



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs E Bennett

**Respondent:** The Chief Constable of Merseyside Police

**Heard at:** Liverpool

**On:** 8,9,10 November 2021

**Before:** Employment Judge Aspinall

## REPRESENTATION:

**Claimant:** Mr Clarke, Friend

**Respondent:** Mr A Jones, Counsel

# REASONS

JUDGMENT having been given orally on 10 November 21 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## Background

1. By a claim form dated 7 January 2019, having entered early conciliation on 9 October 2018 and achieved an early conciliation certificate on 2 November 2018, the claimant brought proceedings for sex discrimination, age discrimination, disability discrimination and constructive unfair dismissal.
2. The claimant had worked for the respondent as a security officer from July 2010 until her resignation on notice which took effect on 11 December 2018.
3. There was a case management hearing before Employment Judge Shotter on 27 March 2019. At that hearing there was a discussion as to whether or not the claim form included a complaint of whistleblowing. The claimant confirmed that it did not. The respondent needed clarification of the discrimination complaints and it was agreed that the claimant would provide further and better particulars of her complaints. Those particulars were provided, and the matter came to a second case management hearing on 26 October 2020 before Employment Judge Doyle. At this hearing it was confirmed that the only outstanding complaint was of constructive unfair dismissal. The time estimate for the final hearing was agreed to be three days. The claimant was

represented by Mr Clarke at that hearing. It was his understanding that he would need one and a half days in which to cross-examine the respondent's witnesses.

4. The final hearing was before me on Monday 8 November 2021. The claimant confirmed that the only complaint was constructive unfair dismissal and Mr Jones was able to provide me with a summary of what had happened to the other complaints, which was agreed by Mr Clarke. I did not have the file of papers, but I understand that the claimant withdrew her age discrimination complaint on 10 May 2019. The claimant's disability discrimination complaint was dismissed by Employment Judge Barker on 4 September 2020 at a preliminary hearing on the basis that the respondent had no knowledge of the claimant's disability at the dates of the alleged acts of discrimination. Mr Clarke told me that the claimant withdrew her sex discrimination complaint by letter to the Tribunal. I had not seen the dismissal judgments for the discrimination complaints at the date of my decision and have included their dismissal in my judgment sent to the parties on 19 November 2021.

### List of Issues

5. A List of Issues was agreed at Employment Judge Doyle's case management hearing. Mr Clarke wished to augment that list. Employment Judge Doyle looked at that augmented list and I have seen it today. I explained the purpose of a List of Issues to the parties today in terms that it can be seen as a road map of the legal points to be decided in the case. Mr Clarke agreed that the Tribunal will use the list agreed by Employment Judge Doyle but will also have regard to the claimant's list which is provided by way of "meat on the bones" of the claimant's case, to borrow Judge Doyle's phraseology. The List below includes references to *breach of contract* which came from the claimant's list. It mattered to her to have those raised. The claimant confirmed that those are breaches of the implied term of mutual trust and confidence that led to her resignation and her unfair dismissal complaint. The claimant does not bring a separate breach of contract claim.

6. The agreed List is as follows:

#### Constructive Dismissal

1. Can the claimant establish that the respondent breached the claimant's contract? In particular:
  - 1.1 On 22 December 2017 did the claimant's line manager, Dave McGurk, breach the claimant's contract by putting his face close to the claimant's face and shouting at her?
  - 1.2 Did the respondent breach the claimant's contract by failing to inform her that she should raise a grievance in respect of the incident on 22 December 2017;
  - 1.3 Did the respondent breach the claimant's contract by failing to vary the claimant's contract to entitle her to full pay during sickness absence for more than six months.
2. Did the respondent's grievance procedure have contractual effect?

3. Did the respondent breach the claimant's contract in the manner in which it dealt with the claimant's grievance? In particular, did the respondent breach the claimant's contract:
  - 3.1 in respect of the time taken to determine the claimant's grievance (being 31 May 2018 until 14 October 2018);
  - 3.2 by failing to permit the claimant to be accompanied by Mr Clarke, on the basis that he was neither a colleague of the claimant nor a trade union representative;
  - 3.3 by refusing to provide to the claimant the statements obtained in the course of the grievance investigation;
  - 3.4 by preferring the evidence of Mr McGurk over that of the claimant;
  - 3.5 *withdrawn*;
  - 3.6 by seeking a conciliatory outcome of the claimant's grievance appeal and/or by failing to resolve the claimant's grievance appeal;
  - 3.7 by refusing to provide to the claimant at the appeal the statements obtained in the course of the first stage grievance investigation;
  - 3.8 by failing to investigate the claimant's grievance appeal and/or by failing properly to question witnesses when investigating the claimant's grievance appeal;
  - 3.9 by telling the claimant during the grievance process that she was obliged to keep in touch with the respondent.
4. Did the email from Belinda Baccino sent to the claimant on 9 November 2018 contribute something to the preceding breaches (if the preceding breaches are proven).
5. If proven, did the breaches collectively amount to a repudiatory breach of contract such that the claimant was entitled to resign in response to the said breaches (the last straw being the email from Belinda Baccino dated 9 November 2018).
6. Did the claimant in fact resign in response to a series of breaches which collectively amounted to a repudiatory breach of contract?
7. Did the claimant delay in resigning in response to that breach of contract?

### **The Hearing**

7. We met in person at Liverpool with all parties confirming that they were content with the social distancing arrangements in place. The claimant was to give evidence as was her husband. The respondent had four witnesses, one of whom could only

appear by CVP and so it was agreed that on the second day of hearing it would become a hybrid hearing.

8. We agreed a timetable for conduct of the hearing. Mr Clarke gave time estimates for his cross-examination of the respondent's witnesses as follows: Ms Susan Denner under an hour; Mr David McGurk two and a half hours; Ms Helen Coates one and a half hour; and Mrs Belinda Baccino two hours. I reminded the parties that a three day hearing time had been agreed and told Mr Clarke that it would not be possible for him to have that much time in cross-examination of the respondent's witnesses.

9. At that point Mr Clarke objected to having his cross-examination time curtailed. The Tribunal took him to page 68b of the bundle, which was Employment Judge Doyle's Case Management Summary, which invited either party to write in if they felt that the three day listing was insufficient time. Mr Clarke said that he had agreed to the three day listing on the basis of his own assumption that one and a half of those days would be cross-examination time for him.

10. I told the parties that I had had the witness statements on Friday afternoon and having had time to read them I considered that this evidence could be managed within the three days. I canvassed with them the options in terms of a strict timetable or of going part-heard or having a reserved judgment. The claimant clearly wished to have a decision as soon as possible and I noted that this case relates to incidents arising as long ago as 22 December 2017. Mr Jones was happy to be timetabled and did not wish to be heard on this point. I agreed to record Mr Clarke's objection.

11. I timetabled the case and in the event the time slots were further adjusted as Mr Clarke did not need to cross-examine Ms Denner:

<b>Day</b>	<b>Morning</b>	<b>Afternoon</b>
Day 1	Reading, agreeing List of Issues, timetabling case  12 noon – Claimant's evidence	Claimant's evidence
Day 2	C2 Mr Bennett  R1 Mr McGurk  R2 Ms Baccino	3.00pm – Ms Coates
Day 3	Closing submissions and deliberation	Deliberation and Judgment  Remedy (if appropriate) would be case managed and relisted

12. Mr Clarke wished me to accept Ms Denner's evidence in chief and made no objection to it. The above timetable was agreed.

**Documents**

13. I had a bundle of 509 pages in hard copy and a smaller file of witness statements. Counsel handed up his Skeleton Argument and authorities which had been shared with the claimant.

### **Oral Evidence**

14. I heard evidence from the claimant. She was a very softly spoken lady who had to be asked to speak up. She gave her evidence in an evasive way often speculating as to her perception of the motivation for the respondent's actions, rather than answering the direct question as to whether or not something had happened. She was forceful and frank in her evidence about the impact events at work had had on her mental health. She also made concessions, agreeing that she had not completed the stress risk assessment forms and she had assumed that the respondent had been aware of the incidents of 22 December 2017.

15. I heard evidence from Mr Bennett. He gave his evidence in a helpful way and accepted that the only direct evidence he had to give was of the meeting on 28 December 2018, the rest of his content had come, understandably, from things his wife had told him at the time.

16. I read the evidence in chief of Ms Denner. It was uncontested.

17. I heard evidence from Mr David McGurk, the claimant's line manager. Mr McGurk accepted that he had shouted at the claimant. There was a disagreement between them as to where they sat at that meeting and as to their proximity to each other. It is not necessary for me to make a finding of fact on that point. It does not add anything to the allegation that Mr McGurk was shouting at the claimant and was too close to her. Mr McGurk has accepted that his conduct in shouting at the claimant and being closer than she would have liked fell below that expected of him. I found him to be a witness who was careful to think and answer accurately and who, despite embarrassment, readily admitted having shouted.

18. I heard evidence from Ms Helen Coates, the grievance appeal manager. She gave her evidence in a straightforward and helpful way. She was clear that she had reinvestigated the claimant's allegations. She had concerns about Ms Baccino having investigated a meeting at which she, Ms Baccino, had been present and she made sure to speak directly to people herself and not rely on notes of conversations Ms Baccino had had with the witnesses.

19. I heard evidence from Ms Belinda Baccino, the first stage grievance manager. She was guarded in the way she gave her responses, being careful not to criticise her employers for decisions they had made that she was not entirely comfortable with, such as being required to investigate the grievance herself and not sharing the notes of the interviews with witnesses with the claimant. She was also frank in her responses as to what she had done and not done in the investigation.

20. Ms Baccino had not interviewed Ms Pennie about 19 February 2018. She had spoken to Ms Donnellan, and she considered Ms Donnellan to be someone who could give a credible account of the meeting.

21. I mention that I have attached little, if any, weight to the notes of interviews that Ms Baccino took because they were her notes and not the testimony of the people interviewed. The same is true, though to a lesser extent, of the statements of the witnesses at appeal.

22. I have attached more weight to the sworn evidence of the witnesses who appeared before me. I had regard to the contemporaneous documents to corroborate positions, and I looked at the conduct of the parties to see if it was consistent with the positions they advanced at the time. Events were a long time ago and memories can fade and can be overlaid, so I had regard to differences in evidence from the contemporaneous position, to the witness statements and to the evidence at Tribunal – the passage of time may mean that there is some slippage there and I do not take a little slippage in memory to necessarily mean that someone is no longer accurate or credible.

### **The Facts**

23. The claimant worked as a security officer in the gatehouse at Merseyside Police Headquarters. She worked a rotating shift pattern of mornings, afternoons and nights. She worked with colleagues, a team of 14 with perhaps three or four on shift, sometimes only two, at any one time. Demanding security issues could arise so that the colleagues needed to be robust and work well together.

24. The claimant believed that when she applied for the gatehouse job another colleague (JF) had also applied and been unsuccessful. After her appointment she perceived that JF had a problem with her having been successful because he did not say good morning to her when she greeted him, and he generally ignored her. She perceived JF and her line manager, Mr McGurk, to be friends.

25. The claimant had sciatica and found that the chair with which she was provided at work exacerbated her back pain. From her seated position she had to reach up to press the barrier button and this was uncomfortable for her.

26. The claimant asked Mr McGurk, in September 2017 and again on 15 November 2018, to look at getting a proper support chair for her. Mr McGurk arranged for a DSE assessment to take place and as part of that assessment the claimant was asked to provide a letter from her GP detailing what would be required, which she did.

27. The claimant took her role very seriously and had concerns about the safety of gatehouse staff when conducting security searches following terror attacks at public venues in Manchester and London. She was also concerned at being required to act as a fire marshal. She put those concerns in writing and Mr McGurk forwarded them to his manager, Mr Thomas, and the claimant was provided with a reply to her concerns from Mr Thomas.

28. In early December 2017 the claimant heard a rumour that JF might be coming to work in the gatehouse and this caused her considerable distress. She did not want to work with him.

29. On 22 December 2017 the claimant asked Mr McGurk if she could discuss something with him. He led her into the kitchen adjacent to the gatehouse for a private conversation. The claimant said she had heard that JF might be coming to work in the gatehouse and asked was that true. Mr McGurk asked the claimant how she knew this and said that he had not heard this and that it could only be a rumour. The claimant said that she could not and would not work with JF. The claimant said that Mr McGurk had colluded with others to get JF into the gatehouse role. The conversation became heated. The claimant threatened to bring a grievance against JF for the way he had treated her. Mr McGurk lost his temper. He had not heard that JF would work in the gatehouse, he was being falsely accused of colluding in getting JF the role and he did not think it was for the claimant to say who she would or would not work with.

30. Mr McGurk shouted at the claimant words to the effect that he had not colluded with anyone and that she should not listen to rumours. The claimant shouted back that she would not work with JF. Mr McGurk shouted that she could go and work at another location, SDL. The claimant shouted that she had worked there for years and why should she have to move, that JF should go to SDL. Mr McGurk left the kitchen still shouting about people not listening to rumours, and as he passed through the gatehouse on his way out he swore about people "shit stirring". Mr Shiels and Mr Plumb were on duty and heard him shouting. They had also heard the claimant shouting.

31. Mr McGurk went out of the gatehouse. The claimant went out to conduct a security patrol and headed to see her union representative. Mr McGurk went back in and apologised to Mr Shiels and Mr Plumb. He went to see his line manager, Mr Thomas, and reported the conversation and that he had shouted at the claimant. There was discussion around the issue and agreement to the effect that the claimant did not get to choose with whom she worked. Mr Thomas told Mr McGurk that he should not have shouted and that he needed to apologise to the claimant. Mr McGurk headed back towards the gatehouse and saw the claimant en route. She did not want to have a conversation with him, kept her head down and kept moving. They did not speak at that point.

32. The claimant went to speak to her union, and then went back to the gatehouse where JF was. JF spoke to her and offered to make her a cup of tea. The claimant declined the offer.

33. Mr McGurk later returned to the gatehouse. There was a short discussion between the claimant and Mr McGurk that day about another matter. He did not apologise to her. The claimant finished her shift. She rang in sick the next day, citing sciatica and stress, and did not ever return to work. Mr McGurk referred her to Occupational Health.

#### Meeting on 28 December 2017

34. There was a welfare meeting with the claimant and her husband and Mr Thomas and a Ms Luther at Alder Hey coffee shop. The shouting incident was not discussed. The claimant spoke about needing an adjustment in the form of a chair to ease her sciatic pain at work. Mr Thomas gave her stress risk assessment forms and

said she should complete them or not, as she chose. The claimant asked for the number for the Force Chaplain, Mrs Pennie, and it was subsequently provided.

35. The claimant was diagnosed with work related stress.

9 January 2018 telephone call with Mr Thomas

36. Mr Thomas asked the claimant would she like to attend a meeting of a group of staff with work related stress. She chose not to attend. Mr Thomas offered the claimant a one-to-one meeting with Ms McCullough but she did not wish to have this meeting. The claimant asked if her Occupational Health meeting could be off site, but Mr Thomas said it could not. The claimant became upset and Mr Thomas asked if he could speak to her husband. The claimant did not want him to speak to her husband and the call ended.

17 January 2018

37. On 17 January 2018 the claimant attended an Occupational Health meeting with Mrs Taylor. The claimant asked for medical redeployment. The discussion was around physical adjustments. Mrs Taylor said that redeployment might be something to consider going forward. Mrs Taylor reported that the claimant had physical and psychological conditions. It was agreed that the Occupational Health report would be sent only to HR and not to the line managers.

30 January 2018

38. On 30 January 2018 Ms Baccino contacted the claimant to say that she had received the Occupational Health report and wanted to have a welfare meeting with the claimant. Ms Baccino was Mr Thomas' line manager. The claimant was upset that the Occupational Health report had been sent to the line management in contravention of the agreement she made with Mrs Taylor. The claimant complained about this to Mrs Taylor, who said that she would investigate it and that Ms Gibson would get back to the claimant about it. The claimant also spoke to Ms Pennie about this and was told that it had been sent in error.

39. The claimant did not accept that it was an error and wanted to pursue this as a breach of confidentiality.

15 February 2018

40. On 15 February 2018 the claimant attended a second Occupational Health review meeting. The report referred to the claimant's "perceived workplace stressors" and said that the claimant's "opinion is unchanged in that she does not believe she is able to return to her substantive post". Psychological support sessions were arranged. This report was not sent to Ms Baccino.

19 February Meeting

41. On 19 February 2018 the claimant attended a welfare meeting at Alder Hey coffee shop accompanied by the Force Chaplain, Ms Pennie. Ms Baccino conducted the meeting. Also present was Ms Donnellan, a senior manager who was sitting in to



observe welfare meetings as part of her own development in learning about the attendance management process. At this point all that Ms Baccino knew was that the claimant was off sick with physical and psychological impairments. Ms Baccino asked the claimant if she would be comfortable allowing her to look at the Occupational Health reports, but the claimant refused. Ms Baccino did not therefore refer to them and left it for the claimant to lead on the content of the meeting.

42. Ms Baccino asked had the claimant completed the stress risk assessment forms for the wellbeing action plan that had been provided to her at the 28 December 2017 welfare meeting. The claimant had not completed them. Ms Baccino provided a second set of stress risk assessment and workplace action plan forms to the claimant.

43. Ms Baccino asked what was causing stress to the claimant at work. The claimant named Mr McGurk, Mr Fleming and Mr Thomas, and Ms Baccino noted their names in her record of the meeting. Ms Baccino had no further details from the claimant as to why she had named those individuals, and no details were given of the shouting incident on 22 December 2017.

44. The claimant spoke about Mr McGurk failing to provide her with a supportive chair and she suggested that Mr McGurk, in asking her for a GP letter in support of the application for a chair, was in some way acting inappropriately because she did not believe that she needed a GP note.

45. The claimant was adamant during the meeting that she would not go back to work in the gatehouse and would not go to work in any role within the estates department. Ms Baccino suggested mediation between the claimant and the colleagues that she felt were a source of stress to her. The claimant was clear that she would not mediate. Ms Baccino said that the next welfare visit would need to cover a return to work plan and Ms Baccino sought to reassure the claimant that management would work with HR and Occupational Health to make sure that any reasonable adjustments that the claimant needed in relation to reaching up to press the barrier would be provided so that she could return to work. Ms Baccino also expressed a willingness to consider the claimant working from a location closer to her home and also expressed a willingness of management to consider working in alternate roles. The claimant said (wrongly) that medical redeployment had been recommended by the Occupational Health report. Ms Baccino was not able to confirm this as she had not seen the second Occupational Health report. The claimant did not tell Ms Baccino or Ms Donnellan at that meeting that she was aggrieved because of the shouting incident. She did not use any words from which they could infer that she was lodging a grievance.

#### 6 March 2018

46. The claimant consented to the referral to counselling. She attended an assessment on 13 March in readiness for that intervention.

#### 6 April 2018

47. The next welfare meeting was again at the Alder Hey coffee shop and was conducted by Ms Baccino. This time Ms Hunter was also present. The claimant was accompanied by Ms Pennie. As had been intimated at the February meeting, the focus of this meeting was to discuss a return to work. Ms Baccino suggested a temporary role in the property section populating the MC with RTA information. There was a desk-based role as the Eaton Road police station close to the claimant's home. Ms Baccino confirmed that a risk assessment would be undertaken to assess the physical environment for the claimant. Ms Baccino assured the claimant that all necessary support would be provided and training would be given. The claimant said that she would consider that role as a medical redeployment. Ms Baccino said that the medical redeployment had not been authorised and reiterated that it would be a temporary role to assist the claimant in a return to work. At this meeting the claimant did not refer to the shouting incident.

48. Following the meeting Ms Baccino prepared a return to work plan which was approved by Occupational Health and HR and included a phased return. Ms Baccino sent it to the claimant on 12 April 2018 with a recommendation that it be discussed with the GP. Ms Baccino invited feedback about reasonable adjustments. The claimant did not respond to this invitation.

49. On 26 April 2018 the claimant attended a further Occupational Health meeting. The Occupational Health professional this time was Ms Denner. Ms Denner's report confirmed that the claimant had ongoing psychological and physical symptoms. It was agreed at the meeting that the claimant "could resume some kind of work and that the return to work plan of her attending at Eaton Road would be appropriate". Ms Denner suggested that the phased return needed to be longer and slower with the claimant returning four hours per day for two weeks, followed by five hours a day for two weeks, followed by six hours per day for two weeks, to be kept under review. There was no discussion at that meeting about the shouting incident, nor any words used from which Ms Denner could infer that the claimant was bringing a grievance. All Ms Denner noted was that the claimant had still not completed stress risk assessment forms. The claimant was then invited to liaise with the wellbeing team and they would help her to complete the forms. The claimant agreed to do this but never did it. Ms Denner did not advise the claimant that she would not be given medical redeployment. Ms Denner did not suggest that the claimant speak to Ms Gibson about taking out a grievance.

#### 2 May 2018

50. On 2 May 2018 Ms Brown from Employee Relations sent the claimant details of the stress risk assessment process and offered support to assist the claimant in completing the stress risk assessment forms.

51. There was a clear return to work plan in place at this time for a temporary role at Eaton Road dated 1 May 2018 from Belinda Baccino, as amended following Occupational Health consultation, and an invitation for input from the claimant's GP. The plan referred the claimant to support, guidance and assistance from Belinda Baccino, and Michelle Cooper in HR. The plan stated that the Force's attendance management policy remained relevant and that it was in place to measure, manage and sustain the claimant's attendance at work.

52. The pressure was mounting on the claimant to return to work.

53. On 11 May 2018 the claimant's contractual terms were such that her pay dropped from full contractual sick pay to half pay.

54. The respondent's sick pay policy provides for a discretion to be exercised to maintain staff on full pay after six months in the following scenarios. They were shared with the claimant in a letter from Elaine Wilson at page 248:

*"The provisions relating to policy of sickness absence is that progression to half pay and no pay status is automatic.*

*However, extensions to occupational sick pay entitlements may be considered by the Head of HR Employee Relations in line with the following criteria. This does not form part of the conditions of service or police staff and applications at the discretion of the Head of HR Employee Relations:*

- Where a member of police staff is suffering from an illness which may prove to be terminal;*
- Where the Force medical adviser or an independent registered medical practitioner advises that the absence is related to disability as defined by the Equality Act 2010. In these circumstances the Head of HR Employee Relations may consider it would be a reasonable adjustment to extend sick pay to allow further reasonable adjustments to be made to enable a member of police staff to return to work;*
- Where a member of police staff incapacity is directly attributable to an injury or illness that was sustained or contracted in the execution of his or her duty without default.*

*You satisfy one of the conditions as detailed above and you wish to make representation to remain on full pay and this needs to be provided in writing and forwarded to me at the below address. If you do wish to make representation then your letter will go from me to the Head of HR Employee Relations with the command team recommendation for a decision. You will be informed in writing of any decision made by the Head of HR Employee Relations."*

55. The claimant did not make written representations for the exercise of discretion in her favour to remain on full pay.

56. The claimant took legal advice on 15 May 2018 from an employment law adviser, her representative Mr Clarke. The claimant contacted Ms Pennie to ask if Ms Pennie would support her in her version of what had happened on 19 February, that is to say an argument that the claimant had raised a verbal grievance on that date. Ms Pennie agreed to provide her notes of the meeting.

57. On 21 May 2018 the claimant lodged a formal grievance by sending it to Ms Baccino and to the HR Department. The detail of the grievance provided was:

- (1) Failure to address grievance;
- (2) Victimisation for seeking reasonable adjustment for physical impairment;
- (3) Victimisation for refusing to be bullied into becoming fire marshall.

58. In the section of the form that asked what actions the claimant would like to see to resolve a grievance, she wrote:

*“Mr McGurk to be disciplined for bullying me. I do not believe he would have spoken to a man, or a younger person, the way he spoke to me or if I had not raised by physical impairment or my concerns. An apology/explanation for failing to address my grievance, exacerbating my mental impairment.”*

59. The claimant added:

*“In light of the circumstances and my health I wish to bring a family friend with me to the meeting. This person will not be available between 7 June 2018 and 21 June 2018 so I would ask that the meeting be set outside these dates”.*

60. The grievance form provided no additional detail. Ms Baccino received the grievance and contacted the claimant on 4 June 2018 to discuss it. The claimant said she would not discuss it and wanted all communication about the grievance to be in writing. Ms Baccino sent a text on 4 June 2017 to say that she had not yet finalised the questions to be sent to the claimant and that she was asking HR to allow an extension of times under the grievance process because she was having to communicate with the claimant solely in writing.

61. Ms Baccino wrote to the claimant on 6 June 2018 seeking additional information. She attached to her letter a list of questions for the claimant to answer. She also said in the letter:

*“As you have requested all communication in relation to your grievance to be in writing I’ve attached a number of questions which clarify your grievance and allow me to investigate further. As you will appreciate your response may generate further questions and as this is via correspondence it will take me longer to fully review all circumstances. In order for me to investigate your grievance would you be agreeable to an initial extension of timescales to 17 August 2018, please?”*

11 June 2018

62. On 11 June 2018 the claimant replied acknowledging receipt of the letter and saying that she would reply in due course but that she needed copies of minutes from the following meetings before she could reply:

- with Mr Thomas and Ms Luther in December 2017;
- with Ms Baccino, Ms Donlon, Ms Pennie in February 2018;

- with Ms Baccino and Miss Hunter in April 2018;
- on 4 November 2017 regarding contract changes.

63. The claimant also requested a copy of the answers to her list of concerns about the fire marshal duties.

64. On 26 June 2018 Miss Baccino replied with notes for the first three meetings, notes about the contract changes and a copy of the answers to a list of concerns.

65. The claimant showed the notes to Ms Pennie and met with Ms Pennie for them each to prepare their own note of the 19 February meeting on 5 July 2018.

66. On 5 July 2018 the claimant replied to Ms Baccino's list of questions. Her letter said:

Q: Is this your first grievance?

A: Yes.

Q: In relation to the incident with your line manager, state the date and time the incident occurred, location, names of witnesses.

A: *You have been aware of various elements of my grievance since the outset and particularly as a result of the OH reports when the nurse states that before I can return to work I have workplace stressors which need to be addressed.*

*Incident took place late morning on my last working day 22 December 2017 and the gatehouse headquarters. The witnesses were Bob Plummer and Andy Shiels.*

Q: Did you have any further contact with your line manager following the incident?

A: *When Mr McGurk came back into the main room in the gatehouse and loudly told the three people on duty not to shit stir I asked him not to shout at me. Mr Shiels said who do you think you are talking to at which point Mr McGurk went out. I later saw Mr McGurk and asked about a collection for another employee.*

Q: Did your line manager apologise to you?

A: *He did not apologise to me but he did apologise to other colleagues.*

Q: Is this the first incident of this nature you had with your line manager?

A: *No, but this is by far the most aggressive.*

Q: How would you describe your working relationship with your line manager prior to the incident?



*about the meeting. Another person had a meeting with him at his time to discuss what would be said at the meeting. I was left out of all this talking. After this meeting everyone came back to the gatehouse and my line manager spoke to everyone except myself, so much so I had to ask for someone to take the window as my shift had finished.*

Q: Who did you raise concerns with in relation to fire marshall duties?

A: *My line manager, my union representative and Mr Thomas.*

Q: What meetings have you attended where you've raised concerns in relation to security officer working practices and who was present?

A: *Specifically the meeting on 15 November 2018 following which I submitted numerous written concerns to Mr Thomas [to] which he later responded in writing. I'd also spoken on a regular basis to Mr McGurk.*

Q: What was the result of those actions you raised?

A: *I was taken aside by Mr McGurk and he took me through the reply from Mr Thomas. I wasn't happy with some of the answers as they contravene government guidelines. I also still have concerns about the lack of fire drills, muster points and fire doors which were open all day.*

67. The claimant also said that she wanted it noted that she did not accept the meeting notes that had been provided were necessarily a true and accurate reflection of those meetings. The claimant made a request that her friend be able to attend any grievance meetings, failing which she said she would consider any further refusals an act of discrimination.

On 17 July 2018 Ms Baccino texted the claimant to say:

*"Hi Eileen, thank you for sending the answers to my questions. I am conscious that I am dealing with your grievance I've not contacted you regarding your welfare. Happy to meet you and discuss this .... please provide dates when you are free, Many thanks, Belinda."*

68. After 17 July 2018 Ms Baccino spoke to John Fleming, David McGurk, Neil Thomas, Mark Durnell and Bob Plum, Andy Shiels, Kerry Brown, Rod Grundy and had an email exchange with Phil Parkinson in the course of the grievance investigation. Ms Baccino had notes of those conversations but they were not a verbatim transcript and not a witness statement and she did not have the consent of the people with whom she had spoken to disclose those notes to the claimant.

69. The grievance policy had the following aims:

- to resolve issues of concern at the earliest opportunity;
- to provide a mechanism which allows staff at all levels to raise issues of concern

Its objectives are:

- to provide a speedy and effective resolution to workplace disputes at the lowest possible management level;
- to provide a facility that contains options for staff to use when they raise issues of concern;
- to improve working relationships at all levels within the Force.

70. The policy provides that staff that invoke the policy have the right to be accompanied at any meeting by a member of the staff Association, trade union, support network colleague of Merseyside police. Volunteers do not have any employment rights and support that is available is limited to their role as a volunteer and not as an employee.

71. Paragraph 5 of the policy deals with informal resolution and provides:

*“Managers and staff must in all suitable cases make every effort to resolve issues informally through dialogue with an appropriate line manager, or any suitable person whom they feel may be capable of achieving an informal resolution to the grievance.*

*When issues are raised informally it is important to note that most kinds of dispute can be mediated provided that those involved want to find a way forward. Mediation is especially suitable when the aim is to maintain the employment relationship and can be used at any stage but is often most effective if used early on.*

*The fairness at work grievance policy and procedure should be invoked only after normal and healthy dialogue including mediation where appropriate, has failed to resolve the issue.”*

72. Paragraph 5.2 deals with formal resolution and provides strict time limits.

73. Paragraph 6.1 provides that normal management procedure will be by local line manager and should be completed within 14 days of receipt of the grievance form. It provides that any extension to timescales must be agreed in writing.

74. The normal management process is for the manager to receive the grievance form, and consider the relevant parties required to address the grievance. The manager should arrange to meet with those parties, the purpose of the meeting being to allow the grievance to be discussed in an open manner with a view to bringing about a satisfactory resolution, to agree outcomes and to agree any further action required. The structure of the grievance meeting should be flexible and it may be necessary to hold a further meeting. If following the meeting it is apparent the matter cannot be resolved consideration may be given to the use of additional mediation. Following completion of the meeting and any mediation the line manager will confirm in writing to the appropriate parties the outcomes of the grievance including the proposed resolution. The manager must inform the claimant of the right to appeal.



75. The policy describes mediation as an aid to grievance resolution.

Welfare meeting

76. On 31 July 2018 Ms Baccino conducted a welfare meeting with the claimant. The claimant was accompanied by Mr Clarke. Ms Baccino wanted to talk about the back to work plan and the claimant said that her work stressors had not been addressed. Ms Baccino again asked the claimant if she had completed the stress risk assessment. The claimant had not. Ms Baccino offered to provide them again.

77. Ms Baccino said that she was investigating the grievance but had been hindered by the fact that she had not been allowed access to the claimant's Occupational Health reports. The claimant clarified that she had allowed BB to have sight of the reports. Ms Baccino also gave an update on progress in the grievance hearing that it should be completed by 17 August but that there had been delays because she had been unable to interview Rob Grundy as he was on leave. Otherwise, Ms Baccino had interviewed all of the other witnesses that she was planning to interview.

78. Ms Baccino said there would be a grievance meeting. The claimant asked if Mr Clarke could attend and Mr Clarke said that if he was not allowed to attend it could be seen as an act of disability discrimination.

79. On 9 August 2018 Ms Baccino wrote to the claimant and invited her to a grievance meeting at 2.00pm on 17 August 2018. She addressed the point about who the claimant could bring with her by saying:

*"In accordance with the fairness at work grievance policy and procedure you are welcome to be accompanied by members of staff association, trade union, support network or colleague of Merseyside policy. I would be grateful if you could confirm your attendance at this meeting by writing to the address."*

Claimant declines invitation to grievance outcome meeting

80. The claimant replied by email on 13 August 2018, saying:

*"I have to say I'm surprised and disappointed at your request that I attend a grievance hearing when asked for the matter to be dealt with by way of correspondence as I am too upset to attend such a hearing and this has added greatly to my stress, particularly as you continue to refuse my reasonable adjustment request to bring the person of my choice if I did feel able to attend. I therefore request that you provide me with the outcome of my grievance as soon as possible and to communicate in the future by either post or email and not by text.*

*For the record I feel unable to attend any grievance hearing, even should this matter go to an appeal, without the support of my choice, in the light of my mental impairment."*

Written grievance outcome

81. On 14 August 2018 Ms Baccino sent her grievance outcome report to the claimant. On the issue of the previous informal grievance launched on 19 February 2018 Ms Baccino concluded:

*“The evidence gathered by the adjudicator shows that during the February 2018 welfare visit Eileen Bennett was asked regarding the associated work-related stress and detail of those work-related stressors was not provided or shared during the welfare visit. Although colleagues’ names were stated, events and cause of the stressors were not. In addition both the stress risk assessment and wellbeing action plan had not been completed.”*

82. The grievance outcome was that there were no grounds for an apology or explanation for failing to address the grievance which the claimant says she had raised informally, verbally, on 19 February 2018.

83. In relation to the allegation that the claimant had been victimised for seeking reasonable adjustments of physical impairment and victimised for refusing to be bullied into becoming a fire marshall, Ms Baccino concluded that there were no grounds to confirm that Dave McGurk had victimised or bullied the claimant due to her raising her physical impairment or for refusing to become a fire marshall.

84. The grievance report covered the 22 December 2017 incident. The report found that there was evidence of a loud disagreement between the claimant and Dave McGurk which focussed on John Fleming. The report found that comments had been made by both the claimant and Mr McGurk, for example that Mr McGurk had said, stating rumours about JF and the claimant had accused Mr McGurk of colluding with JF in the office. The report concluded that both parties had been upset during the altercation. The report found that the claimant had refused to work with John Fleming. The report found that Dave McGurk had self-reported to his line manager Neil Thomas and agreed to arrange a meeting between JF, the claimant and himself to build relationships. The report found that Mr McGurk had also told Mr Thomas that he would return to the gatehouse and apologise. The report found that the claimant said that she had not received an apology.

85. The report acknowledges that the actions of Dave McGurk on 22 December 2017 were that he acted without the proper duty of care to his staff but the report found that this was an isolated incident and that Mr McGurk had already apologised to the two other officers involved. Ms Baccino did not reach a conclusion as to whether or not Mr McGurk had apologised to the claimant.

86. The sanction imposed on Mr McGurk was that he was to be provided with management advice regarding his conduct. Mediation was to be arranged between Dave McGurk and the claimant to resolve issues and improve the working relationship. Mediation was to be arranged between JF and the claimant to resolve issues and create a positive working relationship.

#### Grievance appeal lodged

87. The claimant was dissatisfied with the outcome and lodged an appeal on 22 August 2018. She emailed Ms Baccino saying:

*"I refer to your letter dated 14 August 2018 about the outcome of my grievance. I am not satisfied that this grievance is resolved and I will appeal. Details of the appeal to follow."*

88. The claimant provided a three page grounds of appeal document to Ms Baccino on 28 August 2018.

89. The claimant said that (1) Ms Baccino had ignored the fact that she had been aware that the claimant was aggrieved at Mr McGurk's conduct from the outset. The claimant says:

*"This was reinforced during various meetings/discussions and in my Occupational Health reports. My failure to submit a formal grievance does not negate your legal obligation to deal with my informal grievance. Consequently, you have clearly failed to address my informal grievance. This has resulted in the matter going on for longer than it should, causing me further stress and loss of income which in the circumstances I see as an unlawful deduction of wages."*

90. The claimant stated (2) :

*"You have ignored that I requested a change of chair in September 2017. Mr McGurk failed to take any action until November 2017. This exacerbated my physical impairment. You've ignored that Mr McGurk told me that I would need to provide a GP note which was clearly untrue."*

91. The grounds of appeal (3) provided detail of the 22 December 2017 incident and reiterated the claimant's position that Mr McGurk had failed to apologise to her and that Mr McGurk had been shouting at her.

92. The grounds of appeal included an argument that (4) the grievance had failed to consider the claimant's earlier statements or failed to explain why they had not been accepted or preferred to those of Mr McGurk.

93. The claimant said that she was (5) bemused at mediation proposals as she was unable on medical redeployment grounds to return to the formal role with her colleagues.

94. The claimant also raised the issue of (6) confidentiality of her Occupational Health report of 17 January 2018.

95. The claimant requested copies of all the evidence upon which grievance decision was based. The claimant requested that her friend Mr Clarke, a former magistrate, was allowed to accompany her at an appeal hearing by way of a reasonable adjustment for her mental impairment.

#### Welfare meeting

96. On 13 September 2018 the claimant attended a welfare meeting with Ms Baccino and Mr Clarke at Alder Hey coffee shop. Ms Baccino raised the issue of return to work and again offered the role at Eaton Road. The claimant told Ms Baccino that she had been granted medical redeployment and would not be returning to work

at the gatehouse. Ms Baccino asked the claimant when she would be fit for work and the claimant said she did not know. The claimant raised the grievance outcome, and Mr Baccino said that they should not talk about that at that meeting and it was a welfare meeting. Ms Baccino asked the claimant if she required any further support. The claimant said that she did not. They agreed that would be a further welfare visit in four weeks' time at the same venue.

#### Grievance appeal investigations underway

97. Ms Coates conducted the appeal. She contacted the claimant on 6 September 2018 because the claimant had been critical of the lack of transparency in the handling of the grievance. Ms Coates decided to reopen the matter and reinvestigate. She anticipated this would take an additional amount of time and therefore achieved the claimant's consent to an extension of the timescales and the grievance policy. She spoke to the relevant witnesses and obtained their consent to share her notes of her meetings with them with the claimant.

98. Ms Coates reconsidered the Fairness at Work policy and the rights to representation and decided to allow Mr Clarke to accompany the claimant to her grievance appeal hearing even though this fell outside of the policy. Ms Coates decided to depart from the policy so as to assist the claimant who was suffering from a mental impairment at the time. The meeting was arranged for 12 September.

99. Ms Coates re-interviewed everyone. She allowed Mr Clarke to attend and represent the claimant.

#### Appeal meeting with the claimant

100. The claimant met with Mr Clarke and Ms Coates on 12 September 2018 to clarify the matters in issue. Ms Coates confirmed the terms of her grievance appeal remit to the claimant and agreed with the claimant that she would consider the original grievance form including the claimant's responses to the questions, Ms Baccino's outcome report, relevant job description questionnaires and the claimant's terms and conditions of service, and it was agreed that she would speak with the following people: Belinda Baccino, Dave McGurk, Neil Thomas, Rod Grundy, Jeff Sheerin from GMB, Bob Plum, Andy Shiels, Mary Donnellan and Fiona Pennie.

101. Ms Coates conducted those meetings and prepared her report. She shared her findings with the claimant on 1 October 2018.

#### Appeal outcome

102. Ms Coates looked at the issue of (1) whether or not there was a grievance disclosed informally and verbally during the meeting on 19 February 2018. She concluded that there was not. She had spoken to Ms Donnellan, Ms Baccino and Ms Pennie and had looked at the claimant's account of the incident, and she concluded on balance that the claimant had not said enough to amount to a grievance. She concluded that the first time the claimant lodged a grievance was in the G1 form submitted on 21 May 2018. Ms Coates felt that (3) what Ms Baccino had done to address Mr McGurk's conduct was appropriate action in view of the incident of 22

December 2017 and she found that this had been properly communicated to the claimant at stage one.

103. In relation to the allegation of victimisation as a result of seeking adjustment (2), Ms Coates found this was unfounded. She could see the confusion had arisen as to the reason that Mr McGurk had requested a GP note. She concluded that he had done this so as to ensure that the correct chair was bought by way of consultation whereas the claimant had perceived this to be motivated by malice. Ms Coates found that there was no malice or victimisation.

104. In respect of the victimisation suffered by the claimant as a result of refusing to become a fire marshal, this was outside the grounds of appeal but part of the reinvestigation of the first grievance, Ms Coates found that there was a lack of information about this allegation. She found no corroborative evidence to support the allegation that Mr Thomas had told her that she had to stand outside the gate following the meeting. This allegation was unfounded.

105. Ms Coates looked in detail at the incident of 22 December and found that both the claimant and Mr McGurk had acted unprofessionally. It was unprofessional of the claimant to refuse to work with Mr Fleming and unprofessional of her to challenge her line manager about this, and that Mr McGurk had been unprofessional in reacting to the challenge by shouting. Ms Coates found that she was unable to make a definitive decision about whether or not Ms McGurk had apologised because his perception was that he had. The claimant's perception was that he had not. Ms Coates obtained firm assurance that he was willing to give an apology again.

106. Ms Coates presented her appeal outcome in a way that focussed on moving forward.

9 November email

107. Ms Baccino sent an email to the claimant. It said:

*Hello Eileen, How are you now feeling ? Can we please arrange a time to meet next week ? As we have not met since the 13<sup>th</sup> September 2018, can I please take this opportunity to remind you that as a Merseyside police staff member you have obligations to adhere to the attendance management policy and I draw your attention to the following points:..:*

- remain contactable during absence and maintain regular contact with managers. Contact must be either face to face or by telephone, text or email contact is not acceptable.*
- attend meetings with managers, during sickness absence and on return to work as required*

*I look forward to hearing from you*

*Kind regards*

*Belinda*

## Resignation

108. On 11 November 2018 the claimant resigned in an email to Ms Baccino giving one month's notice. The claimant said *I am resigning in the light of the way I have been treated since September 2017.*

109. The claimant brought her claim on 7 January 2019.

## **The Law**

110. The claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 95(1)(c) provides that an employee is dismissed by his employer if:

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

111. The principles behind such a “constructive dismissal” were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

112. The term of the contract upon which the claimant relies in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and approved a formulation which imposed an obligation that the employer shall not:

**“...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”**

113. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls said at page 611A:

**“The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.”**

114. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

**“12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying**

“damage” is “seriously”. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:

“... apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.”

13. Those last four words are again strong words. Too often we see in this Tribunal failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9

14. The test of what is repudiatory in contract has been expressed in different

at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was “conduct with which an employee could not be expected to put up”. In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

115. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the “last straw” which triggers the resignation. The decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35 demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978.

116. In 2020 Auerbach HHJ in the Employment Appeal Tribunal in **Williams v The Governing Body of Alderman Davies Church in Wales Primary School** applied **Omilaju** and **Kaur**:

“28. The starting point is that there will be a constructive dismissal, that is to say an dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 where a) there has been a fundamental breach of contract by the employer b) which the employee is entitled to treat as terminating the contract of employment and c) which has materially contributed to the employee’s decision to resign. As to the first element, the fundamental breach may be a breach of the Malik term. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively crosses the Malik threshold. As to the third element, the conduct amounting to a repudiatory breach does not have to be the only reason for resignation, or even the main reason, so long as it materially contributed to, or influenced the decision to resign.

30. If there has been conduct which crosses the Malik threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of *contributing* to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?

The answer comes at paragraph 34.

34. .. so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it, has not been lost and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent conduct has also contributed to the decision to resign. It would be true in such a case that *in point of time* it will be the later conduct that has “tipped” the employee into resigning; but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign..

117. A resignation in response to the employer’s conduct must be made in unambiguous words. The words can be informal or imperfect and can be taken at their face value without the need for analysis of the surrounding circumstances. Section 95(1)(c) provides that the employee must terminate the contract *by reason of* the employer’s conduct. The question is whether the repudiatory breach played a part in the dismissal. It need not be the sole factor but can be one of the factors relied on. If, however, there is an underlying or ulterior reason for the employee’s resignation, such that he or she would have left anyway irrespective of the employer’s conduct, then there has not been a constructive dismissal.

118. ACAS Code of Practice 1: Disciplinary and Grievance Procedures 2019 provides the following keys to handling grievances in the workplace

- let the employer know the nature of the grievance
- hold a meeting with the employee to discuss the grievance
- allow the employee to be accompanied at the meeting
- decide on appropriate action
- allow the employee to take the grievance further if not resolved
- In relation to deciding on appropriate action the code provides that a decision should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.

### **Applying the Law to the Facts**

119. I have used the issues from the list of issues as subheadings.

1.1 On 22 December 2017 did the claimant's line manager, Dave McGurk, breach the claimant's contract by putting his face close to the claimant's face and shouting at her?

120. There was factual agreement that there had been shouting on 22 December 2017. In the round I prefer the evidence of Mr McGurk about this incident to that of the claimant because his conduct at the time is consistent with his position at tribunal. He went straight to his line manager and reported himself. He told his line manager that he had shouted and he told him why. I accept his evidence that the claimant was also shouting.



121. It does not matter whether Mr McGurk and the claimant were sitting across a table or side by side, or he was “in her face” or a few feet apart. He acted unprofessionally in shouting at her, he accepted that and offered an apology.

122. This was a heated altercation, initiated by the claimant, who had gone in to challenge her line manager (she accused him of having colluded to get JF a job in the gatehouse) about something that she had heard (that JF was coming to work in the gatehouse) and to make it clear that she would not work with JF.

123. In looking at the incident in context and applying the law I asked myself was there anything that was likely to destroy or seriously damage the relationship of trust and confidence (breach the contract) in this incident. In the context of a police headquarters gatehouse and robust and long serving security staff, I find that the claimant does not establish that anything Mr McGurk did that day was likely to seriously damage or destroy the relationship of trust and confidence. It is a high test. There was no breach of contract.

1.2 The respondent breached the claimant's contract by failing to inform her that she should raise a grievance in respect of the incident on 22 December 2017.

124. The claimant had a welfare meeting with Mr Thomas on 28 December 2017 in December and spoke about the chair issue but not the shouting issue. I find it implausible that if Mr Thomas had been told about the shouting incident by the claimant at this meeting and the claimant wanting to bring a grievance about it, that he would not have provided her with the grievance procedure or directed her to it. He knew about the incident on the day it occurred because Mr McGurk had told him about it. If he had heard that the claimant was still concerned about it on 28 December 2017, or that she had not had the apology Mr McGurk had said he would give for it, then there is no reason to suggest he would not have acted on it. He gave the claimant stress risk assessment forms at that meeting.

125. Seen in context, Mr Thomas failing to inform her to bring a grievance, is not a breach of contract. The claimant was a forceful and resourceful lady, she went to her union on the day of the incident. She did not need Mr Thomas to tell her how to bring a grievance. She could have done that for herself at any point. She had told Mr McGurk that if she did have to work with JF she would bring a grievance about his treatment of her. She clearly knew of the existence of the grievance process. Her failure to bring a grievance about Mr McGurk shouting in December 2017 suggests that it was not the shouting itself that was troubling her but the prospect of having to work with JF.

126. Similarly, at occupational health meetings on 17 January 2018 and 15 February 2018 the claimant did not raise the shouting incident. On 17 January 2018, her first occupational health meeting, the claimant asked for redeployment. This corroborates the view that it was not the shouting incident that was concerning her but the prospect of having to work with JF in the gatehouse.

127. At the welfare meeting on 19 February 2018 meeting the claimant did say that there were issues with staff in the gatehouse but did not say enough for her words to put the respondent on notice of a grievance. She said there were stressors and she

named her colleagues but she did not say that it was stressful because of the 22 December incident. The claimant did not submit her grievance until 21 May 2018 and only gave detail of it when she answered Ms Baccino's 19 questions on 5 July 2018. She does not establish a breach of contract in Mr Thomas failing to inform her that she could bring a grievance .

128. The claimant suggested that the respondent ought to have known from her meeting with Ms Denner of OH on 26 April 2018 that she had already lodged a grievance. I reject that submission. I prefer the evidence of Ms Denner, even though it was not challenged in cross examination, because the form from that meeting is signed by the claimant, and because if Ms Denner discussed a grievance with the claimant, and achieved detail of the shouting incident which the claimant says caused her stress, then it is implausible that Ms Denner would not have recorded those details and the fact of the claimant feeling aggrieved, in her report. I also find it implausible to suggest that if this information had been given to Ms Denner she would not have acted on the claimant's complaints. Ms Denner showed in her report that she was someone who would take steps to achieve necessary outcomes in that she liaised with the wellbeing team to support the claimant in completing stress risk assessment forms. I find it implausible that if she had been told about the shouting incident and the claimant wanting to bring a grievance that she would not have obtained the claimant's consent and liaised with other colleagues in support of the claimant.

1.3 The respondent breached the claimant's contract by failing to vary the claimant's contract so as to entitle her to full pay during sickness absence for more than six months?

129. I accept the respondent's submission that the standard for breach of contract in relation to exercise of a discretion is a high test. I have had regard to the contract and the terms for exercise of the discretion and I saw the letter from Elaine Wilson set out above inviting the claimant to write and say if she thought she fell within the categories for exercise of the discretion. She did not write a letter. The respondent had told her the categories and circumstances in which it might exercise its discretion and invited her to write to put her case in those categories. She did not. Her complaint is that she did not get something that she did not ask for. If she didn't ask for it how can she say that the respondent's failure to exercise discretion in her favour seriously damages or destroys the relationship of trust and confidence between them. She cannot. The claimant does not establish a breach of contract.

130. The claimant submitted that the way the respondent treated her made her ill and that therefore she should not lose pay. Her argument was inviting me to look at what and who caused her to be off sick, rather than whether or not the failing to exercise a discretion in her favour amounted to a breach of contract. I understand her submission and her perception of a causal link but I reject her submission because (i) it is not the right question in law and (ii) if it had been, she would not have established that the shouting incident had caused her to be off. She formed an early view (based at the time on rumour only) that she would be required to work with JF. For reasons of her own this was not acceptable to the claimant and she went off sick and did not return to work. Her failure to complete SRA forms, share her stressors, communicate fully with her employer about what had happened, engage in mediation with JF, and her failure to agree a return to work and insistence on permanent medical

redeployment, together with not mentioning the shouting incident in the December and January meetings but asking for medical redeployment away from the gatehouse at the first OH meeting, all show that she was off sick because of her reaction to the prospect of having to work with JF, and not the shouting incident itself.

2. Did the respondent's grievance procedure have contractual effect?

131. During the course of the hearing it was accepted by the claimant that the procedure was not part of her contract. I did not have to determine this issue. If I had determined the issue, I would have found it did not. The policy outlines what the respondent might consider Best Practice, it is not contractually binding.

3.1 Did the respondent breach the claimant's contract in the manner in which it dealt with the claimant's grievance?

132. The claimant's first point is about whether or not the claimant lodged a grievance, verbally on 19 February 2018. The claimant said that she had told Belinda Baccino and Mary Donnellan on 19 February 2018 at a meeting at Alder Hey coffee shop, in the presence of her witness Fiona Pennie, about the incident on 22 December 2017. She said this amounted to her lodging a grievance. I found her evidence of the 19 February 2018 meeting less reliable than the respondent's witness evidence because:

- (1) it is not plausible to suggest that if the claimant told the respondent's witnesses at this time about the shouting incident that they would not have made a full note of the allegation that she made;
- (2) If the claimant had told the respondent about it so that she believed she had raised a grievance on 19 February 2018, that she would have done nothing in writing to chase up that grievance thereafter
- (3) the claimant is a forceful lady who had raised concerns about fire marshalling, raised the issue of her chair, gone in to see Mr McGurk about the rumour that JF was coming to work in the gatehouse, challenged her manager about colluding to get JF the job, went on to refuse to return to work at her place of work, to insist on medical redeployment, to suggest that medical redeployment had been agreed when it had not, to reject offers of a temporary alternate place of work, work with her doctor and OH to increase the scope of a phased return to work and has since gone on to allege age, disability and sex discrimination and accuse the respondent of "blatant lies". If she had raised the shouting incident there would have been no ambiguity and yet the claimant's witness Ms Pennie was unclear about the point. Ms Pennie could not be sure if it had been raised or not.

133. Further, I note that the claimant used different language each time she described the meeting so that her account was not consistent but alternated between saying that she had raised the incident and that Belinda Baccino had raised the incident. On page 194 of the bundle which is the claimant's own note of the meeting (not a contemporaneous note as it was made in July 2018) the claimant says that Belinda Baccino raised the incident, saying "I had had a little run-in with Dave". In oral evidence under cross examination the claimant said that she had raised the incident herself and that Belinda Baccino had replied, "yes, you had a little tiff with Dave". Later

in the same cross examination the claimant said that Belinda Baccino had said, “you had a little disagreement with Dave”. I make no criticism of her for that, as I have said there can be slippage when recounting events from a long time ago, and events which you have gone over in your mind many times. What I say is that the claimant herself was not sure who had raised the shouting incident on 19 February 2018.

134. The claimant admitted that she wished with hindsight that she had *fully recounted* what had happened in the Dave incident on 22 December 2017 to Belinda Baccino at the 19 February 2018 meeting. This admission that she had not *fully* recounted the event supports a view that it had not been raised. The claimant accepted that she did not use the words “bullying” or “grievance”, that she “assumed that they knew what had gone on and stupidly thought that because they knew what had gone on something should have happened”. The claimant could not say what she had said on that date. Mrs Pennie could not say. The respondent said she had not raised it. It was not in the respondent’s note. For those reasons I preferred the respondent’s evidence as to the content of the 19 February 2018 meeting.

135. I also preferred the respondent’s evidence because I found Ms Baccino credible when she described the meeting as a welfare meeting and said that she was there to offer support to the claimant and that in a welfare meeting it is for the claimant to raise things.

136. The respondent’s evidence was corroborated by Belinda Baccino’s note of the meeting at page 357 of the bundle. It also seems implausible to me that Belinda Baccino, faced with an employee who was off sick for stress, and in the context in which she was chasing that employee to complete stress risk assessment forms, and the context in which she was denied access to the Occupational Health report, would hear about the 22 December 2017 shouting incident from the claimant on 19 February 2018 and then not act on it.

137. The meeting on 19 February touched on tension at work with colleagues but centred largely on physical adjustment issues. That is corroborated by page 357. Belinda Baccino made notes in her diary that issues were with DM, JF and NT and issues surrounding work environment, chair and barrier button.

138. Ms Pennie’s notes of that meeting were made in conjunction with the claimant on 5 July 2018. Ms Pennie later stated to Ms Coates that she could not recollect the shouting issue having been raised. I attach little weight to Ms Pennie’s notes and more weight to the direct oral evidence of Ms Coates that Ms Pennie had told her that she could not be sure, could not recollect the shouting incident having been raised.

139. The claimant also submitted that Ms Baccino should not have investigated the part of the grievance that related to whether or not the content of the 19 February meeting was sufficient to amount to the lodging of an informal verbal grievance. That is because she was present at that meeting. It was far from best practice to have Ms Baccino investigate that point. However, even if the procedure had been contractual in effect and notwithstanding the apparent bias of Ms Baccino self investigating in this limited regard, I find that would not have been sufficient amount to a breach of contract because there were other people present at that meeting and because Ms Baccino looked at the claimant’s grievance on this point, the response to the 19 questions on

this point, spoke to Ms Donnellan on this point and looked at Ms Pennie's notes on this point. It was not simply her word against the claimant's. Ms Baccino told me that she reported her own concern at being asked to investigate a meeting at which she had been present and was instructed to continue. It is a shame that her employer did not have regard to her legitimate concern on this point. Even if there had been a breach of contract here the claimant went on beyond this date to appeal and to request more time for appeal so that she would have affirmed any breach on this point.

140. The Force grievance policy was available to the claimant at all times. I do not accept her oral evidence that she endeavoured to obtain details on how to raise a formal grievance between 8 May and 14 May 2018. I reject that evidence because:

- (1) The claimant had threatened raising a grievance on 22 December 2017 against JF so had shown herself to be aware of the grievance process
- (2) On 22 December 2017 immediately after shouting incident the claimant had gone straight to her union for support
- (3) In November 2017 the claimant had written about her concerns in relation to security and fire marshalling to her line manager.

141. I conclude that if she had been wanting to bring a grievance at that time that she was a capable and professional person, was undoubtedly suffering from stress, but who was still capable either with or without support from the wellbeing team of completing the stress risk assessment forms and writing in the box that said "causes of stress" simple words such as "Dave McGurk shouting at me on 22 December 2017" or "John Fleming coming to work in the gatehouse". The claimant did neither of these things because at that time the shouting incident was not the reason that she was refusing to go back to work. Further, if the claimant had been wanting to bring a grievance at that time she could have written a simple email to Ms Baccino or any member of the HR Department, any Occupational Health professional she had seen or to her union and sought their support. Again, I find that she did not do those things because it was not the shouting incident that was preventing her return to work.

3.1 *In respect of the time taken to determine the claimant's grievance (being 31 May 2018 until 14 October 2018)*

142. This relates to the claimant's submission that there was delay. Ms Baccino had to arranged to interview witnesses, compile notes, reach a decision, attempt to meet with the claimant to share the decision and then finally communicate the decision in writing. During that period she was separately meeting with the claimant in her role as welfare manager. She had expressed her view that there would need to be the extension of time under the policy and she gave the claimant an update as to her progress at the welfare meeting at the end of July. It was the claimant's insistence that the matter be dealt with in writing and I accept that added time.

143. In any event I do not find that taking from 31 May 2018 until 14 October 2018 to complete the first stage grievance which had wide-ranging allegations involving a number of witnesses was an excessive amount of time and was not so excessive as to amount to a breach of contract.

3.2 by failing to permit the claimant to be accompanied by Mr Clarke, on the basis that he was neither a colleague of the claimant nor a trade union representative.

144. Ms Baccino was applying the grievance policy when she refused to allow Mr Clarke to attend. Mrs Coates later exercised a discretion to allow Mr Clarke to attend but there was nothing requiring her or Ms Baccino to do that. There was no breach of contract.

3.3 by refusing to provide to the claimant the statements obtained in the course of the grievance investigation.

145. Much has been made by Mr Clarke of the fact that the claimant did not get to see the notes of the meetings that Ms Baccino had had with the witnesses during the course of her grievance investigation. I found nothing in the grievance policy that requires her to provide them. She gave a legitimate reason for not providing them in that they were not statements, were not verbatim notes of the meetings and that she had not obtained the consent of the individuals during this meeting to be able to share their content. I accept Mr Jones' submission the first stage grievance investigation is not a criminal trial and not even a disciplinary investigation in which there might have been a legitimate request that the person who was being dismissed should see the case against them before a decision is reached – that is not the scenario here.

146. The claimant lodged a grievance in writing. The respondent sought detail about the grievance from the claimant and sought to identify people who might have relevant information to share. Ms Baccino spoke with those people, recorded the content of those meetings, formed a view on the grievance and provided a grievance outcome which informed the claimant of the process that had been undertaken, the evidence she had obtained and the decision she had reached.

147. At appeal Ms Coates decided not to rely on those witness notes made by Ms Baccino but to reinterview everyone herself, which she did. Ms Coates did not share the first stage interview notes nor her own notes of interviews at appeal stage with the claimant.

148. I find nothing in the refusal to provide the first stage grievance witness interview notes to the claimant, either at the first stage or on appeal, that amounts to a breach of contract. The ACAS Code of Practice on Discipline and Grievance has a section called Keys to Handling Grievances in the Workplace. There is nothing there requiring the respondent to share its grievance interview notes with the claimant. The respondent was entitled within its policy to investigate the grievance. It gave a detailed outcome at each stage showing how the outcome had been arrived at. Its investigation of the grievance and decision not to disclose the notes of the grievance investigatory interviews did not amount to conduct that was likely to destroy or seriously damage the relationship of trust and confidence.

3.4 Preferring the evidence of Mr McGurk over that of the claimant.

149. This is essentially an allegation that the grievance outcome was so perverse that no reasonable employer could have reached it and that therefore it amounts to a breach of contract. I cannot see that Ms Baccino did prefer the evidence of Mr McGurk

to that of the claimant. On the essential points of the incident of 22 December 2017, there was agreement. The claimant said Mr McGurk shouted at her, he agreed that he did. His conduct in doing so was inappropriate. The detail as to whether or not they were seated beside each other or across from each other, whether or not he was in her face and screaming at her, whether she accused him of colluding or not, whether he swore or not, whether she shouted or not, was peripheral.

150. The only point on which it might be central that the respondent preferred the evidence of Mr McGurk to that of the claimant might be on the apology point. On this point Ms Baccino found that she could not reach a conclusion as it was his word against her's. Mr McGurk thought that he had apologised to her, the claimant said he had not. The respondent did not prefer the evidence of Mr McGurk over the claimant. It acknowledged that each of them had a genuinely held belief that there had or had not been an apology. There was no witness, no corroborating documentation, just two strongly held views.

151. I find that Mr McGurk did not apologise. Mr McGurk had told his line manager that he would apologise. He should have gone straight back to the claimant that day and asked to talk to her and given her his full and clear apology. He might also have committed it to writing and with her permission copied it to Mr Thomas. He did not. The question for me is whether Ms Baccino not reaching an outcome on this point amounted to a breach of contract. I find there was no breach of contract in the outcome that Ms Baccino reached.

### 3.5 withdrawn

### 3.6 by seeking a conciliatory outcome of the claimant's grievance appeal and/or by failing to resolve the claimant's grievance appeal.

152. The claimant argued that in seeking to conciliate the respondent was failing to properly investigate her grievance appeal and that the outcome was predetermined. She said this amounted to a breach of contract. The respondent submitted that its procedures for grievance handling embed a conciliatory approach. It seeks to have grievances resolved at the earliest possible stage as informally as possible, and at as low a management level as possible.

153. I find it was the claimant who took up an intransigent position that she would not engage in mediation with either Mr Fleming or Mr McGurk. The respondent could not insist that she did as it is a central tenet of successful conciliation that the parties consent to it. The respondent did not impose conciliation on her. It was offered and rejected. The respondent had tried to get the claimant back to work. It was seeking to restore positive working relationships so that she could recover and return to work.

154. The standard in law is that the respondent must have done something to seriously damage or destroy the relationship of trust between the parties. Insofar as the grievance policy and the efforts made by the respondent in welfare meetings, Occupational Health meetings, offers of the provision of support to complete stress risk assessment forms and the wellbeing action plan and the return to work plan are concerned, it was doing all it could to reinforce and improve the relationship between the parties. Conciliation, mediation were legitimated attempts to do that. It must have

been frustrating for the respondent to have so little engagement in that process from the claimant. There was no breach of contract.

3.7 by refusing to provide to the claimant at the appeal the statements obtained in the course of the first stage grievance investigation.

155. I have dealt with this point above.

3.8 by failing to investigate the claimant's grievance appeal and/or by failing properly to question witnesses when investigating the claimant's grievance appeal.

156. The suggestion here is that the witnesses were not questioned properly. The claimant did not see the first stage interview notes nor Ms Coates notes on reinvestigation at appeal. I have found that there was nothing to compel the respondent to share the investigatory interview notes and I find no breach of contract in them failing to do so. I accept the respondent's submission that this was not a disciplinary process where it would be an essential part of the fairness of a dismissal that a claimant knew the case against her.

157. I have had regard to the first stage grievance, the grounds of appeal documents, the statements taken at appeal stage, the notes of the first stage interview meetings, the claimant's timeline and the claimant's List of Issues which we agreed put "meat on the bones" of the allegations that she makes. Ms Coates reinvestigated the grievance. She went beyond the grounds of appeal in her questioning to look at everything the claimant had raised at first stage and at appeal. In effect, she reopened each of the issues the claimant complained about. She reinterviewed relevant witnesses and prepared a written outcome. I can find no breach of contract by the employer in the way in which the grievance appeal was handled.

3.9 by telling the claimant during the grievance process that she was obliged to keep in touch with the respondent.

158. This was a legitimate requirement of the contract of employment and again part of the respondent's efforts to maintain and improve working relationships. The claimant was resistant to contact and found the reminder that she was required to keep in touch upsetting. It would have been remiss of the respondent not to make efforts to keep in touch. The respondent is to be commended in this case for the number and regularity of the welfare meetings that took place, and for the efforts that it went to to find alternate roles, to agree with the claimant, her GP and Occupational Health an appropriate phased return to work pattern, to adjust that in response to feedback from the claimant's GP and Occupational Health and to keep that offer open throughout the claimant's sickness absence period. The respondent was not acting in a way that would seriously damage or destroy the relationship of trust nor signalling that it thought the relationship had come to an end, quite the contrary. It was trying to get her back to work, if not at the gatehouse then at Eaton Road or elsewhere.

3.10 The email from Belinda Baccino sent to the claimant on 9 November 2018 contributed something to the preceding breaches (if preceding breaches are proven).



159. The email of 9 November 2018 is entirely innocuous. I have looked at it in context. It is a routine, friendly communication from the person who has been managing the claimant's absence and is well-versed with the history of the case. It is from someone who has been involved throughout the process to the claimant who had:

- (1) taken up an intransigent position about working with JF;
- (2) refused mediation with JF and Dave McGurk;
- (3) failed to respond to stress risk assessment forms;
- (4) failed to provide detail of what was causing her stress at numerous Occupational Health and welfare meetings;
- (5) made aggressive assertions about discrimination and litigation from as early as May 2018;
- (6) required that she should be communicated with in writing only;
- (7) refused to attend a grievance outcome meeting;
- (8) required provision be made for her outside of policy so that Mr Clarke could attend.

160. In those circumstances, I commend the respondent on its ongoing efforts to keep in touch with the claimant and on the kindly tone of its letters. The 9 November 2018 email contained nothing new, the claimant had been reminded of those provisions of the attendance management policy previously and it is part of a chain of communications between the claimant and Ms Baccino, some in letter form by email and some in text message form throughout all of which Ms Baccino had remained polite and kind.

161. I find no breach of contract in the 9 November email either alone or taken together with all that had gone before.

1. *If proven, did the breaches collectively amount to a repudiatory breach of contract such that the claimant was entitled to resign in response to the said breaches (the last straw being the email from Belinda Baccino which is proven)?*

162. No breach has been established, either collectively nor individually, so the claimant's complaint must fail. I remind myself that in establishing a breach of contract the test has been an objective one. There is nothing in this case, looked at objectively, that the respondent has done that can be said to seriously destroy or damage the relationship of trust between the parties.

2. *Did the claimant in fact resign in response to a series of breaches which collectively amounted to a repudiatory breach of contract?*

163. If the claimant had established a breach of contract, either individually or collectively, I would have gone on to consider what caused the claimant to resign. I looked carefully at the timeline of events provided by the claimant and I mapped this against documents in the bundle and the witness evidence from the respondent. I am not satisfied in this case that the claimant resigned in response to all or any of the alleged breaches.

164. I noted that she did not lodge a grievance until May 2018 when she was about to go on to half pay and was facing mounting pressure to accept a return to work in the role at Eaton Road. In around May 2018 when Mr Clarke came on board there were threats of litigation. I would have found that the claimant was increasingly unlikely to return to work from May 2018 onwards and that this is evidenced by her requests to have everything done in writing and her refusal to attend a grievance outcome meeting, and her requests for more time during the grievance appeal.

165. If I had had to determine this point I would have found that the claimant resigned because she believed that she would have to work with JF and she refused to do so and not because of any or all of the allegations above.

### **Conclusion**

166. For the above reasons the complaint of constructive unfair dismissal fails.

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Employment Judge Aspinall

Date: 22 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
Date: 28 April 2022

FOR THE TRIBUNAL OFFICE

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