ***It is for this reason that I am forced to write to you again. I now feel that my position as secretary of the Club is more tenuous since my letter dated 7/1/18. I find myself placed in a difficult and worse position - Not only am I suffering from some Members of the***

> ***committee, but I am now having the Members of the Club having a say to my future employment. Members of the club are freely discussing the contents of my letter.***
>
> ***I would have thought the Committee would have given me the same consideration about my letter as the one that was delivered to a private address and not to the United Services. If I remember correctly that particular letter was really important. My letter in contrast was way more important than that letter but given so little respect.***

16. The Tribunal was not persuaded that there was complete confidentiality over staffing matters, like the Claimant's grievance. The Claimant complained that her grievance was being gossiped about, and the Tribunal accepted that was happening.

17. The Claimant had an operation in hospital on 2 February 2018 to treat her breast cancer. This was followed by a period of convalescence.

18. On 10 February 2018, the Claimant wrote to the Committee saying the following:

> **I find myself in this position of having to write another letter. I am absolutely appalled at the way I am being treated. I have been informed on numerous occasions that my previous letter is being discussed openly with the Members of the Club. One of the most hurtful comments reported to me is a Committee Member who openly threatened me in the bar "*Cancer or no Cancer I am having her f*****g head on a block*". This was not a passing comment, this comment was made after banging her empty wine bottle on the table to gain the attention of the Club. I am absolutely disgusted by this. How can a Committee Member be so spiteful? I don't know how much more I can take.**

19. The Claimant was not present to hear the above alleged comment ("the comment") but learned of it from another member of the club, and friend of the Claimant, Teresa Dennis. Ms Dennis overheard the comment as she was sitting at the next table with her partner. During her evidence to the Tribunal, Ms Dennis said she could not be certain who was being spoken about, but she was 99.9% sure it was the Claimant. Mr Hinde recalled a conversation but denied that it was about the Claimant. He said there was a discussion about his sister-in-law who was suffering from cancer. He said his wife said something along the lines of "*Cancer or no cancer it did not wash with me*" referring to a falling out between Mrs Hinde and her sister.

20. The Tribunal noted that the explanation given by Mr Hinde at this hearing was the first time he had given this account. He did not even deal with the allegation in his witness statement, which the Tribunal found very surprising. Neither was it set out in the Respondent's response to the claim.

21. The Tribunal considered this allegation carefully, given that it was the substance of the disability discrimination claim. The Tribunal was satisfied that the comment was said as alleged by Ms Dennis in her evidence to the Tribunal, and the members of the committee, together with Mrs Hinde, were referring to the Claimant when this comment was made. Even if the words came from Mrs Hinde, the Tribunal concluded that it was a group discussion in which the President, Mr Hinde, and other members of the committee participated; the Respondent was accordingly responsible for it. Regarding the explanation Mr Hinde gave during his evidence, the Tribunal found this to be too much of a coincidence and not credible. Had there been a legitimate explanation about the conversation heard by Ms Dennis, then the Tribunal believes it would have been provided to the Claimant as soon as the allegation was made. This was such a crucial defence to such a serious allegation, the Tribunal concluded that had it been true, then it would have been included in the response and set out in Mr Hinde's witness statement.

22. The Tribunal was told that the Claimant was the only one with access to online banking which was used to pay bills and staff. Although Mr Hinde was a second signatory, he did not have online access. The Tribunal was told by Mr Spencely that Mr Hinde was not "*tech savvy*".

23. On 12 February 2018, Mr Spencely emailed the Claimant to ask for various pieces of information including log in details. Ms Carey followed this up two days later with the same request. That was a reasonable request in the Tribunal's view. The Respondent was in some difficulty without that information. The Tribunal found nothing unreasonable about a letter which was sent to the Claimant stating that should she fail to provide the information, that disciplinary action could follow. It was in a difficult predicament and the Claimant's suggestion that she could pay staff or bills, was no answer to this problem.

24. It was not until 15 February 2018, that Ms Carey wrote to the Claimant acknowledging the Claimant's letters but stating that they would not start the ball rolling in terms of dealing with them until she was well enough to do so. She also said for the Claimant to rest assured that all matters in the Claimant's letter would be dealt with at the meeting. The Claimant became very frustrated that her grievances were not being dealt with. The Tribunal had some sympathy with the Respondent. The Claimant had undergone surgery, was convalescing and was suffering from stress. The Respondent had received instructions from Mr Smith not to contact the Claimant and therefore the Tribunal accepted that the Respondent was conscious of not wanting to make her condition any worse.

25. The Claimant's absence from work resulted in the delay to the grievance process, which only started once she had confirmed, via her GP, that she was fit enough to participate.

26. Mr Clint was asked by Mr Buckingham to hear the Claimant's grievance. Whilst Mr Clint was selected to deal with the grievance because he had not been previously involved, he was not an ideal candidate to deal with it as he had no previous experience of dealing with grievances.

27. In preparation for the grievance hearing on 22 May 2018, Mr Clint received the Claimant's three letters dated 7 and 31 January 2018 and 10 February 2018. When it came to the hearing, it was made clear to the Claimant that the grievance would be restricted to the bullying allegation against Mr Hinde. It is not clear why that was the case given that the grievances extended well beyond that issue. The Tribunal was satisfied that the Claimant demanded to know why all her grievances were not being dealt with, to which Mr Clint said he had only been asked to deal with the bullying allegation. The Tribunal concluded that Mr Clint did not have a good grasp or understanding of what he was dealing with. Indeed, the Tribunal finds that by assigning Mr Clint to hear the grievance, they were treating it more like a tick box exercise rather than genuinely wanting to get to the bottom of what the Claimant was complaining about.

28. The process did not improve from there. Certain committee members were asked to provide witness statements. There was little discussion or direction as to what they should comment about. They were not interviewed by Mr Clint. The witness statements were not shown to the Claimant, and she was not able to comment on them.

29. Mr Clint wrote to the Claimant on the 18 June 2018. That outcome letter was woefully inadequate as it did not tell the Claimant what process had been followed or include any rationale for the conclusions reached. The Tribunal was not satisfied that Mr Clint had addressed his mind to the issues at hand, supporting the Tribunal's conclusion that this was a mere tick box exercise.

30. The Claimant appealed against this outcome by letter dated 6 July 2018. In that letter she expressly asked for copies of witness statements. She complained about the delay in sending the outcome, to which Mr Clint replied in writing, apologising for the delay, and stating that it took some time to get statements from five people. This the Tribunal found surprising given that Mr Clint had very little to do; he did not interview witnesses and simply received their written evidence.

31. The Claimant was invited to an appeal meeting by Fran Genduso. The date of the appeal was scheduled to take place on 24 July 2018.

32. On the same date, the Claimant wrote to Mrs Genduso asking a number of questions about the appeal process. These were reasonable questions to be asked in the Tribunal's view. Once again, the Claimant requested copies of the witness evidence.

33. Mrs Genduso responded to the Claimant but did not answer many of the questions raised; neither did she provide the information requested. This, the Tribunal finds, was a woefully inadequate response, and unreasonable.

34. The Claimant wrote again on 10 August 2018 asking various questions about the appeal. This letter went unanswered.

35. The appeal hearing went ahead on 20 August 2018. The Tribunal is satisfied that Mr Smith was welcomed into the meeting and his attendance was not questioned. This was disputed by the Respondent. However, the Tribunal did not hear any evidence from the two people at the appeal hearing and therefore the Tribunal accepts the Claimant's and Mr Smith's evidence in this regard.

36. The appeal hearing was ineffective and dealt with very little. The minutes suggest that Ms King did not know very much about the complaints being made by the Claimant.

37. Ms King wrote to the Claimant by letter dated 29 August 2018 giving the outcome to the grievance appeal. The Claimant did not recognise the meeting as described in the letter. In the absence of hearing any evidence from Ms King or Mrs Genduso, the Tribunal decided to accept the Claimant's account of what happened at the appeal meeting and her assertion that the description of the meeting as set out in Ms King's letter was inaccurate. In that letter Ms King proceeded to find against the Claimant without giving any reasons or rationale for doing so.

38. The Claimant resigned in response to the above mentioned letter. She did so by letter dated 7 September 2018 complaining of a serious breach of mutual trust and confidence. She complained about the way that the Respondent had dealt with her grievance.

## Legal principles

### (a) Constructive unfair dismissal

39. Section 95(1) Employment Rights Act 1996 ("ERA") defines what it means to be dismissed:

> ***An employee is dismissed by his employer if and only if:***
>
> ***(a) the contract under which he is employed is terminated by the employer (whether with or without notice),***
>
> ***(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or***

> ***(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.***

40. The Claimant in this case relies on a breach of the implied term of mutual trust and confidence, which means that the employer "*shall not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between employer and employee*": ***Malik v BCCI [1997] ICR 606.*** The test of whether there has been a breach of the implied term of trust and confidence is objective: the question is whether the conduct relied on as constituting the breach, when looked at objectively, is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

41. In **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA** the Court of Appeal clarified that an employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act — the last straw — forms part of the series. The effect of the final act is to revive the employee's right to terminate his or her employment based on the totality of the employer's conduct. This, at any rate, is the case if the final straw incident is not itself so damaging as to comprise a repudiatory breach in and of itself. If, however, it does comprise a repudiatory breach in and of itself and thereby triggers the employee's resignation, there will be no need for the employee to rely on the last straw doctrine as the basis for claiming that he or she has been constructively dismissed.

42. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it.

43. If the Tribunal finds that the Claimant was constructively dismissed, it must then go on to decide whether the dismissal was unfair.

44. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98(1) says as follows:

> ***(1) In determining…whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***

> ***(2) A reason falls within this subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

45. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

**(b) Direct disability discrimination**

46. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

> ***A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.***

47. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?"* Put another way, *"What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?"* It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR***

***572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason why he acted as he did*".

48. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

> ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

49. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason it dismissed the Claimant was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

50. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the Tribunal "*could conclude*", not whether it is "*possible to conclude*". In ***Madarassy v Nomura International plc 2007 ICR 867, CA*** it was said that the bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "*could conclude*" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. However, 'the "more" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

51. Notwithstanding what is said above, in ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, the point was made that '*it might be*

*sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment*'.

**(c) Harassment**

52. Harassment is defined under s.26 EQA as follows:

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

53. Unwanted conduct means "*conduct which is unwanted by person B*"; ***Thomas Sanderson Blinds Ltd v English UKEAT/0317/10/JOJ*** at [28]. Consequently, this requirement is a subjective one which depends on the state of mind of the Claimant.

54. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Code")) suggests the term "unwanted" means essentially the same as "unwelcome" or "uninvited". "Unwanted" does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

55. The final element to consider is whether the purpose or effect of the conduct was to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

56. The purpose requirement is a subjective one with respect to the harasser. With respect to the 'effects' requirement however, the Court of Appeal in ***Pemberton v Inwood [2018] I.C.R. 1291*** held at [88]

> ***In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.***

57. This test is therefore a mixed subjective and objective one, with it being necessary to consider both elements.

58. Whether or not the conduct is related to the characteristic in question is a matter for the tribunal, making findings of fact and drawing on all the evidence before it; ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT 0039/19***. The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. Nevertheless, in any given case there must still be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged in the claim

59. It is important to note that s.212 EQA provides that the concept of 'detriment' does not include conduct that amounts to harassment. This means that harassment and direct discrimination claims are usually mutually exclusive, because the kind of conduct that could amount to harassment is usually the kind of conduct that amounts to a detriment for the purpose of bringing a direct discrimination claim.

## Submissions

60. Both Mr Ridgeway and Mr Smith presented their submissions orally at the conclusion of the evidence. These were considered carefully by the Tribunal before reaching its conclusions.

## Analysis, conclusions and additional findings of fact

61. The Tribunal concluded that there was a wholesale failure of the Respondent to properly deal with the appeal and engage fully with the Claimant's grievance. The appeal meeting was rather pointless. There were serious failings in dealing with the appeal which went to the root of the contract of employment and breached the implied term of mutual trust

and confidence. Even if it was not a breach on its own, it was certainly a last straw to a complete failure over time to fully engage with the Claimant's grievance, for the reasons stated above.

62. On the discrimination claims, as said above the Tribunal finds as fact that the comment (referred to at paragraph 18) was made. The Tribunal concluded that the comment was an act of harassment. It was unwanted conduct which had the effect of violating the Claimant's dignity, and creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Tribunal was satisfied that it was reasonable for it to have had that effect on the Claimant.

63. The comment was not an act of direct discrimination because the detriment was an act of harassment, which cannot also be a detriment for the purposes of a direct discrimination claim (see paragraph 59 above).

64. The Tribunal did not find the failure to investigate the comment to be an act of direct discrimination because the Tribunal was not satisfied that the Respondent would not have treated a hypothetical comparator in the same way. However, the Tribunal is satisfied that the failure did represent a further act of harassment. It was further unwanted conduct which was related to disability; moreover, it was degrading and humiliating for the Claimant to see that it was not being appropriately investigated.

65. On time limits, the failure to investigate the comment continued until she resigned. That complaint is therefore in time.

66. With regards the comment itself, whilst that was made in February 2018, the Tribunal considered that the failure to investigate it was part of a continuing act, ending when the Claimant resigned. Even if the Tribunal did not reach that conclusion, it concluded that it was just and equitable to extend time in the circumstances. The reason the claim was not brought sooner is because the Claimant was waiting for her grievances to be dealt with. The Tribunal could see no hardship to the Respondent by extending time.

67. In conclusion, the Tribunal unanimously finds that the complaints of constructive unfair dismissal and disability related harassment are well founded and succeed.

68. The remedy hearing has been listed for 16 July 2021 unless it is possible for the parties to reach agreement before then.

**Employment Judge Hyams-Parish**
**4 June 2021**