EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4100026/20 (V)

Held on 16, 17, 18, 19 & 20 August & 29 December 2021

Employment Judge N M Hosie
Members R Dearle
J McCaig

Mrs J Douglas	**Claimant** **Represented by** **Ms E Grant,** **ELG Legal**
High Life Highland	**Respondent** **Represented by** **Ms I Fitzpatrick,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

1. the complaint of discrimination arising from disability is well-founded;
2. the complaint of unlawful discrimination in respect of a failure by the respondent to make reasonable adjustments is dismissed;
3. the complaint of harassment in respect of the protective characteristic of disability is well-founded;
4. the claimant was constructively and unfairly dismissed; and
5. a Remedy Hearing should be fixed to assess the award of compensation.

REASONS

Introduction

1. The claimant, Janette Douglas, brought complaints of constructive unfair dismissal and disability discrimination. The claim was denied in its entirety by the respondent. It was agreed that the Hearing would only deal with the issue of liability.

The evidence

2. Each of the witnesses spoke to written witness statements. We first heard evidence from the claimant and then on her behalf from:-

- Anna O'Brien, Part-Time Co-Ordinator who worked at the Youth Club in Alness known as "The Place".
- Joshua Hutchison, Senior Youth Worker at "The Place".
- Alan Banner, Part-Time Sessional Youth Worker with the respondent until August 2019.
- John Douglas, the claimant's husband.

We then heard evidence on behalf of the respondent from:-

- Graham Cross, Commercial Manager.
- Nigel Brett-Young, Youth Work Manager and the claimant's Line Manager until 2015.
- Douglas Wilby, Director of Sport & Leisure.
- Michelle Lawrence, HR Officer.
- Fiona Hampton, Director of Sport & Leisure.
- James Martin, Director of Corporate Services.
- John West, Director of Culture & Learning.

- Wilma Kelt, Area Youth Services Officer and the claimant's Line Manager since 2015.
- Morven MacLeod, HR Manager.
- Mark Richardson, Principal Adult Learning & Youth Work Manager.

3. A Joint Bundle of documentary productions was also lodged ("P").

4. After the evidence was completed, the Hearing was adjourned to enable the parties' representatives to make written submissions which they did, ending with an e-mail from the claimant's representative on 10 November 2021. The Tribunal then reconvened, on its own, on 29 December, to discuss the issues and finalise its decision.

Findings in fact

5. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following findings in fact. We wish to record, at this stage, that we were of the unanimous view that the claimant gave her evidence in a measured, consistent and convincing manner and presented as credible and reliable.

6. High Life Highland ("HLH") is a charitable organisation established in 2011. It is a subsidiary of Highland Council and as such a Scottish Public Authority. The organisation develops and promotes opportunities in culture, learning, sport, leisure, health and wellbeing across nine services throughout the Highlands.

7. The claimant was employed by the respondent as a Youth Development Officer ("YDO") from 1 October 2011, after transferring under TUPE from the Highland Council, where she commenced employment on 11 April 2000 as a Relief Worker. She was employed until 22 August 2019 when she resigned and her employment ended.

8. The role of a YDO involves the delivery of quality youth work services within the YDO's designated area and all communities within it. The claimant's duties included the co-ordination and development of local provision for all young people, supporting their personal, social and educational development and frequently involved working with partner organisations to deliver quality local provision for young people.

9. The claimant's designated area for work was the town of Alness which has a population of about 6,000. She was based at Alness Academy. She lives locally and is well-known within the community, both personally and professionally.

Disability

10. The claimant suffers from a condition known as Fibromyalgia. The respondent accepted that this amounts to a disability in terms of the Equality Act 2010. Occupational Health reports were obtained for the claimant in 2013 and 2014 (P.7, 8 and 9). The respondent was aware that the claimant was likely to be disabled, in terms of the 2010 Act, from at least 6 January 2014 (P.9, page 89). After attending Occupational Health, the claimant and her then line manager, Nigel Brett-Young, discussed ways to best manage her condition. A special ergonomic chair was purchased to help reduce the pain she suffered from sitting at a desk and she was told that she could work from home on days when she was particularly fatigued or in too much pain. Mr Brett-Young was her line manager from March 2011 to June 2015 until he became a Youth Work Manager. After that, the claimant's line manager was Wilma Kelt. Mark Richardson oversaw the HLH Youth Work Programme.

The Place

11. "The Place" is a registered charity, established some 31 years ago and is run by a management committee. It helps deliver youth services to youngsters

around Alness and provide things such as drop-in sessions, activities, employability opportunities, play schemes and residentials to children living in depravation.

12. The claimant worked at The Place between 1990 and 1994 and thereafter worked as a volunteer there for over 30 years. Her volunteering mainly involved securing funding to help The Place deliver youth activities. Between 1990 and 2019 The Place operated out of a building in Alness owned by the Highland Council. It later relocated to an open-aired tent within a field near the claimant's home.

13. Until around 2016, the relationship between The Place and Highland Council (and latterly HLH) had been fairly informal. There was an understanding that The Place was responsible for securing funding for the delivery of provisions, but the Highland Council would allow them to be based in one of their buildings. The Place paid bills and was responsible for all internal upkeep. As The Place grew, they began to employ their own staff but HLH still provided additional staff to assist in the running of activities such as the summer play scheme. In 2016 a formal Partnership Agreement was entered into between The Place and HLH which detailed the roles and responsibilities of each organisation (P.96.1).

14. We heard a considerable amount of historic evidence in this case. However, having regard to the comments by the Tribunal about the remoteness of this evidence, its relevancy to the issues in the case and the weight to be attached to it, the claimant's representative advised in her submissions that she would only be relying on the events between November 2018 and 22 August 2019.

Meeting on 21 November 2018

15. Douglas Wilby, the HLH "Head of Performance" at the time, invited the claimant to attend a "group meeting" on 21 November 2018 to discuss youth work provision in Alness. The reason for the meeting was that Mr Wilby had received *"some feedback"* from Councillor ("Cllr ") Carolyn Wilson, "*that there was a lack of clarity within the community of Alness, and on the part of the school in Alness in particular, around who was doing what in relation to youth work".* In advance of the meeting, Mr Wilby provided details of the "*Youth work in Alness", " to help structure the discussion*" (P. 328); the claimant produced in advance of the meeting information concerning the, *"Role of Alness Youth Development Officer"* (P.331-337). The claimant was concerned when she learned subsequently, that there would be several attendees at the meeting including local Cllrs namely, Pauline Munro and Carolyn Wilson. The claimant and Cllr Wilson had been very close friends at one time but the relationship had broken down, apparently over a personal matter. Thereafter, Cllr Wilson made numerous complaints to the respondent about the claimant.

16. Concern was expressed at the meeting about the claimant doing volunteer work at the "Milnafua Community Group" and The Place as her role as a YDO with HLH involved her supporting and working within these organisations. The claimant did not take kindly to this. She took offence and was angry.

17. In cross-examination the claimant confirmed that she was aware of the HLH *"Guidance on Advising Outside Organisations"* (P.284/285), but maintained that, *"the lines were blurred".*

18. On her return from holiday on 3 January 2019, the claimant received a letter, dated 21 December 2018, from Mr Wilby summarising their meeting on that date (P.343/344). The following are excerpts:-

"*Prior to the meeting, in addition to the summary table that I prepared to structure the meeting, you provided me with a document detailing the work you do with Alness Academy. At the end of it you said 'In my private life I am involved in supporting Milnafua Community Group and The Place'. Both of these volunteering activities will be very worthwhile but I am writing to you to say that my strong advice is that because your role as a member of High Life Highland staff involves supporting and working with these groups that you should seriously consider alternative volunteering roles which are not connected with your job.*

This would be my normal advice to staff, but I am specifically saying this to you because even at the meeting in November which was to clarify with Partners who was responsible for what, you spoke as if you were the one responsible for a project which is a responsibility of The Place Committee and because there seems to be a lack of clarity sometimes between your work and private volunteering roles. You speaking at the meeting on something which is the business of another organisation i.e. The Place Committee, I think, could be interpreted as it being you who is running The Place in the background rather than it being run by the Committee. You need to exercise great care in this regard because if you operate as if you are a 'Director' of an organisation, even if you are not officially recorded as one, you could legally become one and you might not have the insurance cover which the formal Directors of the organisation have. In addition, it is helpful for local people and communities if there is transparency of roles and I do not see how it is possible for you to dissociate your volunteering and work roles.

I firmly believe that whilst employed by HLH you need to seriously consider what groups and organisations you choose to volunteer with to avoid any confusion or blurred lines within the community, but obviously, what you do in your own personal time is up to you. As an absolute minimum, you must make it absolutely clear when you are volunteering and when you are working for HLH and this must be clear to the people you are working and volunteering with. Because HLH is an organisation which is funded by the Council this is particularly important and unfortunately, if there are any misunderstandings in future they will have to be investigated to ensure that both you as an individual member of staff and the organisation can be protected."

Meeting on 9 January 2019

19. Douglas Wilby invited the claimant to a meeting at Alness Academy as he was meeting the Head Teacher there that day. Wilma Kelt also attended the meeting. The claimant maintained that the reason for the meeting was to discuss another complaint which Cllr Wilson had made about her. However, that was denied by both Mr Wilby and Ms Kelt and we were unable to make a finding in fact that it was. However, we do find in fact that in the course of

the meeting the claimant complained about the way she was being treated by "various people in HLH" and how the complaints by Cllr Wilson, which she described as a "vendetta", were having on her health. She also said she felt she had been misled about the purpose of the meeting on 21 November and feared that she would lose her job as she was told that she had to give up volunteering at The Place. She claimed that she did not feel supported by HLH and that she felt she was being *"pushed out".*

Meeting on 18 March 2019

20. Nigel Brett-Young, Youth Work Manager, and until 2015 the claimant's Line Manager, telephoned the claimant at home at around 8.30am on 18 March 2019 and told her that she was required to attend a meeting in two hours' time with James Martin at the HLH offices in Dingwall, approximately 15 miles away from her place of work. James Martin was the respondent's Director of Corporate Services and as such part of the Executive Team. Although Mr Brett-Young was aware that the meeting was to discuss the "possibility", as he put it, of the claimant being redeployed he refused, when asked, to tell her what the meeting was about. He said in evidence he had been instructed not to do so. The claimant was very concerned. She feared she was going to be dismissed.

21. When the claimant arrived at the respondent's offices in Dingwall, she met her Line Manager, Wilma Kelt. She asked Ms Kelt if she knew what the meeting was about and she was advised that "*I think herself has been phoning this week*". The *"herself"* was a reference to Cllr Wilson.

22. When the claimant went upstairs to the office, she was surprised to see Mark Richardson, the respondent's Principle Adult Learning and Youth Work Manager to whom Mr Brett-Young reported, also there. Both Mr Martin and Mr Richardson said they were not aware that the claimant was disabled.

23. When they met, Mr Martin advised the claimant that because of her fund raising skills it had been decided to redeploy her, by way of a one year secondment. This would involve her working from the respondent's Dingwall, offices with colleagues there to raise funds for the benefit of young people across the Highlands. She would no longer be working in Alness; she would no longer be working directly with young people. Mr Martin explained that when giving evidence that this was a decision that had been "taken at a Heads of Service meeting amongst HLH's Executive Team (comprising the Chief Executive and HLH's Heads of Service as they were at the time)".

24. Mr Martin claimed in evidence that this was a "proposal" only, that he had told the claimant to go away and consider the "proposal" and had she refused he, *"would have re-grouped with management colleagues and discussed our next steps".*

25. However, this was disputed by the claimant. She claimed that Mr Martin "*opened the meeting by advising me that they were removing me from my position at Alness and that I would be required to take up a new position in Dingwall the following Monday.*" He also said that her *"job description and conditions"* would be e-mailed to her the following day and that she should report to the Dingwall office the following Monday at 9.30am, unaware that the claimant did not work on Mondays.

26. We were of the unanimous view that the claimant's evidence was to be preferred. Her evidence in this regard was consistent and convincing and in our unanimous view credible and reliable. Further, there was corroboration of her evidence from Mr Richardson. It was put to him in cross-examination that, *"at that meeting she was told she was being redeployed? No option?"* to which he replied "*no, it was an instruction".* There was also cotemporaneous correspondence consistent with the claimant being presented with a *fait accompli* and not a *"proposal"* (P425, for example).

27. Funding had been obtained for the claimant's redeployed post and Wilma Kelt was told that she would no longer be the claimant's Line Manager from 18 March.

28. We also accepted Mr Richardson's evidence that what had prompted the decision to redeploy the claimant was *"a meeting or meetings"* of the Senior Management Team, which he had attended when it was decided that fund raising was required; he also said that Cllr Wilson's relationship with the claimant and her complaints was *"a secondary close factor".* However this relationship was not discussed at the meeting in Dingwall on 18 March and nor was the contention by Mr Martin, when he gave evidence, that the Head Teacher at the school, Alness Academy, had raised concerns with the respondent about the claimant's conduct, *"and her attitude towards working with external partners and elected members of Highland Council"* and that, "*the crux of the issue was that the school did not want to deal with the claimant anymore and, from recollection, those involved didn't want her in the school."*

29. The claimant's assertion in evidence at the Tribunal Hearing that the respondent "*relies heavily on the support of local Cllrs and as such there is a strong emphasis on maintaining good relations"* was not disputed. During the meeting on 18 March, the claimant said to Mr Martin, *"this is because of Carolyn Wilson"* or words to that effect. However, at the meeting Mr Martin denied that that was so, despite the fact that Mr Richardson said in evidence that the claimant's relationship with Cllr Wilson and her numerous complaints was a significant factor in their decision to redeploy the claimant. It was abundantly clear to us from all the evidence we heard and the relevant documentation that that was so.

30. The claimant became very distressed at the meeting. She drove home and, as she put it, in her *"confused state"* she decided to speak Cllr Wilson who was working in a local shop in Alness. She accepted that was misguided on her part and the wrong thing to do, especially in her distraught state. In any event, during their conversation Cllr Wilson said "*this is a brilliant opportunity*

for you, a new start." However, the claimant had not told Cllr Wilson about her new redeployed role and maintained this could only have come from the respondent at a senior level.

31. When she arrived home, she was still very upset. The stress had also caused her fibromyalgia to *"flare up".* She told her husband that she had been told by James Martin and Mark Richardson that she was "*being put to Dingwall".* This had come *"as a complete shock and was totally out of the blue".* She didn't want to go to the Dingwall office as *"she loved her job based at Alness Academy"* but, "*she had no choice and would be relocated the following Monday".*

Freedom of information request

32. The claimant recovered, by way of a Freedom of Information ("FOI") request, "*all correspondence between Cllr Wilson and High Life Highland between the period of Dec 2014 and April 2019 about youth work and Janette Douglas*" (P.421-443). This included an e-mail which was sent by James Martin to Cllr Wilson and others on 20 March, the terms of which reinforced our view that the claimant's secondment had been presented to her as a *fait accompli* at the meeting on 18 March. It was not just a *"proposal"*, with the claimant being afforded time to consider, as Mr Martin claimed in evidence. That was patently not so. The following are excerpts from his e-mail (P425-426):-

"*Whenever there is a significant change to our service in an area, it is our practice to notify the local Members most involved. I am therefore dropping you this note to advise you that Janette Douglas, part-time youth worker in Alness* ***has been seconded*** (the Tribunal's emphasis) *into a 12-month post of Youth Development Officer (Funding) to attract funding to assist the youth services, based in our Dingwall office.*

Janette ***will move to the seconded post on Monday 25 March*** (the Tribunal's emphasis) *and in the meantime she has been asked not to engage in HLH business and to take the rest of the week to reflect on the Job Description and Personal Specification and to remove herself from her substantive role. I hope that she will see the secondment as a positive step for her as well HLH youth services and the wider Highland communities.*

Janette has an excellent track record in terms of fund raising and I'm confident that if she proactively embraces the role over the next 12 months then it will reap the rewards with the potential to become a more permanent post in the HLH establishment.

As this is an HR matter, I have instructed Janette not to be in touch with you further with regard the decision (sic) *to second her into the post. I would suggest that if she does get in touch that you advise her of this and let me know……*"

33. The correspondence recovered by way of the FOI request also included an e-mail from the claimant's Chief Executive, Ian Murray, to Cllr Wilson on 10 April 2019. It was in the following terms (P.427):-

"*Sorry, because I was away in sunny Dunfermline and because I was chairing a meeting I knew I wouldn't be able to get back to you swiftly that's why John and Wilma were dispatched to get in touch. My take on it is that we are finally seeing The Place exposed as it really is, a* ***"flag of convenience"*** (the Tribunal's emphasis) *for Janette to dress up what she wants to pursue but with HLH and the Council being the real foundation. I know Mark located the Agreement so I'm not sure why you don't have it. I will see where it's got to today and come back.*"

34. Cllr Wilson told Mr Murray that the claimant had spoken to her at her shop in Alness on 18 March immediately after her meeting in Dingwall. Mr Murray advised Mr Martin of this and he telephoned the claimant that day. He told her to take the rest of the week off and to "*think about her behaviour*".

35. By letter dated the same day, Mr Martin wrote to the claimant to advise her of her relocation (P.124). The terms of that letter also served to confirm our view that contrary to Mr Martin's evidence, this was not a "proposal" but rather a management decision. The claimant replied to Mr Martin's e-mail by 20 March 2019 (P.128).

Claimant's suspension and subsequent disciplinary proceedings

36. By e-mail dated 21 March 2019, Mark Richardson advised James Martin by e-mail that he felt that the claimant had not adhered to clear instructions (P.140). Accordingly, Mr Martin wrote to the claimant on 22 March to advise her that she was suspended pending a disciplinary investigation into the following allegations (P. 142-143):-

"*1. Failed to follow a reasonable instruction which was not to engage in HLH work; and*
2. Removed folders relating to your work which may contain personal and sensitive information and therefore classed as a potential data protection/GDPR breach."

37. He also instructed the claimant to return items that she had removed from her workplace in Alness Academy and any items belonging to the respondent.

Claimant signed off

38. On 19 March, the claimant had gone into her office and printed off the new job description, duties and completed some administrative duties. However, the stress had caused her Fibromyalgia to flare up. She went to her doctor the same day and was signed off with work-related stress.

39. On or about 23 March, the claimant was removed from a "group chat" which she had with the Alness Youth Work Team. This was done on the instruction of Mr Brett-Young who had advised them that they were not allowed to contact the claimant and if she tried to contact them they were to let him know. Wilma Kelt, the claimant's Line Manager, also told the youth team that they were not to contact the claimant. A written signed statement, in support of the claimant, from a number of youth workers, was later submitted as part of the disciplinary process (P.447).

Suspension

40. The suspension letter on 21 March (P. 142-143) had instructed the claimant not only not to attend her place of work but also the respondent's "other establishments". However, the majority of the respondent's public facilities where the claimant stayed were either operated by or facilitated to the respondent. This meant that she was unable, for example, to take her grandchild swimming. She felt that the suspension was "disproportionate" and she complained.

41. On 29 July, the claimant received an e-mail from Morven MacLeod, the respondent's HR Manager, to advise that on 10 June the respondent had decided to allow her access to three of its sites, for specific purposes (P.258). The claimant said she had not been aware of this until 29 July but Ms MacLeod's letter of 10 June to her was one of the documentary productions (P225).

Disciplinary

42. On 4 April 2019, the respondent's "Investigating Officer", Graham Cross, Commercial Manager, wrote to the claimant to invite her to attend a "Formal Investigation Meeting" (P.148). He advised that the purpose of the meeting was to investigate the allegations of misconduct in Mr Martin's letter of 22 March which had been sent by e-mail (P.142/143).

43. The investigation meeting took place on 17 April and lasted approximately half an hour. Minutes of the meeting were produced (P.178-184). We were satisfied that these were reasonably accurate. The "Investigation Officer Report" detailed the investigation which was carried out by Mr Cross (P.149-190). In the course of the investigation meeting the claimant advised Mr Cross that she had Fibromyalgia and that her then Line Manager, James Brett-Young had agreed that she could work from home. Apparently, James Martin had not been aware of this.

44. On 30 April, John West "Designated Officer" and the respondent's Director of Culture and Learning, wrote to the claimant to advise her that she was required to attend a Disciplinary Hearing (P.193). The Hearing ultimately took place on 20 May. The claimant was accompanied by her Trade Union Representative, Jayne Atkinson. Minutes were produced (P.216-221). We were satisfied that these were reasonably accurate. When asked by Mr Cross if she had "permission to take things home" she replied as follows (P.219):- "*I have e-mail proof of this and the Occupational Health Report 2013/14* (P.83-89)*. I was provided with a laptop so that I could work from home. Occupational Health recommended that as I have Fibro, I work from home as stress can make my conditions worse.*"

45. During the meeting, the claimant's Union representative drew Mr West's attention to various character references (P.209-215). Finally, the Minutes record the representative saying this:-

"*I would like to draw attention to personal statements about Janette's role in HLH. It is clear that Janette has not brought HLH into disrepute. Nigel and Wilma were both more than happy with Janette's performance.*
James had a conversation with Janette whilst she was in the vets. James did not send Janette an e-mail until 7.30pm and he sent it to her work e-mail.
Wilma did not speak to Janette as indicated.
There seems to be some confusion about what belongs to who.
There was some confusion on the day and that is the reason Janette's bag was not emptied.
The GDPR policy was followed and there is no clear alternative policy.
Janette had a discussion with Paul MacMillan only on 19 March.
Janette has worked in this job for 19 years and has an exemplary record and is committed.
This is having a detrimental effect on her health."

Final written warning

46. On 27 May, Mr West wrote to the claimant to advise her that he found that allegation 1 (the alleged failure to follow a reasonable instruction not to engage in HLH work) was substantiated but that allegation 2 (removing folders relating to her work) was not. He advised that he had decided to issue a final written warning.

Appeal

47. On 3 June, the claimant sent an e-mail to the respondent to advise that she wished to appeal against the sanction of a final written warning.

48. On 10 June, Morven MacLeod, HR Manager, wrote to the claimant to advise her that her suspension from work had been lifted and that she was free to return to her seconded post "YDO (funding)" in Dingwall (P.225). However, she further advised that due to "*the potential conflict of interest she would only be permitted to attend specified HLH facilities*".

Appeal hearing on 27 June 2019

49. The claimant's appeal against the issuing of a final written warning was heard by Fiona Hampton, the respondent's Director of Sport & Leisure. Minutes of the Appeal Hearing (P.230-232). We were satisfied that they were reasonably accurate.

50. On 28 June, Ms Hampton wrote to the claimant to advise her that she had decided to uphold the Appeal but to reduce the sanction from a Final Written Warning to a Written Warning (P.233/234).

Claimant's grievance

51. On 3 April 2019 the claimant had submitted a grievance (P.242). She raised the following issues for consideration:-

"*1. HLH has failed to support or address an ongoing issue which has led to the decision to force the secondment placement.*

2. A breach of the Equality Act 2010 where HLH failed to make reasonable adjustments relating to the instructed redeployment position. Adjustments

which were clearly stated on the independent Occupational Health Report dated 15 May 2013 (P.86-87).

3. Stress and humiliation has resulted in such a deterioration in health that I am presently declared unfit for work by my G.P.

Resolution Sought

To return to present position with the terms and conditions previously agreed re-my ongoing health condition. To resume my 17.5 hr. post with same responsibilities and duties with the agreed support or sessional staff on "Fibro fog" days."

52. The claimant was upset when she was advised that James Martin had been appointed to hear her grievance (P.243/244). The reason for this was that although she had only spoken to him on a few occasions she claimed that she found him *"bullying and intimidating".* Further, her grievance related to the decision to redeploy her and Mr Martin had been "*instrumental in that decision*" and she felt he had been *"intimidating"* at the meeting on 18 March when he told her she was being redeployed.

53. On 8 April, therefore, she sent an e-mail to the respondent's Chief Executive, Ian Murray, to request that another officer be appointed (P.247). Morven MacLeod replied by e-mail on 10 April to advise that, "*a decision has been taken to defer appointment of a nominated officer for your Grievance until the conclusion of the ongoing Disciplinary Process.*"

54. After the disciplinary process concluded, with the claimant being issued with a written warning on 28 June, Ms MacLeod advised the claimant by e-mail on 1 July that Fiona Hampton had been appointed to hear her Grievance (P.248/249).

55. On 10 July, Ms MacLeod sent a further e-mail to the claimant to remind her that she was only permitted to attend specified HLH facilities (P.251). At that time, the claimant was still signed off work due to ill-health.

56. The claimant replied by e-mail on 12 July as follows (P.256/257):-

"*First can I apologise for the delay in responding however my Fibro has worsened due to the stress of this matter and I am only now able to write a coherent response.*

As you are aware I was diagnosed with Fibromyalgia in 2013 and require medication in order to help with my condition. The effect of my condition is that I live in constant pain and experience fatigue, cognitive problems, headaches, IBS, dizziness, clumsiness, anxiety and depression. No two days are the same.

You are no doubt aware that my condition falls within the definition of a disability under the Equality Act 2010.

You have been aware of my disability since 2013. You have in the past instructed Occupational Health and are fully informed of my symptoms. You were aware that stress was highly likely to exacerbate my condition.

In order to enable me to provide a full response to Fiona Hampton's query re-my grievance (P.248) I would ask that HLH first answer the following questions:-

1. *Having regard to my disability, why was I not consulted prior to being told that I would be redeployed?*
2. *What consideration was given to how lack of consultation might affect my condition?*
3. *Why was I not referred to Occupational Health prior to informing me of my redeployment?*
4. *In light of the Disciplinary/Grievance why have I now not been referred to Occupational Health?*
5. *Do you feel the Disciplinary and Grievance Hearings have been properly conducted having regard to my disability?*
6. *What reasonable measures have been obtained to facilitate my return to work?*
7. *Do you feel HLH has properly followed their own Equality Policy?*
8. *What consideration was given as to the effect on my health when deciding to ban me from HLH locations without discussion?*
9. *Do you feel HLH has adequately supported me as a disabled employee?*"

57. Ms MacLeod replied by e-mail on 15 July (P.255/256). She advised that,

"*As the questions you have asked relate directly to issues raised in your Grievance it would not be appropriate for HLH to comment on them in advance of the Grievance Officer's formal consideration.*

The purpose of any Grievance is for an employee to highlight and evidence any issues that have arisen relation to their work. If you believe any of the issues raised below require consideration by the Grievance Officer then you should detail the reasons for this and provide the evidence in your submission.

I look forward to receiving your response to the Grievance Officer for additional information so that the matter can be heard as soon as possible."

58. The claimant replied by e-mail the same day as follows (P.255):-

"*I think the questions are very clear and indicate exactly as to why I am raising a grievance. I have a huge amount of evidence which spans a 5 year period and without clarity from HLH as to why they decided to proceed in such a manner makes it difficult to be specific in my response to the questions posed. If you are unable to respond then I will unfortunately will have to wait until my Union Rep. is available until after the 23 July for further advice.*"

59. Ms MacLeod replied by e-mail later than day as follows (P.255):-

"*I would refer you back to the Grievance procedure, which I have attached, noting that we are stage 1 of the process. It is clear why you are raising the Grievance but the Grievance Officer has requested additional information from you to clarify the points you raise. This will enable her to review your Grievance fully and understand all the issues relating to the matter. This is entirely normal practice.*

Without this information the Grievance Officer is unable to address your Grievance. The questions you ask HLH is your e-mail of 12 July are directly related to point 2 of your Grievance and you should provide the Grievance Officer with details of how you believe HLH has breached the Equality Act 2010. The Grievance Officer can then address this issue - as I said before it would not be appropriate to respond to your questions in advance of the formal consideration.

If you wish to wait until you can take further advice from your Union representative after 23 July then that is your choice but that I would ask that the additional information requested by the Grievance Officer is submitted to me ***no later than 5pm on Wednesday 31 July*** *to allow this matter to be progressed. If I do not hear from you by the 31 July then HLH will have no option but to consider the matter closed as your Grievance cannot be considered fully without that additional information.*"

60. In response to the request for further information, the claimant's Union representative, Jayne Atkinson, sent a lengthy e-mail to Ms MacLeod on 26 July 2019 (P.260-263).

61. The claimant said in evidence that she expected Ms Hampton to respond to the nine questions she had asked in her e-mail of 12 June to Ms MacLeod (P.257) but she never did.

Grievance Hearing on 21 August 2019

62. Fiona Hampton, Director of Sport and Leisure, chaired the Grievance Hearing. The claimant was accompanied by her Union representative, Jayne Atkinson. Notes of the Hearing were produced. We were satisfied that they were reasonably accurate (P.264-267).

63. Each of the three "Items" in the claimant's grievance (P.260-262) were addressed. The first item related to an alleged failure by the respondent to take any action, "*to deal with constant attacks*" by Cllr Wilson and a "*constant barrage of complaints – 12 in total – from Cllrs Wilson and Munro which had made her life very difficult in the past 5 years and HLH had done nothing to stop them*."

64. The following are excerpts from the Notes in relation to "Item 1":-

"*FH asks whether JD had ever had any formal action against her because of these complaints and JH had confirmed that she had never been formally investigated prior to March of this year.*

FH commented that 5 layers of management had over the years (including the Chief Executive, Head of Service, Principal Manager, Youth Manager and Area Officer) tried to advise and counsel JD in her relationship management with local councillors and local representatives of other agencies and tried to ensure that JD's post as YW and her voluntary roles were very distinct so as to avoid a blurring of lines and potential crossover.

HLH works with many organisations and when challenged about the behaviour of employees has a responsibility to ensure that employee is both protected from criticism and not putting themselves in situations that can provoke criticism.

Having advice from managers, it seemed that JD found it difficult to keep her various voluntary and employment roles distinct and separate.

FH commented that had this not been a formal hearing she would be advising JD that she wasn't helping herself in the current situation by ignoring advice from managers and failing to see where the conflicts have arisen.

JD had commented that all she had wanted was for HLH to tell Cllr Wilson to stop harassing her and all her personal managers had acknowledged that it was a personal vendetta.

FH acknowledged that the situation had been difficult for JD but there was also a frustration that JD continued to put herself in situations that set herself up to be criticised. For example, when advised that she was to be redeployed in March 2019, the first thing JD did when she left her meeting with James Martin was to visit Cllr Wilson in her shop and confront her and blame her for the situation.

JD acknowledged that this had been an error of judgment.

FH stated that HLH and its employees have to manage relationships with many agencies and funders and it is sometimes necessary to accept things that you don't necessarily agree with.

JD felt that she often received mixed messages from management, her line manager and principal manager would tell her one thing and compliment her on her work and then she would be subject to complaints from local Cllrs. It was just a constant barrage of personal attacks with nobody doing anything to protect JD.

FH commented that JD would have no knowledge of what conversations might have taken place between HLH and other agency representatives but the fact that HLH had never taken formal action against her despite or continuing to be even aware that she was creating difficult situations for herself is a measure of the HLH protection afforded to her. JD's involvement in The Place had created situations where there was a lack of clarity in who she was representing i.e. The Place or HLH."

65. Ms Hampton then went on to address "Item 2":-"*A breach of the Equality Act 2010 where HLH failed to make reasonable adjustments relating to the instructed redeployment position. Adjustments which were clearly stated on the independent Occupational Health Report dated 15 May 2013 (P.86-87).*"

66. The Notes record the following exchanges:-

"*FH stated that she was happy for OH referral to be organised with reference to the new posts and if any adjustments required then they would be made as appropriate and required.*

The post that JD was to be redeployed into did not require re-training – it involved a skill set that JD used as part of her existing post and in fact was recognised as being very good at i.e. fundraising. If anything, this new post was seen as an opportunity to remove JD from, in her own words, a stressful situation and allow her to use skills she was good at and focused of (sic) *existing strengths.*"

67. Finally, Ms Hampton addressed "Item 3":- "*Stress and humiliation has resulted in such a deterioration of health that I am presently declared unfit for work by my G.P……..I feel I have been bullied and victimised over a lengthy period of time with the full knowledge of HLH….*"

68. The following are excerpts from the Notes:-

"*JA stated that JD felt that she had been harassed by Cllr Wilson and others and believes that HLH has not supported her. The action taken in moving and disciplining JD felt totally humiliating. The manner in which she was informed – without any notice – the lack of clarity was inappropriate. JD is a highly regarded member of staff and should have been treated better.*

FH commented that the decision taken by JD and HLH was in everyone's best interest. An opportunity to undertake a new role for a while – focus on what she is good at in an environment without the stress. These situations keep happening and they need it to stop.

As an organisation HLH could be criticised if we didn't do anything – the managers involved with JD have collectively felt that this situation is not going to get any better and putting JD into a new role that she is good at and would help the organisation was seen as a positive move as she continually failed to take any advice or guidance on how to help the situation.

HLH tried to accommodate your request for access to specific sites so that your family are not affected but there were specific reasons for you being excluded from certain facilities and they were as much as to protect you from further potential allegations of conflict of interest."……

FH Final Comments

- *Your emotion, passion and dedication have blinded you to management issues. Despite interventions over 5 years, nobody has managed to get through to you.*
- *You are very single-minded – don't think you like to accept when asked questions – reluctant to consider wider issues – the same issues have come up time and time again.*
- *At no point in time have you been formally investigated. Things have come to a head. Time for you and the organisation to take a step out for a time and focus on things you are very good at. This is not punitive. Recognising that there is a situation that is causing you difficulty at work. New role, focusing your skills, taking you out of the situation. You have chosen to interpret this as punishment.*
- *Inability to relationship management issues* (sic)*.*
- *Happy to arrange the OH referral – physical and mental support required and would urge you to consider counselling if you are feeling as described.*
- *Grab this situation which you can make very positive and move forward. Genuinely feel that if you return to post in Alness at this time that we would be back here in the near future. Review in 12 months. As an employer it would be irresponsible to put you back into this situation.*
- *Will send you a formal response in writing confirming your right of appeal and put a date in diary for 12 months time to review the situation.*"

69. The claimant was dissatisfied with the way in which Ms Hampton had conducted the Grievance Hearing. She said that, "*After the meeting Jayne (our Union representative) commented on Fiona's aggressive behaviour and told me not to expect a positive outcome as the meeting had clearly been pre-determined."*

FOI request /Claimant's resignation

70. In July 2019, the claimant had made a Freedom of Information ("FOI") request to the respondent (P.421-422). She received what she considered to be a *"partial response"* on 8 August (P423-443) as she, "*knew there was a sizeable amount of correspondence that hadn't been disclosed*". She raised her concerns with Ms Hampton at the Grievance Hearing.

71. At this time, the claimant was unwell. Her health had declined due to "*the stress and anxiety of the situation"*. This had exacerbated the effect of her

Fibromyalgia. She only started reading the FOI response on 20 August, the day before her Grievance Hearing, and again on 22 August. She said that when she read the correspondence she knew she "*couldn't go on working at HLH so I resigned the same day.*" She sent the following e-mail to Morven MacLeod, the respondent's HR Manager, at 06:50 on 22 August (P.268/269):-

"*Resignation Letter*

It is with sincere regret that I am writing to advise that I am resigning from my post as Youth Development Officer at High Life Highland with immediate effect.

Your treatment towards me has been horrendous and as you are aware, has made me very ill. I therefore feel I have no option but to resign.

As you can tell from the early hour, I have not been able to sleep worrying about things which has again, exacerbated my condition. I don't feel well enough today to detail all the reasons for my resignation but will do so in the next few days."

72. By e-mail that morning at 09:38, Ms MacLeod intimated that the claimant's resignation had been accepted (P.268).

"Supplementary resignation letter"

73. It was not until 6 September, that the claimant felt able to prepare and submit her "Supplementary resignation letter" (P.275-278). The following are excerpts:-

"*I had not been well enough to properly read over the information until the early hours of 20 August (the day before the grievance hearing) and was appalled by what I read. The information that HLH did provide contained unequivocal proof that HLH had a relationship with Carolyn Wilson that went far beyond any professional working relationship.*

Some specific examples include an e-mail from James Martin to Carolyn Wilson informing her that I had been suspended pending an investigation (P425)*. This is entirely inappropriate. It not only breaches GDPR Regulations (something which I will be pursuing) but specifically discloses confidential information to a third party without my consent. I was subsequently never*

informed that HLH had released this information and only discovered this through the FOI request.

Another example is an e-mail to Pauline Munro, Cllr dated 27 March 2019 (P424) *which again discloses confidential information to a third party without my consent. Within this e-mail he makes it clear that I would be suspended 'had she not acted as she did last week after my discussion with her'. In other words, had I accepted the redeployment without complaint I would not have been subjected to disciplinary action.*

Yet another example is that of e-mail correspondence between Ian Murray, Chief Executive and Carolyn Wilson dated 9 and 10 April 2019 (P427). Within the e-mail dated 9 April Carolyn clearly states that with 'Janette there every day we cannot see a way forward'. Yet another personal attack on my character which has never been discussed with me directly. However, rather than support a HLH employee (or at least investigate the allegations first) he replies 'My take on it is that we are finally seeing The Place exposed as it really is, a 'flag of convenience' for Janette to dress up what she wants to pursue but with HLH'.

A discussion of this nature with a third party who has bullied, harassed and made numerous defamatory comments about my conduct is utterly appalling. This e-mail was written just weeks after the outcome of my Disciplinary Hearing and just weeks before the outcome of my Grievance Hearing and again is indicative that the outcome of both the Disciplinary Hearing and Grievance Hearings were pre-determined.

The information produced as a result of my Freedom of Information request was the final straw in a long course of conduct by HLH, which taken cumulatively, amounts to a breach of the implied term of trust and confidence which must exist between employer and employee and as such I had no option but to resign on 22 August 2019. The behaviour has been so bad I have only now felt well enough to be able to properly detail the many reasons for my discrimination."

74. The claimant then went on in her letter to explain the basis for her complaint of disability discrimination and, in particular, an alleged failure to make reasonable adjustments. She referred to the Occupational Health Reports which the respondent had obtained in 2013 and 2014 (P.83-89), in particular the report of 15 May 2013 which had advised that reasonable adjustments should include not being redeployed (P.86-87). She then went on to say this:-

"*On 18 March, I was given less than two hours' notice that I was required to attend a meeting with James Martin Head of Development and my Line Manager Nigel. I was given no advance notice of what the meeting was about*

and therefore no time to prepare for what might be discussed. When I arrived James immediately told me that I was being moved from the office in Alness to Dingwall as of the following Monday.

There had been no prior discussion regarding being relocated. It was obvious that I was visibly shocked as I began to cry uncontrollably. I asked for an explanation but nothing substantive was forthcoming and it was presented as a fait accompli.

As a disabled employee, HLH has failed me. You are aware that as a result of my condition I suffer from cognitive problems including trouble remembering things and can find it difficult to concentrate. This is particularly so in a stressful environment.

Prior to a meeting of this nature you should have considered whether there were any reasonable adjustments that may be required in order to assist me attending the meeting. Such adjustments would include giving me advance notice as to what the meeting was about and giving me the opportunity to have someone accompany me who had the ability to properly focus and understand what was being said. When it became evident during the meeting that I was not coping well with the situation, it should have been cut short and re-scheduled to allow me the opportunity to seek assistance and advice…

In terms of the redeployment, the report on 15 May 2013 makes it clear that my condition is such that I should not be redeployed as this could cause my condition to worsen. Again, HLH were aware of this recommendation and indeed I repeatedly re-iterated this concern throughout the Disciplinary and Grievance process. As the Occupational Health Report had been prepared some 6 years earlier, HLH should have instructed a further report prior to my decision regarding redeployment.

Within the correspondence by Fiona Hampton dated 22 August 2019 re the outcome of the Grievance (P.272-274) *he states: 'Having reviewed the contents of both your OH referrals on 6 February 2013 and 15 May 2013 I found no evidence to support your statement.' [concerning redeployment].*

I find this extremely difficult to accept as the OH Report of 15 May 2013 specifically states 'I do not believe that redeployment would be useful in that the main barrier to her in returning to full-time is that of extreme fatigue and this will exist whatever post she is in with the added stress of learning skills.'

The advice of the OH is clear and unambiguous. It is accepted that this report is from 2013 however it is more than sufficient to alert HLH to the fact that an updated OH Report should have been instructed prior to any decision being made about redeployment. Either Fiona Hampton failed to properly investigate my Grievance because the outcome had been predetermined or HLH simply don't care about the health and welfare of their disabled employees……

Again, within the said letter dated 22 August in response to my complaint about feeling stressed and humiliated due to HLH's handling of the situation (ultimately resulted in me being declared unfit to work) she states, 'having reviewed the information provided by all parties….. it is my determination that the main source of stress has stemmed from your own unwillingness to accept the advice and interventions of your managers and HLH as an organisation when conflict has arisen. I also believe that any humiliation you feel is as a result of your own making.'

Although HLH are aware of my disability and the impact it has on my work, Fiona Hampton is not medically qualified and should have sought advice prior to the determining the outcome of my Grievance. Instead she chose to consider only the information presented to her by HLH staff (also not medically qualified) and effectively put herself in the shoes of someone who does not suffer from my condition. No allowances or consideration was given as to how a disabled person might feel or react when faced with the same situation. Again, it is clear the decision was pre-determined.

To summarise, I had no option but to resign with immediate effect due to the conduct of HLH which included bullying, harassment and victimisation as well as disability discrimination."

75. On 22 August, Ms Hampton had sent a letter to the claimant to confirm that she had not upheld her Grievance (P.272-274). However, by that time the claimant had intimated her resignation.

Submissions

76. The following is a basic summary of the submissions which were given by the parties' representatives.

Claimant's submissions

77. The claimant's representative's submissions were attached to her e-mail of 15 October 2021 at 20:45. These are referred to for their terms. They ran to some 32 pages.

78. The claimant's representative advised in her introduction that she had *"withdrawn the 'physical features' discrimination claim".* She further advised that the claim would only relate to the *"acts between November 2018 and 22 August 2019."*

Constructive dismissal

79. She then went on in her submissions to detail the facts she relied upon in support of the constructive unfair dismissal complaint. She relied on a breach of the implied term of trust and confidence. She referred to the following cases in support of her submissions:-

Omilaju v. Waltham Forrest London Borough Council [2005] ICR 481;
Kaur v. Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

80. She submitted that the "final straw" was when the claimant read the information she received from the respondent in response to her FOI request. She submitted that in itself was a breach of the implied term of trust and confidence.

81. She submitted that the disclosure of confidential information by James Martin to Cllrs Wilson and Munro that the claimant had been suspended, "without her knowledge" was also a breach.

82. She was critical of claimant's suspension and the fact that she was prevented from accessing all the respondent's premises.

83. She was critical of Cllr Wilson "*being privy to information relating to the ongoing disciplinary action*" against the claimant and referred to the e-mail of 22 April 2019 from Cllr Wilson to Ian Murray, the respondent's Chief Executive (P.430).

84. She was critical of the arrangements which were made for the meeting on 18 March 2019 and of the refusal by her Line Manager Nigel Brett-Young to tell her what the meeting concerned. Nor did the respondent consider her disability "*and the mental and physical impact relocation would have on the claimant*."

Disability discrimination

85. The claimant's representative intimated that she wished to advance complaints of discrimination arising from disability in terms of s.15 of the 2010 Act; a failure to make reasonable adjustments in terms of s.20; and harassment in terms of s.26.

Time-bar

86. She submitted that the allegations of discriminatory conduct on the part of the respondent amounted to a "continuing act", in terms of s.123(3)(a) of the 2010 Act and that accordingly the claim was timeous. In support of her submissions in this regard she referred to the following cases:-

Hendricks v. Metropolitan Police Commissioner [2002] EWCA Civ 1686;
Pugh v. National Assembly for Wales UKEAT 0251/6/2609;
Hale v. Brighton & Sussex University Hospitals NHS Trust UKEAT/0342/17.

Knowledge

87. She submitted that the respondent had knowledge of the claimant's disability, namely her Fibromyalgia, having obtained Occupational Health reports in 2013 and 2014. Further, the claimant reminded the claimant about her disability on a number of occasions either at meetings, hearings or in correspondence between 18 March 2019 and 22 August 2019.

Discrimination arising from disability

Redeployment

88. She claimed that the claimant was treated unfavourably as she was "forced to redeploy".

89. The claimant's representative referred to the circumstances of the meeting in Dingwall on 18 March 2019, how the claimant had been upset and experienced "Fibro Fog". Further, in the course of that meeting she advised James Martin and Mark Richardson that the Occupational Health report recorded that she had specific needs and that redeployment would be detrimental to her health (P86-87).

90. Although the respondent gave as the reason for the claimant's redeployment her "excellent track record in fundraising" the claimant gave evidence that, in the 19 years that she had worked for the respondent, she had only done a handful of fundraising applications in her YDO role. It was in her volunteering role at The Place that she had excelled at fundraising.

91. The claimant's representative also submitted that the respondent had failed to prove that the claimant's redeployment was justified as it was required to do. She submitted that:-

"*The decision to redeploy the claimant was rushed and ill-thought out. The respondents benefitted from having a large and experienced Human Resources Department from which they could and should have sought advice prior to the Meeting. During cross-examination both Mark Richardson and James Martin accepted this should have been done. HR advice should also have been sought in response to the issues the claimant raised during the Meeting rather than continue to force her into a role she did not wish to do. Again, both Mark Richardson and James Martin accept this should have been done.*

It is submitted that there were a number of measures that should first have been considered which would have been a less discriminatory means of achieving the same objective. Such measures included consulting the

claimant, discussing the issues with HR, consideration of remote working and obtaining updated medical reports to ascertain whether any reasonable adjustments could be made rather than simply forcing her into the redeployed position. Accordingly, it is the claimant's position the respondent is not able to discharge the burden of proof and show the decision to redeploy the claimant against her wishes was objectively justified."

Disciplinary action

92. The claimant's representative also submitted that subjecting the claimant to disciplinary action was discrimination arising from her disability. She maintained the claimant was not afforded the opportunity of explaining the impact her disability had had on her behaviour. She submitted that:-

"*By the time the appeal hearing had concluded, Fiona Hampton had the benefit of having read all of the previous material, heard the claimant explain why she felt her disability was material to the outcome of the disciplinary appeal and had the benefit of support from Morven MacLeod, HR Manager throughout the process. Despite this neither she nor Moven MacLeod made further efforts to determine how the claimant's disability would have impacted upon her behaviour before making a decision regarding the appeal outcome.*"

93. She submitted that the outcome of the appeal was "pre-determined". She further submitted that:-

"*It was accepted by both Morven MacLeod and Fiona Hampton during cross-examination that an Occupational Health Report should have been obtained in order to assess whether any reasonable adjustments could be made before making any decision regarding disciplinary action. Additional measures could also have included things like counselling given by the stage the claimant was still signed off and was clearly very unwell. The action from the respondents should have been one of support not punishment.*"

Grievance

94. The claimant's representative also submitted that the manner in which the respondent had dealt with the claimant's grievance and the failure to uphold her grievance amounted to discrimination arising from disability. She submitted that, "*no consideration was given to the affect her disability had on*

her behaviour and had it been the grievance would have been upheld." The claimant in evidence stated, "*I explained to Fiona that my confrontational behaviour had happened because I was under extreme stress. When this happens, my disability worsens causing me to react impulsively. My confrontational behaviour and being told I would be redeployed therefore came about as a consequence of my disability.*"

95. The claimant's representative submitted that by the time of the Grievance Appeal Hearing, "*the claimant had made several requests for an Occupational Health Report to be instructed. Indeed, in her e-mail of 12 July 2019 she specifically asked, 'why was I not referred to Occupational Health prior to informing me of my redeployment? In light of the disciplinary/grievance why have I not now been referred to Occupational Health?'"*

Failure to make reasonable adjustments

96. The submissions by the claimant's representative in this regard related only to the respondent's policy in relation to the arrangements for and the conduct of the meetings on, *"17 April 2019 (investigation meeting), 20 May 2019 (disciplinary hearing) and 21 August 2019 (grievance hearing) (**"the Meetings"**)";* and an alleged failure to provide her with an "auxiliary aid" (an ergonomic chair, or similar) at these "Meetings".

Respondent's policy

97. The respondent had known about the claimant's disability since 6 January 2014. However, they only issued standard generic letters to her when arranging investigation, disciplinary and grievance hearings. They also failed to ask the claimant whether she had any specific needs as a result of her disability. That Policy has now changed. The respondent now asks routinely

whether an employee has specific needs as a result of a disability when they are invited to attend a meeting.

Auxiliary Aid

98. The other submission with regard to the alleged failure to make reasonable adjustments related to the provision of an "auxiliary aid". It was alleged that the respondent failed in its duty to make a reasonable adjustment by providing the claimant with an ergonomic chair, or something similar, when she attended the specified "Meetings". As a consequence, she was, "*required to sit on a hard-backed chair at all of the hearings for a prolonged period; the claimant was in visible pain during the Hearings which inhibited her ability to properly concentrate or participate in proceedings.*"

99. In support of her submissions in this regard the claimant's representative referred, in particular, to ***Wilcox v. Birmingham CAB Services Ltd*** UKEAT/0293/10.

Harassment

100. This complaint related to the manner in which Fiona Hampton conducted the Grievance Hearing on 21 August 2019. It was submitted, that although she was aware of the claimant's disability and that the claimant, "*suffered both from memory loss and difficulties in concentrating as a result of her disability*" that, "*Fiona Hampton's manner during the Hearing was abrupt and aggressive.*" In particular, when the claimant told Ms Hampton that she was struggling to understand or concentrate she responded by telling the claimant that that was "*rather convenient.*"

101. The claimant was *"visibly distressed"* when Ms Hampton made that comment. It was submitted that "*Fiona Hampton's comment made the claimant feel violated, intimidated, angry, hurt and humiliated.*" She gave evidence that

there was a *"bad atmosphere"* at the hearing and that, "*Fiona Hampton was abrupt and aggressive. She kept interrupting me and her manner made it clear that she regarded me as a problem employee and had preconceived notions about the reasons for my confrontational behaviour.*"

Respondent's submissions

102. The respondent's solicitor made her submissions by way of attachment to her e-mail of 8 October. These are referred to for their terms. They ran to some 35 pages.

103. In support of her submissions, she referred to the following cases:-

Malik & Mahmud v. Bank of Credit & Commerce International SA (In liquidation) [1997] ICR 606;
Western Excavating (ECC) Ltd v. Sharp [1978] ICR 221;
Sharfudeen v. TJ Morris Ltd t/a Home Bargains UKEAT027216/LA;
Ewart v. Chancellor Master & Scholars of the University of Oxford [2019] 12 WLUK565;
Humphries v. Chevler Packaging Ltd UKEAT/022406;
Bexley Community Centre (t/a Leisure Link) v. Robertson [2003] EWCA Civ576;
Williams v. Trustees of Swansea University Pension & Assurance Scheme & Another [2019] ICR 230;
Robinson v. Department of Work & Pensions [2020] EWCA Civ859;
Homer v. Chief Constable of West Yorkshire [2012] ICR 704;
Smith v. Churchills Stairlifts Plc [2006] IRLR 41;
Griffiths v. Secretary of State for Work & Pensions [20017] ICR 160;
Henderson v. General Municipal & Boilermakers' Union [2015] IRLR 451;
Richmond Pharmacology Ltd v. Dhaliwal UKEAT/0458/08.

Burden of proof

104. The respondent's solicitor reminded the Tribunal that the burden of proof rested with the claimant in respect of all heads of claim. She submitted that the claimant had failed to discharge this burden.

Constructive unfair dismissal

105. The respondent's solicitor submitted that the "last straw" relied upon by the claimant, namely when she received the response to her Freedom of Information request, was not in itself a repudiatory breach of contract and nor was it "justified and reasonable" and accordingly did not amount to a "final straw".

106. She also submitted that the "earlier incidents" being relied upon by the claimant did not constitute actual or anticipatory breaches of contract, sufficiently serious to justify resignation. She submitted that, "*the respondent had reasonable and proper cause for each of the actions relied on by the claimant.*" In particular, "*the respondent had reasonable, proper and justifiable cause in respect of its decision to place the claimant on a temporary 12-month secondment.*" She submitted that this was an effective allocation of the respondent's resources; "*in addition the decision would have had the added benefit of temporarily removing the claimant from the challenging situation that had developed with the local Cllrs in Alness and the community partners in the local area (particularly the Head Teacher of Alness Academy) who had indicated to the respondent that they no longer wished to work with the claimant.*"

107. In conclusion, the respondent's solicitor submitted that, "*in any event, the totality of the claimant's allegations about the way in which she was treated would not amount to a repudiatory breach of the claimant's contract of employment.*"

SOSR

108. In the alternative, the respondent's solicitor submitted that the claimant's dismissal was "for some other substantial reason",

Disability discrimination

Time bar

109. In support of her submissions in this regard, the respondent's solicitor referred to ***Ewart***, in consideration of which she made the following submissions:-

"*The only claim under the EQA which the claimant has brought in respect of the respondent's decision to second her is a claim under s.15. This is an isolated act and is certainly not capable forming part of a continuing act of discrimination in respect of the other heads of claim being advanced (relative to the disciplinary and grievance processes).*

The claims under the EQA which the claimant has brought in respect of the disciplinary process include: 6 claims under s.20 and a claim under s.15 relating to the written warning which was issued to her on 28 June 2019. It is accepted that these acts are capable of forming part of a continuing act of discrimination. However, it is denied that these acts are capable of forming part of a continuing act of discrimination in respect of the other heads of claim being advanced (relative to the redeployment decision and the grievance process).

The claims under the EQA which the claimant has brought in respect of the grievance process include: 2 claims under s.20, a claim under s.15 relating to the written grievance outcome on 22 August 2019 and a claim under s.26. It is accepted that these acts are capable of forming part of a continuing act of discrimination. However, it is not accepted that these acts are capable of forming part of a continuing act of discrimination in respect of the other heads of claim being advanced (relative to the redeployment decision and the disciplinary process)."

110. It was accepted that the following claims (relative to the grievance process only) were timeous:-

"*The claim under s.20 of the EQA (relative to her not being asked whether she had any specific needs as a result of her disability at the grievance hearing on 21 August 2019), which is denied.*

The claim under s.20 of the EQA (relative to her not being provided with a similar auxiliary aid to her ergonomic chair at the grievance hearing on 21 August 2019), which is denied.

The claim under s.26 of the EQA (in respect of the alleged comment made by Fiona Hampton at the grievance hearing on 21 August 2019) which is denied.

The claim under s.15 of the EQA (in relation to the respondent's decision not to uphold the claimant's grievance, which was communicated in writing to the claimant on 22 August 2019) which is denied."

111. She further submitted that none of the discrimination complaints which formed part of any alleged continuing act of discrimination had been brought within the statutory time limits.

112. She further submitted that it would not be "just and equitable" to grant an extension to the ordinary time limit.

Discrimination arising from disability: redeployment

113. The respondent's primary position was that this complaint is time-barred.

114. However, when they conducted the meeting on 18 March 2019, neither James Martin nor Mark Richardson were aware that the claimant was disabled.

115. She further submitted that the decision to redeploy the claimant did not constitute unfavourable treatment. The claimant was an excellent fundraiser. The decision, "*would have removed the claimant from the difficult situation which had developed over time*" in respect of her relationship with the Cllrs and the local school.

116. In any event, it was submitted that the alleged unfavourable treatment did not arise in consequence of her disability.

117. In the alternative, it was submitted that were the Tribunal to find that the claimant was treated unfavourably that such treatment was objectively justified.

Discrimination arising from disability: written warning

118. The respondent's primary position was that this complaint is also time-barred.

119. It was accepted that Fiona Hampton did have knowledge of the claimant's disability when she issued the written warning. However, it was submitted that "*there is no objectively reasonable basis for the claimant to assert that she was treated unfavourably. Both she and her Union representative acknowledged that some sort of disciplinary sanction was warranted.*"

120. The respondent's solicitor further submitted that the behaviour relied upon by the claimant did not arise because of her disability.

121. In the alternative, the respondent's solicitor submitted that, "*it is clear that her (Fiona Hampton's) decision to issue a written warning was also driven by the inappropriate nature of the claimant's conduct (i.e going into a public place and abusing someone verbally) (that being Cllr Carolyn Wilson).*"

122. In any event, it was submitted that, in all the circumstances, even if the claimant was treated unfavourably that such treatment was objectively justified.

Discrimination arising from disability: failure to uphold the claimant's grievance

123. The resolution sought by the claimant was a return to her substantive post with the same responsibilities and duties with regard she had to her disability.

However, it was submitted that Fiona Hampton's outcome letter demonstrated that her decision was, *"considered, fair and in the best interests of the claimant."* It was submitted that "*this does not meet the threshold of unfavourable treatment for the purposes of the EQA.*"

124. Further, the claimant did not exercise her right of appeal.

125. The respondent's alleged confrontational behaviour did not arise in consequence of her disability.

126. In any event, it was submitted that if there was any unfavourable treatment that it was "objectively justified".

Failure to make reasonable adjustments: conduct of the hearings

127. The respondent's primary position was that these claims were time-barred.

128. It was accepted that the respondent's standard procedure was not to ask specifically whether an employee had any specific needs for the hearings as a result of disability. In any event, it was disputed that this put the claimant in the present case at a substantial disadvantage. The claimant had trade union representation for the entirety of the disciplinary and grievance process; the claimant confirmed in evidence that she did engage in the hearings; although the respondent applied the same PCPs in respect of the disciplinary appeal hearing the claimant did not alleged that she suffered any disadvantage; nor does she allege any disadvantage in relation to the hearings itself.

129. It was further "*firmly denied that the respondent knew or could have reasonably been expected to have known that the claimant was likely to be placed at a substantial disadvantage by any of the PCPs relied upon by the*

claimant, as alleged there at all." In any event, it was submitted there was no disadvantage suffered by the claimant.

130. Nor were the adjustments relied upon by the claimant "reasonable", "*on the basis that these would not have alleviated the disadvantage being complained of.*"

Failure to make reasonable adjustments: auxiliary aid

131. It was submitted that the evidence demonstrated that the claimant was not inhibited from properly participating in the meetings because she was not provided with a *"similar auxiliary aid"* to her ergonomic chair.

132. Further, and in any event, it was "*denied that the respondent knew or could have reasonably been expected to have known that the claimant was likely to be placed at a substantial disadvantage which she now says she was.*"

133. Finally, in this regard, the respondent's solicitor made the following submissions:-

"*During re-examination, the claimant was asked what she had meant by 'to the best of her) abilities' in terms of her participation in these meetings. In response to this, the claimant spoke of her concern regarding the location of toilets everywhere that she goes. When pressed and asked whether having an ergonomic chair would have helped her to engage in each of the hearings she said 'a higher chair with wheels might have helped as I could have shoogled but it certainly wouldn't eliminate the toilet concern'. In my submission, the claimant's own evidence does not even come close to supporting a finding that the provision of a chair similar to her ergonomic chair would have removed the substantial disadvantage she is relying upon (which is denied).*"

Harassment

134. Fiona Hampton denied that she had made the comment that it was *"rather convenient"* when the claimant said she was having problems concentrating at the Grievance Hearing on 21 August. In any event, neither the claimant nor her union representative complained about this at the time.

135. Even if it was found that such a comment was made, it was denied that had the purpose or effect required by the 2010 Act.

136. In support of her submissions in this regard, the respondent's solicitor referred to ***General Municipal*** and ***Richmond Pharmacology***.

137. Further, even if there was an unwanted comment and it had such an effect, it was denied it was reasonable for it to have done so:-

"*To conclude only in the event that the Tribunal finds that such a comment was made and it had the requisite effect (which is denied), it is my submission that the single comment could not reasonably be seen or to have created a humiliating, hostile, degrading or offensive environment for the claimant nor could it have violated her dignity. If the Tribunal is minded to conclude that it had such an effect on the claimant subjectively, it is submitted that it could not have said to have had that effect reasonably, from an objective perspective.*"

Discussion and Decision

"List of Issues" and "Joint Legal Summary"

138. Helpfully, the parties' representatives submitted an "Agreed List of Issues" (P1-6) and a "Joint Legal Summary" which we referred to during our deliberations.

Discrimination

Disability status

139. It was accepted that the claimant's Fibromyalgia amounted to a disability in terms of s.6 of the Equality Act 2010 ("the 2010 Act"). The claimant's evidence was not disputed that the condition means that she suffers from, "*excruciating pain, IBS, anxiety, depression, muscle stiffness, eyesight problems, difficulty sleeping and 'Fibro Fog' which is a term used to describe Fibromyalgia related cognitive problems which include memory loss and difficulties in concentration.*" Her condition is exacerbated by stress.

Knowledge

140. An employer has a defence to a complaint of discrimination arising from disability under s.15 of the 2010 Act, and of a failure to make reasonable adjustments under s.20, if it did not know of the disability and could not reasonably be expected to know of it.

141. In the present case, we were satisfied that the respondent did have that knowledge. They commissioned Occupational Health Reports in 2013 and 2014 (P.83-89). In the Report dated 6 January 2014 the Occupational Health Doctor advised as follows (P.89):

"*As you are aware decisions regarding the Equality Act can only be made by a Tribunal but I think it is likely that Janette's condition would be covered by the disability provisions within the Act and that the above adjustments are recommended.*"

142. We also heard that thereafter adjustments were put in place for the claimant which included the provision of an ergonomic chair.

143. While James Martin and Mark Richardson claimed that at the meeting on 18 March 2019 they were not aware that the claimant was disabled, the EHRC Code of Practice on Employment (2011) states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (para. 5.15).

144. Even if we were to accept their evidence in this regard, therefore, in our view, they could "reasonably be expected to know" that the claimant was disabled. They could readily have done so by enquiring with the respondent's HR Department. The respondent has a large HR Department and we are bound to say that we were rather surprised not to hear any evidence that HR was consulted for advice on arrangements for the meeting on 18 March, the conduct of the meeting and the legal duties on an employer seeking to meet with and redeploy a disabled employee, especially when it was anticipated that she would be reluctant to redeploy.

145. Further, so far as the respondent's knowledge was concerned, as the claimant's representative submitted (Para. 5.1.5) the claimant advised Messrs. Martin and Richardson that she had a disability at the meeting on 18 March and subsequently she reminded other employees of the respondent, in senior positions, of this on a number of occasions either in correspondence or at meetings.

Time bar

146. The submissions, in this regard, are to be found at Paras 4 of the written submissions by the parties' representatives.

147. The claimant obtained an ACAS Early Conciliation Certificate on 13 November 2019 and the claim form was submitted on 4 January 2020.

148. While the various claims related to the period from 18 March 2019 until the claimant's resignation on 22 August 2019, we were satisfied that they were linked and that what was established was continuing discrimination over a period of time, ending with the claimant's resignation when she read the FOI correspondence she had requested.

149. We were satisfied that the submissions by the claimant's representative, in this regard, were well-founded; the discrimination at the meeting on 18 March, in connection with the claimant's redeployment was the claimant's 'catalyst' for the subsequent acts of discrimination. They were not a succession of unconnected or isolated specific acts. The discrimination lasted for as long as the claimant remained in the respondent's employment.

150. In arriving at this view, we were mindful of the guidance in ***Hendricks***, which was approved by the Court of Appeal in ***Lyfar v. Brighton & Sussex University Hospitals Trust*** [2006] EWCA Civ1548.

151. Accordingly, in our unanimous view, the claim was submitted in time.

152. However, for the sake of completeness, we wish to record that even if we are in error in deciding that the discrimination claim is timeous, we would have exercised our discretion and allowed the claim to proceed on the basis that, in all the circumstances, it was just and equitable to do so.

153. In arriving at this view, which is unanimous, we had regard to the guidance in ***Robertson*** and that the exercise of the discretion is "*the exception rather than the rule*". ***British Coal Corporation v. Keeble*** [1997] IRLR 336 also provides guidance on the exercise of this discretion. There is also guidance in the recent Court of Appeal case, ***Adedeji v. University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23.

154. While the claimant had the benefit of Union advice and she was able to correspond and attend meetings, she was restricted from doing so as her health had deteriorated; her Fibromyalgia flared up due to stress and she was signed off work. That had impacted on her ability to respond and engage promptly, as can be seen, for example, from the first line of her e-mail of 12 July (P256).

155. Further, the length of the delay was not significant; we did not consider that the cogency of the evidence would be affected by the "delay"; and in our view the balance of prejudice/hardship favoured the claimant as, in particular, she would be prevented from leading evidence about the redeployment meeting at 18 March which was pivotal to her claim; also the evidence in support of the constructive unfair dismissal claim was very similar to that in support of the discrimination claim. We were also of the view that it would have been in accordance with the "overriding objective" in the Rules of Procedure and in the interests of justice to extend the time limit.

Discrimination arising from disability

156. S.15 of the 2010 Act is in the following terms:-

"***15. Discrimination arising from Disability***

(1) *A person (A) discriminates against a disabled person (B) if –*
(a) A treats B unfavourably because of something arising in consequence of B's disability and,

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

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

Redeployment

157. The first element of the definition is that the disabled employee must have been treated "unfavourably". The term is not defined in the 2010 Act, but the EHRC Code states that it means that the disabled person "must have been put at a disadvantage" (Para. 5.7).

Unfavourable treatment

158. We were of the unanimous view, in the present case, that the claimant was treated unfavourably in respect of her redeployment. She had no desire whatsoever to be redeployed. She had been employed by the respondent for 19 years. She had an exemplary work record. She loved her job and was good at it. She enjoyed working in Alness. She was given no advance warning that the purpose of the meeting on 18 March was to advise her that she was to be redeployed the following Monday. That was because the respondent was aware that, if she had been, she would have been extremely resistant and may well not have attended the meeting. Mr Brett-Young said in evidence, " *I knew the claimant well enough to know that she probably would not be happy with the proposed change. I knew this because, over many years I had known her, she would always say that all she wanted to do was youth work in Alness- nothing different and nowhere else".* However, Mr Brett-Young was instructed not to tell the claimant what the meeting was about. She was only given some two hours' notice of the meeting and had no time to prepare. Her redeployment was presented to her as a "*fait accompli*" by James Martin and Mark Richardson at the meeting. There was no consideration of how the decision would impact on her, particularly having

regard to her disability; there was no thought given to obtaining an up-to-date Occupational Health Report; there was no thought of addressing in a meaningful way, with both the claimant and Cllr Wilson, the breakdown in their relationship and the reasons for her numerous complaints, as an alternative to redeployment.

"Because of something arising in consequence of disability"

159. The second element of the s.15(1) definition is that the employee must show that the unfavourable treatment was, "*because of something arising in consequence of his or her disability.*"

160. One of the reasons given by the respondent for the decision to redeploy the claimant was her fundraising ability. However, her success at fundraising was achieved through her voluntary work, not her work in her substantive post as a YDO.

161. It was clear to us that the main reason for the decision to redeploy the claimant was a breakdown in her relationship with Cllr Wilson and the many complaints she had made about the claimant. In the morning of 20 March, only two days after the meeting, Mr Martin confirmed to Cllr Wilson, first of all, and another Cllr, that the claimant, *"will move to the seconded post on Monday 25th March"* and that the claimant had been instructed not to contact them and if she did they should let him know (P425-426). This was at complete odds with the evidence given by Mr Martin at the Tribunal Hearing that her redeployment was only a "proposal" and that she was given time to consider the "proposal".

162. We heard no evidence about Cllr Wilson's complaints; the claimant was never disciplined; she was never afforded an opportunity of responding in any meaningful way; no evidence was led from Cllr Wilson although these

complaints were a factor in the respondent's decision to redeploy the claimant. Mark Richardson said as much.

163. It was also alleged that another reason was that the Head Teacher at Alness Academy did not want to work with the claimant. However, that was never discussed with her; she was never disciplined; we heard few details about this and no evidence was led from the Head Teacher.

164. Although we heard no direct evidence, it was clear that these were conduct issues on the part of the claimant allegedly. It was to do with her alleged behaviour. They related to the breakdown in the claimant's relationship with Cllr Wilson and apparently with the Head Teacher. Having regard to how the claimant's disability affected her, her conduct was likely to have been affected by her disability, her Fibromyalgia. However, the claimant was not afforded the opportunity of discussing this at the meeting on 18 March. The claimant was summoned to the meeting and told she was being redeployed the following week. The undue haste with which this was done demonstrated to us an overwhelming and blinkered desire, on the part of the respondent, to placate Cllr Wilson, in particular, by creating some distance between the claimant and her and probably also to satisfy the Chief Executive, Ian Murray, with whom Cllr Wilson had been corresponding direct about the claimant, in a negative manner, around that time. It was clear that pressure was being applied by Cllr Wilson to the respondent, at senior management level, to remove the claimant from her substantive post in Alness. We heard evidence from Wilma Kelt, the claimant's Line Manager, that shortly before the meeting Cllr Wilson had telephoned Mr Murray to complain about the claimant and in her opinion, *"that had something to do with the meeting*". Also, when asked if she thought Cllr Wilson had influenced the decision to redeploy the claimant she said, "*probably, yes".* There was a causative link, in our view, between the claimant's unfavourable treatment and her disability.

165. We were of the unanimous view, therefore, that the unfavourable treatment in respect of the claimant's redeployment was "because of something arising in consequence of her disability".

166. In arriving at this view, we were mindful, with reference to ***Hall v. Chief Constable of West Yorkshire Police*** [2015] IRLR, that the disability need only be an effective cause of unfavourable treatment: the claimant only needs to establish some kind of connection between her disability and the unfavourable treatment. Also, in ***Risby v. London Borough of Waltham Forrest*** EAT0318/15, the EAT reconfirmed that all that is required is a loose connection between the employee's unfavourable treatment and the "something" that arises in consequence of the disability.

Justification

167. However, a s.15 complaint will only succeed if the employer is unable to show that the unfavourable treatment, to which the claimant has been subjected, is a, "*proportionate means of achieving a legitimate aim*". In light of our findings in fact, particularly in relation to the respondent's motives for redeploying the claimant, we had little difficulty arriving at the unanimous view that it was not.

168. The respondent's submissions in this regard are set out at paras. 5.8 to 5.10.8. We were not persuaded that there was a "legitimate aim". As we recorded, the claimant's fund raising was minimal in her substantive post, compared with the funds she raised from her voluntary work.

"Public Servant of the Year"

169. We heard scant evidence about alleged difficulties created by the claimant with, *"professional working relationships between the respondent and its key partners";* we heard scant evidence about any misconduct on the claimant's part which had given rise to the numerous complaints by Cllr Wilson. The issues between them appear to have been personal in nature. It was clear

that Cllr Wilson was not favourably disposed to the claimant. There was scant evidence before the Tribunal to suggest a basis for any disciplinary action against the claimant and no such action had ever been taken against her in the 19 years she was employed. Indeed, there was evidence that she was a highly regarded employee. In November 2018, only a few months before the unilateral decision was taken to redeploy her, the claimant was awarded "Public Servant of the Year" at the "Highland Heroes Awards" and Ian Murray, the respondent's Chief Executive, wrote to congratulate her and to praise her work and commitment. (P338-339) .

170. While the numerous complaints had caused the claimant stress, we heard no evidence about the exact nature of the complaints and how they were investigated, although the respondent knew that the claimant was disabled and would not want to be redeployed. No formal action was ever taken against her. The claimant had no opportunity to discuss with the respondent, in a formal setting, the personal difficulties between her and Cllr Wilson and the alleged difficulties which the Head Teacher at Alness Academy apparently had with her and how these difficulties might be addressed and resolved with her remaining in her substantive post.

171. Nor was she afforded any opportunity of discussing her redeployment. As we recorded above, her redeployment was presented as a *fait accompli*. The respondent's main aim, or at least one of them, in deciding to redeploy the claimant and move her place of work from Alness to Dingwall, was to distance the claimant from Cllr Wilson and put an end to her complaints.

172. Nor were we satisfied, with reference to ***Homer***, that the claimant's treatment was "proportionate". The respondent may have been prepared to obtain an up-to-date Occupational Health Report may but the possibility was never discussed in relation to the claimant's redeployment notwithstanding the OH Report in 2013 that redeployment would not be in her interests (P86-87). She was simply advised, without any meaningful discussion, or consideration of the likely effect on her due to her disability, that she would be starting her

new role the following week. The claimant did say that she "wanted something to be done" which would put a stop to the complaints, but it was not proportionate to advise the claimant, without any discussion, that she was to be redeployed.

173. We arrived at the unanimous view, therefore, that the claimant's redeployment was unlawful discrimination arising from disability under s.15 of the 2010 Act.

174. We were also of the unanimous view that the respondent's unfavourable treatment of the claimant at the meeting on 18 March and the continuing course of unfavourable treatment and discrimination thereafter, which we have detailed below, designed to remove the claimant from working in Alness to a different job working in Dingwall, were inextricably linked and ultimately led to her constructive dismissal.

Disciplinary action

175. On 27 May 2019, the claimant was issued with a final written warning for "failing to follow a reasonable instruction not to engage in HLH work" (P.222/223).

176. At the "Investigation Interview", which was conducted by Graham Cross (P.178-183), the claimant explained her conduct. She had tried to contact her Managers on 18 March in the afternoon of her meeting that day with James Martin and Mark Richardson but was unable to do so. We accepted that she had gone into the office on 19 March but any HLH work she did was minimal (P.191). She collected her personal belongings and left after an hour and forty-five minutes.

177. She had also told Graham Cross that she had "Fibro", something which she also told James Martin and Mark Richardson about at the meeting on 18

March when she was visibly upset and distressed. However, notwithstanding this there was no consideration as to how her disability might have impacted on her conduct. Indeed, it seems that Mr Cross was also unaware that the claimant was disabled in terms of the 2010 Act. Mr Cross also obtained a statement from Rhys Campbell confirming that the claimant had been in tears when she attended at HLH's offices on 19 March 2019. However, notwithstanding all these factors Mr Cross decided that disciplinary action was necessary (P.193).

178. The claimant attended a disciplinary hearing on 20 May 2019 (P.216-221). She was issued with a final written warning (P.222/223).

179. In advance of the hearing, the claimant's Trade Union representative submitted a number of "statements" in support of the claimant (P208-215). These included a statement from Lynsey Stein who was present at Alness Academy on 19 March when the claimant came in to her office (P215). She said that, the claimant *"packed her things"* and did not remove, to her knowledge, any *"documents that were relevant to Janette's work currently or any confidential documents that would contravene GDPR guidelines. Any confidential documents that were held in the office were in a locked cupboard…."*.

180. Further, at the hearing the claimant and her representative explained, in some detail, exactly what the claimant had done when she went into the office that morning (P216-221).

181. In our unanimous view, having regard to the background to the claimant's "conduct" on 19 March, having been advised the day before that she was being redeployed, without any advance warning or discussion; her own evidence and that of her witnesses; her clear distress at the time; her exemplary work record over 19 years; her explanation for her conduct and her disability, that sanction was not merited.

182. The sanction was reduced to a final warning by Fiona Hampton at the Appeal. However, in the course of the appeal hearing the claimant tried to explain to Ms Hampton *"the impact her disability had had on her behaviour"* but apparently this was not a factor that Ms Hampton took account of when deciding to issue the claimant with a written warning. Although Ms Hampton said she was prepared to obtain an Occupational health Report, she never did. She made her decision without the benefit of such a Report. We also accepted the claimant's evidence that the Appeal Hearing was conducted hastily and that at the end of the Hearing her trade union representative said to her that he had never before attended a meeting where "*clearly they had an agenda*" and that "*he had never seen anything like it.*" For all the reasons we were not satisfied that the written warning was justified. In our unanimous view, the outcome was predetermined.

183. We were of the unanimous view, therefore, that the respondent treated the claimant unfavourably by subjecting her to these disciplinary proceedings and issuing her with written warnings. We were satisfied that this unfavourable treatment was "because of something arising in consequence of her disability".

Justification

184. We were not satisfied that this treatment was objectively justified. In all the circumstances, Ms Hampton's decision to issue the claimant with a written warning was not a "proportionate way of achieving a legitimate aim". The aim in our view was to pressure the claimant to redeploy from her substantive post as a YDO, working in Alness, to a fund-raising job working in Dingwall.

Grievance

185. The claimant submitted her grievance on 3 April 2019. It was in the following terms (P.242):-

"***Nature of Grievance***

I wish to take out a grievance against High Life Highland with regards to the following points:

1. *HLH has failed to support or address an ongoing issue which has led to the decision to force the secondment placement.*
2. *A breach of the Equality Act 2010 where HLH failed to make reasonable adjustments relating to the instructed redeployment position. Adjustments which were clearly stated on the independent Occupational Health Report dated 15 May 2015* (P.86/87).
3. *Stress and humiliation which has resulted in such a deterioration in health that I am presently declared unfit for work by my G.P.*

Resolution Sought

To return to present position with the terms and conditions previously agreed re-my ongoing health condition. To resume my 17.5hr post with the same responsibilities and duties with the agreed support of sessional staff on 'Fibro Fog' days."

186. The claimant objected to James Martin hearing her grievance and rightly so, in our view, as he had conducted the meeting on 18 March which the claimant complained about and advised her that she was being redeployed. There was a clear and obvious conflict on his part and we were surprised that the respondent nominated him, in the first place.

187. Fiona Hampton conducted the Grievance Hearing on 21 August (P.264-267). Whether she was a suitable person, having heard the claimant's appeal and issued her with a written warning, is debateable but neither the claimant nor her union representative appeared to object. She advised the claimant at the conclusion of the hearing that her grievance had not been upheld.

188. We accepted the claimant's evidence that in the course of the hearing she, "*explained to Fiona that my confrontational behaviour had happened because I was under extreme stress. When this happens, my disability worsens causing me to react compulsively. My confrontational behaviour on being told I would be redeployed therefore came about as a consequence of my disability.*"

189. Ms Hampton was aware, or at least she could have been aware by reasonable enquiry, that the claimant was disabled. In her grievance, the claimant had referred to the Occupational Health Report dated 15 May 2013 (P.86/87). It contains the following provision:- "*I do not believe that redeployment would be useful in that the main barrier to her returning to full-time is that of extreme fatigue and this will exist whichever post she is in with the added stress of learning new skills. She would not qualify for ill-health early retirement at this stage.*"

190. Further, we accepted the claimant's evidence that she, "*explained to Fiona that my confrontational behaviour had happened because I was under extreme stress. When this happens, my disability worsens causing me to react impulsively. My confrontational behaviour on being told I would be redeployed therefore came about as a consequence of my disability.*"

191. Further, in her e-mail of 12 July to Morven MacLeod the claimant had posed nine questions relating to her disability, one of which was why she had not been referred to Occupational Health (P.256/257). She was advised by Ms MacLeod that her questions would be addressed at the Grievance Hearing (P.255). They were never addressed in any meaningful way by Ms Hampton who appeared to want the Hearing conducted as speedily as possible.

192. Notwithstanding the claimant's detailed explanation and representations, Ms Hampton reached her decision to reject the claimant's grievance without any

further enquiry seeking an up-to-date Occupational Health Report. She gave her decision at the end of the Hearing.

193. It was clear from the confirmatory letter Ms Hampton sent to the claimant on 22 August, the day after the Hearing, that the claimant's conduct was a factor in her decision and the claimant had told her that her Fibromyalgia affected her behaviour. The following are excerpts from her letter (P.272):-

"*There have been many complaints against you from local Members and from partner organisations over a protracted period of time and on no occasion has HLH instigated any formal action against you. HLH officers have been required to respond to these complaints and issues and have had to work hard to resolve the problems while seeking to guide you on your role and responsibilities as an HLH employee in relationship management with partners and key stakeholders.*

The decision to place you on a one year secondment based in the HLH Dingwall office to focus on one of your key skills was not punitive but was in response to yet another problem arising as a consequence of poor relationship management while undertaking your role as YDO in the Alness area. It had become apparent that, despite many interventions from HLH managers listed above, you did not seem willing or able to adapt your behaviour to positive effect when dealing with local Members or partners. Furthermore, on being advised of the temporary change in role and being advised to go home and consider the new opportunity, you chose to become confrontational and behaved in a manner that resulted in the first formal investigation in connection with this issue, with subsequent disciplinary action being necessary."

194. The claimant had been employed by the respondent for 19 years. She had never been subjected to disciplinary action previously. The complaints against her had never resulted in any disciplinary action. We heard no evidence at the Tribunal Hearing about these complaints. Further, despite clear medical evidence that redeployment was likely be detrimental, Ms Hampton took her decision without the benefit of up-to-date medical advice, in particular from Occupational Health.

195. We also accepted the claimant's evidence that the hearing was conducted with undue haste. That was entirely consistent with our view that the

respondent was at pains to distance the claimant from those who were complaining about her. They did so without investigating fully whether there was any merit in the complaints without and whether the claimant's conduct was due to any extent to her disability.

196. It also follows from our findings that this unfavourable treatment of the claimant was not a proportionate means of achieving a legitimate aim.

197. We arrived at the view, therefore, that the manner in which the respondent addressed the claimant's grievance was also discrimination arising from disability and that this was another factor in her decision to resign.

Failure to make reasonable adjustments

198. When considering these complaints, we were restricted to only addressing the submissions by the claimant's representative which related to the arrangements for, and conduct of, three ""Meetings": the Investigation Meeting on 17 April 2019; the Disciplinary Hearing on 20 May 2019; the Grievance Hearing on 20 May 2019; and an alleged failure to provide the claimant with an "auxiliary aid" at these meetings, in the form of an ergonomic chair, or the like (Paras 9-10 in her written submissions).

199. S.20 of the 2010 Act is in the following terms:-

"***20. Duty to make adjustments***

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

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would not, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid……"

"**Conduct of Hearings**"

200. The claimant's representative's first submission in this regard was an alleged failure to make reasonable adjustments in relation to the "Conduct of Hearings".

201. When considering this complaint, we were mindful that the claimant had trade union representation at these Meetings

Provision, Criterion or Practice ("the PCP")

202. As we understood the claimant's position, she alleged two PCPs in relation to the "Conduct of Hearings":-

"*1. The procedure of issuing a standard, generic letter to employees when arranging investigation, disciplinary and grievance hearings. The letters did not ask whether the employee had any specific needs as a result of disability.*

2. The standard procedure when conducting formal meetings related to disciplinary or grievance matters was not asking employees whether they had any specific needs at the hearing as a result of a disability."

203. The claimant accepted that it was not their standard practice, at the time, to ask employees attending meetings of this nature whether they had any specific needs as a result of a disability, whether by way of the invitation letters or at the commencement of the hearing. Although we understand that this has now changed.

"Substantial disadvantage"

204. The duty to make reasonable adjustments only arises where the disabled person in question is put at a "substantial disadvantage", caused by the PCP, in comparison with non-disabled persons. S. 212(1) of the 2010 Act states that "substantial" means "more than minor or trivial".

205. The claimant's contention was that the application of the PCPs made it *"difficult for her to engage in the process".* However, at each of the meetings relied upon by the claimant she had benefit of trade union representation; she was not prevented from responding to the allegations; and it was clear from the Minutes of the meetings and the claimant's evidence at the Tribunal Hearing that she and her representative were well able to "engage", and articulate the claimant's position. Nor did they complain at the time.

206. Further, the claimant was also able to *"engage in the process"* by way of correspondence. For example, in her e-mail of 12 July to Morven MacLeod, she asked a number of questions relating to her disability which she and her representative were not prevented from raising at any of the meetings (P.256-257).

207. While we were mindful that arguably "substantial disadvantage" represents a relatively low threshold, in our unanimous view the submissions by the respondent's solicitor in this regard were well-founded (paras. 8.3-8.6). The claimant was not put at a substantial disadvantage by the application of these PCPs. This is a material element of the s.20 definition. The respondent was not under a duty, therefore, to consider reasonable adjustments. Accordingly, this complaint is dismissed.

Auxiliary aid

208. The claimant's contention in this regard was that she should have been provided with an ergonomic chair at the meetings on 17 April, 20 May and 21 August. She claimed that this *"inhibited her ability to properly participate".*

209. We were also of the unanimous view that this complaint was not well-founded, primarily for the reasons we have already given in relation to the other adjustment complaint relating to the conduct of the "Meetings". There was clear evidence from the respondent's witnesses that the claimant and her trade union representative were well able to participate properly at those meetings. They were not inhibited, in any way. This is also clear from the Minutes of the meetings which in our view were reasonably accurate. Nor did they complain at the time.

210. We were satisfied that the submissions by the respondent's solicitor in this regard were well-founded (Paras. 9.2-9.4).

211. The claimant was not put at a "substantial disadvantage" in relation to non-disabled persons by the respondent's "failure" to provide her with an ergonomic chair, or something similar. The respondent was not under a duty, therefore, to consider reasonable adjustments. Accordingly, this complaint is dismissed.

Harassment

212. S.26 of the 2010 Act is in the following terms:-

"***26. Harassment***

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……*"

213. Disability is one of the relevant protected characteristics.

214. This complaint related to the manner in which the Grievance Hearing was conducted by Fiona Hampton on 21 August 2019.

215. We found in fact that this Hearing was conducted with undue haste, that the outcome was "pre-determined" and that a written warning was not justified.

216. By the time of this Hearing, Ms Hampton was aware that the claimant was disabled.

217. As we recorded above, the claimant presented as credible and reliable and, although this was disputed by both Ms Hampton and Ms MacLeod, we found in fact that when the claimant told her that she was having difficulty understanding or concentrating what she was being asked, Ms Hampton responded by telling the claimant that was "*rather convenient*".

218. It was clear that the comment was "unwanted". The claimant was upset and started crying when it was made. There was no doubt that this related to the claimant's disability, given Ms Hampton's state of knowledge. A one-off incident can constitute harassment (***General Municipal & Boilermakers' Union v. Henderson*** [2015] IRLR 451).

219. In her submissions the respondent's solicitor placed importance on the word "environment" in the s.26 definition. However, we accepted the claimant's evidence that there was a "bad atmosphere" at that Hearing and that Ms Hampton was "abrupt", bordering on the aggressive. That was consistent with our view that the outcome was predetermined.

220. We did not consider that this singular comment was "trivial", as the respondent's solicitor submitted.

221. So far as the objective aspect of the test was concerned, we were mindful of what the EAT said in ***Richmond Pharmacology v. Dhaliwal*** [2009] ICR 724, to which we were referred by the respondent's solicitor, that, "*while it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on the other grounds covered by the …….legislation……) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase……..If, for example, the Tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section, whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment for the Tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.*"

222. Considering that guidance, and having regard to the context in which the comment was made and the manner in which the Hearing was conducted, along with Ms Hampton's state of knowledge, we were of the unanimous view that it was reasonable for the conduct, and in particular Ms Hampton's comment, to have the effect on the claimant.

223. In arriving at this view, we also had regard to the EHRC Employment Code which states that unwanted conduct can include "*a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surrounding or other physical behaviour.*" (para.7.7)

224. We arrived at the unanimous view, therefore, that the s.26 definition had been satisfied and that the claimant had been subjected to unlawful harassment, related to her disability.

Constructive dismissal

225. Having resigned, it was for the claimant to establish that she had been constructively dismissed. This meant that, under the terms of s.95(1)(c) of the 1996 Act, she had to show that she terminated her contract of employment (with or without notice) in circumstances such that she was entitled to do so without notice by reason of her employer's conduct. It is well-established that that means that the employee is required to show that the employer is guilty of conduct which is a fundamental breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once.

226. The correct approach to determining whether or not there has been a constructive dismissal was discussed in ***Western Excavating***, the well-known Court of Appeal case, to which we were referred. According to Lord Denning, in order for an employee to be able to establish constructive dismissal, four conditions must be met:-

"

(1) there must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;

(2) that breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous interpretation of the contract by an employer will not be capable of constituting a repudiation in law;

(3) he must leave in response to the breach and not for some other unconnected reason; and

(4) he must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract."

227. Accordingly, whether an employee is "entitled" to terminate his or her contract of employment, "*without notice by reason of the employer's conduct*" and claim constructive dismissal, must be determined in accordance with the law of contract. It is not enough to establish that an employer acted unreasonably. The reasonableness or otherwise, of the employer's conduct is relevant, but the extent of any unreasonableness has to be weighed and assessed and a Tribunal must bear in mind that the test is whether the employer is guilty of a breach which goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of its essential terms.

"Trust and confidence"

228. So far as the present case was concerned, we were mindful that there is implied into all contracts of employment a term that all employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in ***Woods v. WM Car Services (Peterborough) Ltd*** [1981] IRLR 347 described how a breach of this implied term might arise: "*To constitute a breach of this implied term it is not necessary 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 it's effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.*"

229. In ***Malik***, to which we were referred, Lord Steyn stated that, in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.

230. When we considered the authorities, we recognised that a wide range of behaviour by employers can give rise to a fundamental breach of the implied term of mutual trust and confidence.

Present case

"**Last straw**"

231. In the present case, the claimant claimed constructive dismissal after a "last straw", which was when she read the documentation following her FOI request. In ***Kaur*** the Court of Appeal reviewed cases on the "last straw" doctrine and formulated an approach to "last straw" cases, referring to the implied term of trust and confidence as 'the ***Malik*** term":-

"*In the normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:*

(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?

(2) Has he or she affirmed the contract since that act?

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

*(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reasons given at the end of para. 45 above).*

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

232. The most recent act (or omission) on the part of the employer which the claimant alleged caused or triggered her resignation was the documentation she received from the respondent in relation to a FOI request We accepted the claimant's evidence that she was "devasted" when she read this correspondence and the negative comments about her. She stated in evidence that, "*reading the FOI information made me feel physically sick. I had long had suspicions that confidential information was being fed to Carolyn via HLH management but when I raised concerns with people like Wilma and Mark, I was made to feel paranoid or crazy. However, having the foresight to make a FOI request meant that I now had proof and if I'm honest, it made me sick to my stomach to learn that senior members of HLH management, who I had previously put my faith in, had in fact breached confidentiality, being unprofessional in their conduct toward me as an employee and had totally inappropriate professional relationships with third parties.*"

233. On 20 March 2019 (two days after his meeting with the claimant), James Martin sent an e-mail to Cllr Wilson and others to advise that the claimant "*has been seconded to a 12-month post of Youth Development Officer (Funding) to attract funding to assist the youth services, based in our Dingwall office*"(P.425). He then went on in his e-mail to say this:, "*As this is an HR matter, I have instructed Janette not to be in touch with you further with regard the decision to second her into the post. I would suggest that if she does get in touch that you advise her of this and to let me know.*"

234. On 10 April, Ian Murray, the respondent's "Chief Executive" sent an e-mail to Cllr Wilson at 07:52 (P.427). The following is an excerpt:- "*My take on it is that we are finally seeing The Place exposed as it really is, a "flag of convenience" for Jeanette to dress up what she wants to pursue but with HLH and the Council being the real foundation.*"

235. This was in response to an e-mail from Cllr Wilson on 9 April at 21:34 (P.427). The following is an excerpt:- "*As long as The Place is there in its current form and Janette there every day we cannot see a way forward. Mark told me last Monday he would look out the agreement and contact me, I now understand he is on holiday for the next fortnight. Is there anyone else who can advise us on this? It's a complete mess.*"

236. On 22 April 2019 at 21:23, she sent an e-mail to Ian Murray, Chief Executive in relation to a meeting at The Place in which she stated (P.430):-

"*She (the claimant) wanted John Douglas to be present at the meeting, we were not comfortable with this as it might compromise both us as members and HLH until the disciplinary situation is sorted. We did not meet her…. There were several things which she said which make me feel she is far from robust but actually a fairly naïve individual. She explained that she understands that The Place Committee had a 'proforma arrangement' with HLH to run The Place, I am not at all sure what she thinks this is or in fact what it means. She is probably being fed information she clearly does not understand properly and is just repeating it……..*"

237. It was clear from this that neither Ian Murray, the respondent's Chief Executive, nor Cllr Wilson were favourably disposed towards the claimant. His *"flag of convenience"* comment was particularly insightful of his attitude as was Cllr Wilson's comment that *"it's a complete mess"* and her desire to progress matters by removing the claimant from The Place, in Alness. It was also clear from the correspondence and from the claimant's evidence at the Tribunal Hearing, that Cllr Wilson was very much involved in the decision to redeploy the claimant and was privy to confidential information.

238. In our unanimous view, this correspondence was in itself a repudiatory breach of the contract. This meant that her claim was timeous.

239. The claimant resigned immediately thereafter. There was no question, therefore, of any affirmation on her part in relation to this breach.

240. Further, and in any event, the "last straw" was in our view part of a continuing series of breaches of contract by the respondent, comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence.

241. In her submissions the claimant's representative detailed a number of these in the period from November 2018 until her resignation on 22 August in addition to the breaches of confidentiality (Paras 3.2.24 – 3.2.54).

Cllr Wilson's complaints

242. As far back as January 2019, the claimant had advised Douglas Wilby and Wilma Kelt that the numerous complaints by Cllr Wilson was causing her stress and making her unwell. However, none of these complaints were ever investigated in a meaningful way and no disciplinary action was ever taken against the claimant. The claimant had worked for the respondent for 19 years. We heard a considerable amount of evidence from her colleagues that she was a skilled and highly regarded employee with great knowledge and experience in her job; there were also statements from her colleagues in the joint bundle to that effect (P209-215); she ""loved her job" and was considered by a number of her colleagues to be "an example of good practice" (P447); she was "Public Servant of the Year" in November 2018 (P338-339). Although we did not hear evidence from Cllr Wilson or hear any details of her complaints, it was clear that her personal animosity towards the claimant was a factor in her bringing these complaints. At the Grievance Hearing, the claimant referred to a *"barrage of complaints – 12 in total – from Cllrs Wilson and Munro had made her life very difficult in the past 5 years and HLH had done nothing to stop them"* (P264).

Suspension

243. When the claimant was suspended she was advised that not only should she not attend her place of work, but also, *"any of the Charity's other establishments"* (P142). This, in our view, was disproportionate and unnecessarily punitive. It meant, for example, that she could not take her grandson swimming. Despite the claimant's complaints, it took the respondent until 10 June to advise the claimant that she was permitted to attend three of their specified facilities (P225).

Meeting on 18 March

244. The manner in which the meeting on 18 March was convened and conducted contributed to the repudiatory breach by the respondent. The claimant was only given two hours' notice of the meeting; her Line Manager Nigel Brett-Young refused to tell her what the meeting was about; at the meeting her redeployment was presented to her as a *fait accompli*; she was told that she would start her new job the following Monday; although James Martin and Mark Richardson were aware or should have been aware that the claimant was disabled there was no allowance made for this. The respondent anticipated that the claimant would not want to redeploy. Indeed, she was very distressed at the meeting. As she put it, she was *"purposely ambushed".*

Disciplinary proceedings and warnings

245. As we recorded above, we were also of the view that the disciplinary proceedings and the written warnings issued to the claimant were predetermined and without substance. They caused the claimant considerable distress and, viewed objectively, that was understandable. In ***Burn v. Alder Hey Children's NHS Trust [2021]*** EWCA Civ 1791, there were some *obiter* comments by Singh LJ and Underhill LJ, two of the Court of Appeal's specialist Employment Judges, who indicated support for

implying a term into employment contracts that disciplinary procedures should be conducted fairly (Paras 42 and 47-48).

Grievance

246. The manner in which the Grievance was conducted by the respondent and the ultimate sanction was unreasonable; we also found that the respondent was guilty of unlawful harassment and the outcome predetermined. Our views in this regard were reinforced by the negative comments about the claimant in the documentation she recovered following her FOI request.

247. Actual, or apparent, bias in the conduct of an internal grievance may amount to a breach of the implied term of trust and confidence which is a fundamental breach because employees are entitled to a fair hearing of a grievance (***Watson v. University of Strathclyde*** [2011] IRLR 458).

Continuing breaches

248. There was no "reasonable and proper cause" for the series of continuing breaches by the respondent (***Hilton v. Shiner Ltd*** [2011] IRLR 727). They were designed to ensure that the claimant was no longer working in her substantive post at Alness. When taken together, they contributed, in our unanimous view, to a repudiatory breach of contract with the FOI correspondence being the last straw.

Affirmation

249. Last straw cases, such as the present one, should be contrasted with those where there is a one off act by the employer which has ongoing consequences. The Court of Appeal in ***Kaur*** made it clear that where there is a genuine 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 positive affirmation because the effect of the final straw is to revive the right to resign.

250. In any event, for there to be affirmation, once there is a breach, there has to be some positive action on the part of the employee consistent with acceptance of the breach, other than just the passage of time (***Buckland v. Bournemouth University Higher Education Corporation*** [2010] EWCA Civ 121, for example). In the present case, there was no such positive action by the claimant. Quite the contrary, in fact, as she continued to complain about the way she had been treated, appealed the final written warning and raised a grievance. Any " delay" on the claimant's part in resigning was not indicative of any affirmation. There was no question of the claimant affirming the various breaches by the respondent.

Resignation in response to the breaches

251. It was also clear, as we recorded above, that she had resigned in response to the various breaches. The last straw was when she read the FOI documentation. That was also clear from her "Reasons for Resignation" e-mail of 6 September 2019 (P275-278).

252. We arrived at the unanimous view, therefore, that the course of conduct by the respondent amounted, cumulatively, to a breach of the implied term of trust and confidence `which is a fundamental breach. The claimant was, therefore, constructively dismissed.

Unfair dismissal

253. We were also of the view, with reference to s.98(4) of the 1996 Act, that the respondent had not acted reasonably and that the claimant was unfairly dismissed. In all the circumstanced and having regard to the respondent's "size and administrative resources", the claimant's 19 years' service and her exemplary work record, her dismissal was not within the range of reasonable

responses that a reasonable employer could have adopted (***Iceland Frozen Foods Ltd v. Jones*** [1982) IRLR 439.

Remedy

254. The parties' representatives are encouraged to liaise with a view to agreeing the remedy, failing which a Remedy Hearing will be fixed.

Employment Judge **N Hosie**
Date of Judgement **30 December 2021**
Date sent to parties **30 December 2021**