THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Ms MA Stevenson
Respondent: Citizens Advice County Durham

Heard at: Newcastle Hearing Centre **On:** 5 to 12 August 2022 inclusive

Before: Employment Judge Morris
Members: Mr G Gallagher; Mr R Dobson

Representation:
Claimant: In person
Respondent: Miss S Bowen of counsel

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person and gave evidence. She also submitted a statement in support from GR, who was unable to attend the hearing to give evidence.

3. The respondent was represented by Ms S Bowen of counsel who called the following present or former employees of the respondent to give evidence on its behalf: Ms JM Arragon, Head of Operations; Mr SM Dexter, former Chief Executive Officer. She also submitted a statement from TRM who was similarly unable to attend the hearing.

4. The evidence in chief of or on behalf of the parties was given by way of written witness statements. The Tribunal also had before it a bundle of agreed documents comprising some 472 pages. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in the document bundle.

The claimant's complaints

5. The claimant's complaints were considered at length at a preliminary hearing held on 10 March 2022 (129). They are set out in detail at paragraph 8 of the case summary arising from that hearing and, that being a matter of record, do not need to be repeated here. In essence, they are as follows:

5.1 A complaint under Section 111 of the Employment Rights Act 1996 ("the 1996 Act") that she was dismissed by the respondent (in that she terminated her contract of employment in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct as provided for in Section 95(1)(c) of that Act) and that dismissal was unfair contrary to Section 94 of that Act, by reference to Section 98 of that Act. More specifically, by doing the things recorded in paragraph 8.2 of that case summary the respondent breach the term of mutual trust and confidence that is implied into all contracts of employment thus entitling her to resign and claim to have been constructively dismissed.

5.2 A complaint under section 120 of the Equality Act 2010 ("2010 Act") that, as is provided for in section 21 of that Act, she being a disabled person due to a hearing impairment, the respondent discriminated against her in that it failed to comply with its duty under section 20 of that Act 2010 to make adjustments in accordance with the first and third requirements as provided for in sections 20(3) and (5) of that Act respectively. More specifically:

5.2.1 The respondent had a practice of not allowing family members to attend grievance hearings, which put her at a substantial disadvantage and it should have allowed her to have a family member present.

5.2.2 Allowing a family member to be present at grievance meeting amounted to the provision of an auxiliary aid and, being hearing impaired, she would be put at a substantial disadvantage if that was not provided, and the respondent had a duty to take reasonable steps to ensure that she had a family member present.

6. The respondent's response was as follows:

6.1 It denied that it had breached the claimant's contract of employment entitling her to resign and, therefore, denied that she had been dismissed.

6.2 Although initially not accepting that the claimant was a disabled person at the material times, upon receipt of further information it had ultimately accepted that by reason of a hearing impairment the claimant was a disabled person (as defined in section 6 of the 2010 Act) and that it had knowledge of that disability from 22 January 2020 but denied that it had knowledge of substantial disadvantage or that it had failed to provide reasonable adjustments.

The issues

7. The issues to be determined at this hearing can be drawn from paragraph 8 of the case summary referred to above. In that context, the parties had agreed a list of issues, which is attached as the Appendix to these Reasons. Although the list in that Appendix is said to be the "Respondent's List of Issues", at the commencement of the hearing the claimant confirmed that she agreed with that list. Additionally, Ms Bowen asked that the issue of a "Polkey reduction" should be added to the issues listed in relation to remedy for constructive dismissal, which was agreed.

Consideration and findings of fact

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law, including that referred to by Ms Bowen, (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by it on the balance of probabilities.

8.1 The respondent is a registered charity providing confidential information and advice to people with a range of problems. It is a large employer with some 135 employees and other volunteers, and has fairly significant resources including an in-house qualified HR Officer.

8.2 The claimant was employed from 6 June 2016 as Training Coordinator working in the respondent's DurhamWorks project. That is a project to provide training to young people aged 16 to 24 years to develop their skills and opportunities for employment, the majority of whom presented with various physical and mental health issues.

8.3 Those employed in the project comprised a single team managed initially by SW and latterly by TRM. The team was based at two sites in Bishop Auckland and Peterlee. The claimant's principal function was to coordinate the training programme and manage the training side of the team. The other side of the team was not directly involved in training and included a Network Officer. At the time relevant to these proceedings that officer was EG who had joined the project in 2018. She was primarily based at Bishop Auckland while the claimant was primarily based at Peterlee although there was regular interchange, for example at team meetings.

8.4 For much of the claimant's employment no issues of any significance arose; indeed she performed the responsibilities of her post to the respondent's satisfaction and was well-regarded. Unfortunately, some friction developed between the claimant and EG arising from what the claimant saw as EG seeking to be involved in the training aspects of the team's work.

8.5 Things came to a head when EG sent the claimant an email on 31 July 2019 (231). The claimant considered the content of that email to be insulting, disrespectful and hurtful. Worse, EG had sent copies of her email to the other members of the team and sent a blind copy of it to the

manager, which the claimant described as being humiliating. She also considered that EG's email had fractured the team and caused division within it.

8.6 As a consequence, the claimant lodged a grievance on 31 July 2019 (232). The claimant referred to past emails that were negative, rude and disrespectful but her focus was on the email of 31 July. The grievance concluded, "At this moment in time, I feel I no longer trust and wish to work alongside" EG.

8.7 In accordance with the respondent's grievance procedure, the claimant's grievance was first considered at an informal stage; first in a meeting with BR on 12 August 2019 (233) and then in a meeting with LF on 10 September 2019 with BR in attendance (254).

8.8 At that second meeting the claimant made clear that she was only concerned with the email of 31 July. She stated that the earlier emails provided background but she was not concerned about that and she requested that it be taken out; "what I'm interested in is the email dated 31st July 2019. I think it's not professional ….". Towards the end of that meeting the claimant restated that she did not want to work with a person she could not trust and, when asked how she thought the matter could be resolved, she replied, "I don't think you can resolve it, I don't want mediation, I don't want her to email me I don't want to have any other conversation". When asked whether she felt she could go forward, she replied, "I don't want to talk to her other than if I have to. I want to progress to the next stage, I don't want to go forward with her. I can't see a way back I will always act in a professional way. But after that email how can Citizens Advice County Durham allow this to happen and think that it is okay. I want her to know that her actions have formal consequences." (262)

8.9 The informal part of the claimant's grievance was concluded on 16 September 2019 (265). The Tribunal is satisfied that LF's response was measured and appropriate. It included the following: understanding the claimant's position; it was inappropriate for the team to be sent copies of the email of 31 July; the claimant's desired outcome was unreasonable; the claimant's comments were respected and regret was expressed about how she felt; her comments would be taken forward as the respondent considered appropriate; mediation was recommended and its aim was explained.

8.10 The claimant rejected this response explaining that she felt it was a witch-hunt and immediately handed over a formal grievance letter (267) dated that day, 16 September 2019, which she had prepared in advance of the meeting stating that she wanted her grievance to be taken forward formally.

8.11 The claimant's letter confirmed that the issues concerned began with the email of 31 July 2019, which she said had impacted on her health, and the thought of being in the same room at EG made her feel sick. She

contended, amongst other things, that her contract of employment, the respondent's grievance procedure, the Employment Rights Act 1996, the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations had all been breached, and explained that the Employment Rights Act allowed employees to claim unfair dismissal if they are forced to leave their job. She concluded that she would like to address the problem internally, "without the need for any legal action".

8.12 BR responded to the claimant on 18 September (269) inviting her to a grievance meeting to be held on 19 September with DK.

8.13 The note of that meeting (271) is lengthy and does not need to be set out in these Reasons. Key points included the following:

8.13.1 The claimant confirmed that the email of 31 July 2019 was the beginning of her issue with EG because, although there had been problems previously, they had been in a one-to-one setting and she had been able to handle them.

8.13.2 Her objective was to go back to the way things had been before 31 July and have her working environment restored to the safe, professional, happy workplace.

8.13.3 If she had sent the email she would have expected to be walked off the site and would have understood why. In cross examination, the claimant confirmed that, by that, she meant dismissed.

8.14 There was a further meeting between the claimant and DK on 26 September 2019 at which DK gave the claimant her decision (282), which she confirmed in a letter of 26 September 2019 (294). Importantly, DK upheld all of the claimant's grievances. Her letter concluded as follows:

> "The email you received from [EG] constitutes unacceptable behaviour and we will take action we deem appropriate with the staff member concerned to ensure that they have a clear understanding of the Dignity at Work Policy and behaviours expected of them.
>
> The informal stage of the grievance process was not carried out in a timely manner and no reference was given to the dignity at work policy during proceedings. As a result, we will ensure that at an upcoming Citizens Advice County Durham Leadership Forum, a workshop will take place on the Dignity at Work Place policy, which leaders will then cascade down to all staff within the organisation to ensure that all staff members understand the expectations upon them when it comes to Dignity at Work. In addition, we will review our Grievance Policy to identify if changes are required to the policy around timeliness of the informal stage of the grievance process and will ensure that all leaders within Citizens Advice County Durham follow the process outlined with the policy." (297)

8.15 In connection with the first of these conclusions, at their first meeting, DK had sought to assure the claimant that matters would be pursued with EG (and others), that their manager would be keeping a close eye on things and she could assure the claimant 100% that the Dignity at Work Policy would be addressed (284).

8.16 DK offered the claimant a right of appeal, which she did not exercise.

8.17 As she had promised the claimant, DK met EG on 1 October 2019 (298) and made very clear to her what her decision had been on the claimant's grievance and why, and that EG was to familiarise herself with the Dignity at Work Policy, which she confirmed she would and would adhere to it in future.

8.18 On 7 October 2019, TRM met the claimant to agree measures that would be put in place to address her grievances and the outcome. These were as follows:

8.18.1 Creating space between the claimant and EG: i.e. they would work from different sites.

8.18.2 Create a team charter.

8.18.3 Create an agreed communication policy for the team.

8.18.4 Deliver a learning session relating to the Dignity at Work Policy.

8.18.5 TRM would receive and forward any emails from EG to the claimant for four weeks and then review this arrangement. This was to ensure that the emails were appropriate. She would not review emails from the claimant to EG.

8.19 The claimant confirmed in evidence that each of these measures was put in place. As to the monitoring of EG's emails to the claimant, in the review period TRM only identified one email, which contained an exclamation mark, which she thought was open to interpretation. She raised this with EG and the email was not sent. This would suggest that the monitoring arrangement was effective.

8.20 After the review period, this monitoring measure was amended so that, in future, TRM would only be copied into emails between the claimant and EG for a further four weeks. It would appear that these measures were successful in that no further issues were raised by the claimant until 13 January 2020 when she asked to speak to TRM regarding EG's behaviour towards her. Furthermore, the claimant did not suggest in her appeal in respect of her second grievance that she went on to raise that the measures had not been successful.

8.21 The meeting the claimant had requested was arranged for 22 January 2020. In advance of that meeting TRM obtained advice from BR (303). During the Tribunal hearing the claimant seemed to suggest that there was something sinister in TRM obtaining that advice in advance of their

meeting but the Tribunal is satisfied that it is perfectly normal, indeed often right, for a manager to obtain advice from HR on an employment situation and the possible options that might arise.

8.22 At their meeting the claimant presented TRM with a document headed "Informal Grievance Supporting Evidence" (305) in which she set out five incidents commencing 7 January 2020. These were considered at the meeting as is recorded in the notes produced by TRM (312). In summary, it was confirmed that all the measures agreed in October had been put in place and TRM was satisfied that EG was working within the dignity at work policy. TRM made the point that DK had upheld the claimant's grievance on the grounds that it was unacceptable behaviour, which was not the same as bullying and harassment as the claimant had suggested. TRM informed the claimant that as she was still unhappy (and having received some further feedback from the team) she was planning certain steps to combat the workplace culture as follows:

8.22.1 "I am planning 1:1's with all Durhamworks staff to deliver a consistent message on the need to change the culture of the Durham Works team.

8.22.2 Citizens advice County Durham will be hosting a Managing Conflict in the Workplace training. I expect Durhamworks employees to be on this training program.

8.22.3 Mediation is still on offer.

8.22.4 Counselling is still on offer.

8.22.5 I will continue to monitor emails between you and [*EG*] for a further 4 weeks.

8.22.6 I will speak to [*EG*] in relation to the conversation concerning [*NC*].

8.22.7 I will ensure one person within the team will take quick bullet points of key information discussed within the huddles. The bullet points will then be cascade via email to everyone, to make sure information isn't forgotten or duplicated." (318)

8.23 Once more, these measures were carried out.

8.24 Also on 22 January, the claimant informed TRM and others that she had had hearing aids fitted. TRM informed BR of this on 23 January adding that she had asked the claimant to let her know if the respondent needed to make any reasonable adjustments (310). There is no evidence before the Tribunal to suggest that the claimant ever pursued this suggestion.

8.25 The claimant formalised this second grievance by writing to Ms Arragon on 3 February 2020 (319). She repeated, "From Jan 07th 2020 to present, the undermining, disrespectful and unprofessional emails from [*EG*] have escalated to a point I now find intolerable." Having referred to certain

statutes and regulations the claimant summarised her points of grievance as follows:

> "Bullying and Harassment by work colleague [*EG*]
>
> Health and Safety: My health and safety has declined since all of the Bullying and harassment started
>
> Breach of Policies and Procedures
>
> Breach of mutual trust and confidence by both the CACD Organisation and [*TRM*] DurhamWorks Service Manager."

8.26 The claimant added what she said was a very important point of detail: "I am the recipient of the Bullying and Harassment and not the perpetrator, a point I feel has been seriously overlooked" and stated, "I would like us to address the problem internally, without the need for any legal action." (320)

8.27 Ms Arragon wrote to the claimant on 7 February 2020 (322) to invite her to a grievance meeting on 10 February 2020. She informed the claimant of her right to be accompanied and that if either the claimant or her representative was unable to attend, an alternate time and date would be arranged.

8.28 The meeting went ahead on 10 February (324). BR attended as note-taker and the claimant had requested GR to accompany her. Neither before nor at the meeting did the claimant suggest that she would have preferred a different person to accompany her; for example a family member. The claimant had previously submitted what she referred to as a pack of information and more than once said that she did not wish to discuss matters further. She did make it clear, however, that she did not want to work with [*EG*] or receive emails from her and wanted zero contact: "I want no contact whatsoever." She said that she wanted serious action to be taken by the respondent failing which, to stop the bullying and harassment, she would pursue matters through the criminal courts. Ms Arragon again raised the offer of counselling and asked if the claimant wanted any reasonable adjustments or time off, all of which she declined including that (having named TRM in her grievance) she did not require any reasonable adjustments to be made in respect of their relationship at the moment. To avoid causing the claimant further distress, Ms Arragon adjourned the meeting. The Tribunal accepts that the letter of 11 February 2020 (330) provides a good summary of what had occurred.

8.29 As the meeting had been cut short, Ms Arragon considered that she had been unable to understand fully the claimant's grievance and the claimant had not had the opportunity fully to state her case. Ms Arragon therefore enclosed with her letter 10 questions (332), which she hoped would address these deficiencies.

8.30 The claimant replied on 14 February 2020 (342) attached to which were her detailed responses to Ms Arragon's 10 questions (344). A point that becomes of some significance is that she stated that the reasonable adjustments she would like to request under the Equality Act was to bring into meetings "A person, work colleague or outside person who supports me by listening and taking notes and telling me anything I may not have heard", adding that without such support, "it puts me at a great disadvantage to other work colleagues who have good hearing. I believe this to be a reasonable adjustment and no added cost to the company" (348).

8.31 In this second grievance the claimant raised a number of concerns; those which she then took forward as issues in these proceedings were limited as follows:

8.31.1 On 4 November 2019 the claimant identified that the agenda for a team meeting on 6 November included an item to discuss the training programme start dates and EG was named in that regard. The claimant considered that this undermined her position as Training Coordinator, and was part of the reason that led to her first grievance. She raised the matter of this agenda with TRM by email and in discussion. The Tribunal notes that this matter only emerged as an issue in the claimant's discussions with Ms Arragon at the grievance meeting on 10 February; the claimant had not referred to it in in the informal stage of her second grievance or, indeed, in her appeal letter.

8.31.2 On 13 January 2020, a new employee, NC, arrived in the office. As part of her induction, she spoke with the claimant for about one hour and then moved on to speak with EG. Two team members (GR and CW) then approached the claimant who reported that NC had told them that she sensed tension between the claimant and EG; and EG had told NC that certain information provided to her by the claimant was "not right". The claimant considered that to be totally unacceptable, disrespectful and undermined her credibility. She said she had felt physically sick and could not concentrate on her work.

8.31.3 EG circulated minutes of a team meeting that took place on 15 January 2020 in which the claimant contends she was misrepresented as it was wrongly implied that the claimant wanted to restrict the window of opportunity for participants to come in for an initial meeting, and this undermined her.

8.32 These and other matters were investigated by Ms Arragon in what the Tribunal considers was a very thorough investigation, which included interviewing all relevant members of the team; the notes of that investigation running to 83 pages. In that investigation, Ms Arragon explored matters generally and specifically the above three issues:

8.32.1 As to the first matter of the agenda, the information provided by TRM included that given EG's responsibilities it was appropriate for her to raise the question of the training programme, which is why TRM had

circulated the agenda containing that item. The claimant had then said that she was not happy with this and wanted the item removed from the agenda because the plan was not ready. TRM had therefore complied with the claimant's request and removed the item. She said she would explain why to EG and pick it up with the claimant in her one-to-one meetings so as to ensure that she met the deadline (351).

8.32.2 Ms Arragon pursued the NC issue with GR (406) and CW (419) both of whom had confirmed that NC had told them that EG had said that something the claimant had told NC was not right but neither could say what that something was. TRM told Ms Arragon that NC had resigned from her post because she been offered a permanent job elsewhere and had not made any negative comments about the team. She also told Ms Arragon that, the claimant having raised this issue with her and TRM having received an email from CW about this (421), she had spoken with EG who had said that she had not said anything to contradict the claimant and she had clarified the process for submitting expenses (361).

8.32.3 Regarding the final matter of the minutes of the meeting on 15 January, TRM informed Ms Arragon that the team had agreed a referral process. It included that EG would make the appointments for the whole team for new learners. The claimant had then said it was not working for her and she wanted every referral to come through her. She would be copied into all referrals and meet the new participants between 9 o'clock and 10 o'clock or 3 o'clock and 4 o'clock. Minutes to this effect were produced and circulated; it seems by EG, which the Tribunal considers would be appropriate as the matter of referrals came within her role. TRM considered this arrangement to be administratively burdensome but everyone had agreed to it except EG as it would be seen to be disempowering her. TRM told Ms Arragon that she thought that it was "absolutely reasonable" for EG to challenge the change in process as it was part of her role (365). Ms Arragon received similar information from other team members; for example, LL (373) and DP (386). LL added that she thought that the claimant was "interfering with [*EG's*] job".

8.33 Having considered the product of her investigation, Ms Arragon wrote to the claimant a grievance outcome letter dated 20 February 2020 (435). She identified the main points of the claimant's grievance as being:

"1. Bullying and Harassment by your work colleague, [*EG*].

2. Health and Safety: Your health and safety has declined since all of the bullying and harassment started.

3. Breach of Policies and Procedures (specifically CACD Dignity at work policy, Grievance Procedure and Health and Safety Policy)

4. Breach of mutual trust and confidence by both the CACD organisation and [*TRM*], DurhamWorks Service Manager."

8.34 In summary, Ms Arragon rejected all of the claimant's grievances. In her letter she did not expressly refer to the three matters referred to at paragraphs 8.31 and 8.32 above but noted the following:

8.34.1 She considered that it was reasonable for the Networking Officer role to seek clarity on courses and process.

8.34.2 The evidence did not suggest that the tone of the emails was rude or unprofessional.

8.34.3 Some emails demonstrated reasonable challenge, which Ms Arragon found appropriate.

8.34.4 Reasonable preventive measures had been put in place following a risk assessment after the claimant's first grievance and there was no evidence to support allegations of bullying or harassment, or breach of health and safety.

8.34.5 The claimant had declined external counselling, time off work and mediation and a lack of engagement from the claimant as per the expectation within the respondent's health and safety policy.

8.34.6 She had found no evidence that the resolutions that had been put in place following the claimant's previous grievance had not been adhered to.

8.34.7 Similarly, she found no evidence to support the claimant's contention regarding breach of trust and confidence with the respondent or TRM; and in this connection she found that more than one inappropriate conversation had taken place, that EG's conversation with NC related to expenses and there was no evidence to suggest that it undermined the claimant's competence.

8.35 Ms Arragon concluded her letter as follows:

> "Throughout my investigation it has become clear to me that further work needs to be undertaken to improve communication channels between all members of the DurhamWorks Team, in connection with the Service Delivery Plan and the Team Charter. In addition, further clarity regarding roles and responsibilities will be provided and I will work with the DurhamWorks Team and the Service Delivery Manager for this purpose." (445)

8.36 Ms Arragon offered the claimant a right of appeal, which she exercised in a letter to Mr Dexter dated 24 February 2020 (446). She gave the reasons for her appeal as being that, first, she totally disagreed with Ms Arragon's outcome on all points and, secondly, she believed the decisions she had made were wrong. In her letter the claimant repeated much of what she had referred to in her second grievance. Additionally, she stated that there were three questions that she would like to raise. The second of those questions was as follows:

> "Also, in my Second stage Formal grievance meeting I requested reasonable adjustments, to have support at any meetings I attend, to be accompanied by a person (family member) I can trust, assist me, due to my deafness. This was not mentioned in Jess Arragon's Outcome letter."

8.37 The Tribunal notes three points arising from this second question:

8.37.1 The claimant had not in fact requested this support in the grievance meeting itself. Rather, she had made a similar request after that meeting in answer to question 8 of the 10 questions Ms Arragon had sent to her.

8.37.2 As recorded above, that answer was to bring into meetings "A person, work colleague or outside person who supports me by listening and taking notes and telling me anything I may not have heard". Thus, the claimant had not previously referred to being accompanied by a family member.

8.37.3 The claimant raising this as a question in her letter to Mr Dexter was not, in itself, a request to him to allow her to be accompanied by a family member at the appeal hearing but was raised as the point that Ms Arragon had not mentioned this issue in her outcome letter.

8.38 On 26 February 2020, the claimant commenced a period of absence from work due to sickness. By letter of that day (449) Mr Dexter requested the grounds of the claimant's appeal, which she provided on 2 March 2020 (450).

8.39 The appeal meeting took place on 12 March (455). As had been the case at the grievance meeting with Ms Arragon, the claimant was reluctant to discuss previous details and wished to rely instead on her letter of 2 March 2020. Mr Dexter explained, however, that he needed to get the full picture. Amongst other things, he noted that the claimant had decided not to bring a representative with her to the meeting, which she explained was due to all work colleagues being previously involved in the grievance and she was not part of a trade union. Mr Dexter asked if she was happy to proceed without a representative and she confirmed that she was. In this regard, the Tribunal records that the respondent employed some 135 employees not all of whom had been previously involved and there was one person who was an elected employee representative, one of whose functions was to accompany employees at such meetings. In answer to a question from Mr Dexter, the claimant said that she had informed TRM of her hearing impairment on 22 January 2020 and Mr Dexter asked if anything different could have been done by the respondent, to which the claimant replied that "being accompanied by a family member would have helped".

8.40 By email of 26 March 2020 (459) Mr Dexter informed the claimant of his decision not to uphold her appeal. His reasons included his finding that Ms Arragon had conducted her investigation in the correct manner and her

conclusion had been fair. Additionally, addressing the key points in the claimant's letter of 2 March 2020, he found as follows:

8.40.1 There was insufficient evidence to find bullying and harassment; by that he meant that the outcome of the claimant's first grievance had been that the email from EG of 31 July 2019 had been found to be unacceptable behaviour, not bullying and harassment, and there was no evidence of bullying harassment in respect of the second grievance.

8.40.2 There was no evidence of breach of the respondent's policies and procedures.

8.40.3 The claimant had not been failed by the respondent's grievance procedure or Dignity at Work policy.

8.40.4 Reasonable resolution methods had either been put in place or offered to the claimant, the latter of which she had declined.

8.41 In the above circumstances, Mr Dexter found that Ms Arragon's decision "was fair and correct in accordance with the relevant policy and procedure". As such, he did not uphold the claimant's appeal. Mr Dexter concluded his letter that he would now like to meet the claimant in relation to her reintegration back into the organisation.

8.42 Instead, the claimant submitted her resignation, which is dated 30 March 2020 (462). She explained as follows:

> "I am resigning due to fundamental breaches by the CACD organisation of a total breakdown of mutual trust and confidence, an implied term of my contract, causing an irreparable breach of my employment resulting in my constructive dismissal from the organisation with immediate effect 30.03.2020. Discrimination of a disabled employee, myself as a deaf employee, failure to provide reasonable adjustments under the Equality Act 1986."
>
> "As you have not upheld my grievance, I now consider my position at Citizens Advice County Durham untenable, and my working conditions intolerable, leaving me no option but to resign on the grounds of constructive dismissal."
>
> She then set out the breaches that she stated had led her to her decision.

8.43 Mr Dexter wrote to the claimant on 31 March 2020 (471) suggesting that she was acting in haste and offered her until 3 April 2020 to reconsider. He offered her the opportunity to raise a further grievance regarding certain aspects of her resignation letter. The claimant appears not to have replied so, by email of 9 April 2020 Mr Dexter wrote to accept her resignation (465).

Submissions

9. After the evidence had been concluded Ms Bowen and the claimant made submissions, each by reference to written skeleton arguments. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from its findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account by the Tribunal in coming to its decision.

10. That said, the key points made by Ms Bowen on behalf of the respondent included as follows:

Constructive dismissal

10.1 The burden is on the claimant to prove that there was a repudiatory breach of contract. The test is objective rather than the claimant's subjective interpretation. This is important as the claimant's reaction was extreme causing matters to spiral out of all proportion and never get back on track after the 31 July email. None of the matters relied upon by the claimant amounted to breaches going to the root of the contract either individually or cumulatively.

10.2 This case has not been pleaded as a last straw dismissal and the Tribunal has not heard any evidence of that.

10.3 The breach of contract must be an effective cause of the resignation. The claimant has not pleaded the grievance outcome as a cause and in any event it cannot be a breach of contract. The respondent was continuously supportive and offered mediation, counselling and time off work, all of which were refused.

10.4 The claimant's immediate assertion that she would not work with or be in the company of EG was an excessive and extreme reaction to the email of 31 July, and looking for her dismissal was grossly disproportionate. Given the overlap between the roles of the claimant and EG and the need for them to work in tandem the claimant knew that this ultimatum was creating an impossible situation. The claimant was reluctant to accept this but having gone through documents with her in cross examination, she eventually did.

10.5 After the first grievance the respondent put in place and monitored effective and sensible steps, which were discussed with the claimant who agreed in cross examination that they addressed her grievance. The claimant had suggested certain other steps: an apology should have been sought from EG but that was first raised that in these proceedings and the lack of an apology is not a fundamental breach of contract; a formal risk assessment but an assessment of the risk was clearly undertaken; to keep her and EG apart but such steps were taken and they did work in different offices albeit that neither could work in total isolation of the other.

10.6 The claimant had not mentioned the 4 November 2019 issue at any stage of her second grievance but, in any event, it is a small issue and not a breach of contract.

10.7 The assertions relating to NC were vague. Nobody knew what was said and there was nothing before Ms Arragon from which she could conclude that EG had undermined claimant; and the Tribunal is in the same position.

10.8 The 15 January 2020 issue of the claimant wanting to change the referral process was a storm in a teacup; a day-to-day workplace issue. Staff interviewed had said that EG was correct to raise the matter. The fact that staff including the manager had that view undermines the allegation of breach of contract.

10.9 The claimant has not complained about the grievance process or the outcome as being an allegation of breach of contract. In any event the process was thorough, fair and well-based.

10.10 Whatever the respondent did would not be good enough. The claimant was using language such as breach of mutual trust and confidence, constructive dismissal and legal action throughout. She had closed her mind to resolution, hence why counselling, mediation and time off work were all refused.

10.11 It is denied that the claimant resigned in response to any fundamental breach of contract but did so because she did not get the outcome she was looking for.

10.12 The claimant unreasonably delayed before resigning and affirmed her contract of employment.

Reasonable adjustments

10.13 This relates to two meetings: the second grievance meeting on 10 February and the appeal meeting on 12 March 2020.

10.14 The claimant was accompanied at the first meeting by her chosen colleague and did not state before or at that meeting that she required a reasonable adjustment in this regard.

10.15 As to the second meeting, the claimant initially did not mention being accompanied by a family member, which she only raised in her grounds of appeal. One reason relied upon was confidentiality and another that her colleagues had been interviewed; neither related to her disability. In any event, the issue appears to relate to the claimant's anxiety or stress as opposed to her actual disability. Relevant disadvantage must relate to the disability, if it does not the duty will not arise.

10.16 It is difficult to see a family member as an auxiliary aid but the above points regarding substantive disadvantage and knowledge apply equally.

Additionally, the claim must fail on its facts, especially the claimant's evidence that she did not experience any difficulty in meetings.

11. The key points made by the claimant included as follows:

Reasonable adjustments

11.1 In accordance with my duty of care under section 7 of the Health and Safety at Work Act 1974, on 22 January 2020 I informed the respondent of my diagnosis with mild to moderate hearing impairment in both ears. I believe a risk assessment should have been carried out regarding measures to take that would have helped me in the grievance procedures. It might have suggested a family member or someone from the RNID, which could have done a specialised hearing risk assessment.

11.2 Hearing aids help but the impairment is still there. Also they were new and I was going through the anxiety of learning to use them and I was embarrassed when noises came. Reasonable adjustments would have helped me not be at a substantial disadvantage compared with a hearing person.

11.3 The respondent failed to comply with the Management of Health and Safety Regulations 1999 (which would have flagged up changes to help prevent risk to me and others) and the Health and Safety at Work Act (the employer's duty of care to myself under section 2).

11.4 In the Grounds of Resistance the respondent had denied that I had a hearing impairment and that had not been amended.

Constructive dismissal

11.5 Due to the bullying and harassment the only option I could take was to remove myself. I did not believe I was protected as a disabled person and the bullying and harassment continued, which had an effect on health and safety. The respondent had failed to run fair grievance procedures and to cascade down steps to be taken.

11.6 A formal risk assessment after the first grievance would have ensured measures would be robust and actually implemented to prevent the bullying and harassment continuing. To have a formal document would have enabled progress to be monitored to decide if the measures put in place were adequate or needed to be reviewed or adjusted.

11.7 The respondent's grievance procedures and policies failed me; they failed to be carried out in a fair and proper fashion.

11.8 I was living every day in a toxic environment feeling unsupported or protected and nobody really listening from the start. I put my trust and confidence in the respondent and believe that they failed me. As a hearing-impaired employee suffering stress and anxiety also due to bullying I removed myself from the risks that had not been addressed by the respondent. I had no alternative to turn to so I resigned.

The Law

12. The principal statutory provisions that are relevant in this case (with some editing so as to be relevant to the claimant's complaints) are as follows:

Unfair dismissal – Employment Rights Act 1996

*"**94 The right.***

(1) An employee has the right not to be unfairly dismissed by his employer."

*"**95 Circumstances in which an employee is dismissed.***

(1) For the purposes of this Part an employee is dismissed by his employer if ……

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

*"**98 General.***

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

…….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Disability discrimination – Equality Act 2010

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

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

"39 Employees and applicants

(1) An employer (A) must not discriminate against an employee of A's (B)-

…….

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…….

(5) A duty to make reasonable adjustments applies to an employer."

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Application of the facts and the law to determine the issues

13. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law, the case precedents in this area of law and the Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Code").

Constructive dismissal

14. As in any case involving a claim of constructive unfair dismissal, the first question is whether there was a dismissal at all. As mentioned above, the claimant relied on section 95(1)(c) of the 1996 Act that she had resigned in circumstances where she was entitled to do so by reason of the respondent's conduct: commonly referred to as constructive dismissal.

15. The decision of the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 has stood the test of time for over 40 years. It is well-established that to satisfy the Tribunal that she was indeed dismissed rather than simply resigned, the claimant has to show four particular points as follows:

15.1. The respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the respondent and the claimant.

15.2. If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.

15.3. If so, the claimant resigned in response to that breach.

15.4. If so, the claimant resigned timeously and did not remain in employment thus waiving the breach and affirming the contract.

16. To establish the required breach of contract, the claimant relies not upon a breach of express terms of her contract of employment but upon a breach of the term implied into all contracts of employment that the parties will show trust and confidence, the one to the other. As was said in Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347,

> *"… it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee …. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunals' function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly, is such that the employee cannot be expected to put up with it …. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed."*
>
> *"… the conduct of the employer had to amount to repudiation of the contract at common law. Accordingly, in cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer's conduct amounts to a fundamental breach of the contract."*
>
> *"Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of contract"*

17. It is clear from the final paragraph in the above excerpt that with regard to the second of the above factors in Western Excavating (ECC) Limited, in general terms, a breach of the implied term of trust and confidence "will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract": see Morrow v Safeway Stores plc [2002] IRLR 9 applying the decision in Woods.

18. The decision in Malik v BCCI [1998] AC 20 is summarised by Hale LJ in Gogay v Hertfordshire County Council [2000] EWCA Civ 228 thus:

> "*This requires an employer, in the words of Lord Nicholls of Birkenhead in Malik v BCCI [1998] AC 20, at p 35A and C,*

> *'. . . not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. . . . 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'. Lord Steyn emphasised, at p53B, that the obligation applies 'only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship . . . '"*

19. Similarly, in the decision in Sharfudeen v TJ Morris Ltd t/a Home Bargains UKEAT/0272/16 it was stated that an employment tribunal, "must be satisfied that the employee has lost that trust and confidence as a result of the conduct on the part of the employer that was without reasonable and proper cause; a question that is to be answered by the ET objectively (see also, Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168) not simply by applying a range of reasonable responses test": see also Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, CA.

20. Clearly, therefore, unreasonable conduct alone will not suffice: see Claridge v Daler Rowney Ltd [2008] ICR 1267, EAT. Likewise, it is insufficient that a decision might be unreasonable, it must be shown to be irrational under the more stringent Wednesbury principles: see Braganza v BP Shipping Ltd [2015] UKSC 17 and IBM United Kingdom Holdings Ltd v Dalgleish [2018] IRLR 4.

21. It is also well-established that, "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment": see Lewis v Motorworld Garages Limited [1985] IRLR 465. In this case the claimant relies upon such cumulative conduct on the part of the respondent and what is sometimes referred to as the 'last straw' doctrine. This was explored in Omilaju v Waltham Forest London Borough Council [2005] ICR 481, CA in which it was said of a final straw as follows:

> "*it should be an act in a series whose cumulative effect is to amount to a breach of the implied term…. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*"

22. The last straw can, however, itself be sufficient to be a repudiatory breach (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978).

23. In summary of the guidance that the Tribunal draws from the above authorities (and noting that the claimant relies not upon a breach of an express contractual term but on a breach of the implied term of trust and confidence) it reminds itself that the key questions in relation to the complaint of constructive unfair dismissal are as follows (the references to "the respondent" being read to include, also, relevant employees acting on its behalf):

23.1 Did the actions of the respondent either separately or cumulatively amount to a breach by the respondent of the term of trust and confidence that is implied into all contracts of employment: i.e:

23.1.1 did the respondent conduct itself in a manner that was calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between it and the claimant, and, if so

23.1.2 did the respondent have reasonable and proper cause for doing so?

23.2 Was the breach a fundamental one: i.e. was it so serious that the claimant was entitled to treat the contract of employment as being at an end?

23.3 Did the claimant, at least in part, resign in response to the breach: i.e. was the breach of contract a reason for the claimant's resignation?

23.4 Did the claimant affirm the contract before resigning: i.e. did the claimant's words or actions show that she chose to keep the contract alive even after the breach?

23.5 If the claimant was dismissed, what was the reason or principal reason for the dismissal: i.e. what was the reason for the breach of contract?

23.6 Was that reason a potentially fair reason by reference to section 98(1) of the Act?

23.7 By reference to section 98(4) of the Act, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

24. In the above context, the Tribunal comes to consider the matters relied upon by the claimant as amounting to a breach of the term of trust and confidence that is implied into all contracts of employment; as those matters are summarised in the agreed list of issues. In doing so, the Tribunal has utilised the numbering in that agreed list of Issues for the side-headings of the paragraphs below.

1.(a) The respondent failed to take measures to prevent EG bullying and harassing the claimant

25. As the Tribunal has found above it is not correct for the claimant to assert that after holding her first grievance the respondent failed to take measures to prevent EG from bullying and harassing the claimant in future. To the contrary, even the claimant has accepted that, first, on 7 October 2019 she agreed the measures that would be put in place and, secondly, she confirmed in cross examination and in answer to the Employment Judge that the agreed measures had been put in place. To be clear, however, those measures were to address EG's single act of inappropriate behaviour in sending the email of 31 July 2019 and the respondent did not make and never has made any finding of bullying or harassment of the claimant by EG whether in sending that email or otherwise. The Tribunal finds those agreed measures to be a reasonable and proportionate response to the situation and they went beyond the relationship between EG and the claimant in extending to work with the whole team. On a point of

detail, the Tribunal considers that TRM offering to act as a go-between and monitor EG's emails was commendable.

26. Further, while the claimant might seek to challenge the effectiveness of the measure it appears that they were effective at least from their implementation until 7 January 2020.

27. In relation to the particular matters cited in this issue 1.(a), the Tribunal finds as follows:

(i) EG to apologise

There is no evidence that this was ever raised during the internal stages of these matters and only emerged in the course of these proceedings. That notwithstanding, the Tribunal is satisfied, as the claimant accepted in cross examination, that not requiring EG to apologise did not amount to or contribute towards a breach of her contract of employment.

(ii) Risk assessment

While a formal risk assessment in the nature of an assessment in accordance with the Health and Safety at Work Act was not undertaken, the Tribunal accepts the evidence of both Ms Arragon and Mr Dexter that an assessment of risk was undertaken, which was necessary and productive identifying the agreed measures that were put in place following the claimant's first grievance.

As with the matter referred to at paragraph (i) above, the claimant accepted in cross examination that this did not amount to a breach of contract. That said, whether or not it was a breach of contract is to be considered objectively by the Tribunal; it is satisfied that it neither amounted to nor contributed towards a breach of the claimant's contract of employment.

(iii) Keeping the claimant and EG apart

Far from failing to keep the claimant and EG apart, the respondent did seek to ensure that this would happen through them being based in offices at different locations, albeit there was an inevitable and unavoidable coming together so that each could support the other in their respective and complementary roles.

The Tribunal is satisfied (as the claimant again accepted) that this issue did not constitute or contribute towards a breach of her contract of employment.

1.(b) EG's email of 4 November 2019 regarding training

28. The Tribunal is satisfied (as found above and as explained by TRM to Ms Arragon) that this agenda item was related to EG's role and, therefore, she was entitled to ask for it to be discussed at the team meeting on 6 November 2019. Be that as it may, when the claimant raised the point with TRM she immediately removed the item from the meeting agenda. It can reasonably be inferred that the claimant was satisfied with this as she did not mention it again until during the formal grievance meeting on 10 February: it did not form part of her informal second grievance document or her formal grievance document; neither did she refer to it in her appeal letter.

29. He we above circumstances, the Tribunal is once more satisfied that this neither amounted to nor contributed towards a breach of the claimant's contract of employment.

1.(c) The new employee, NC

30. There is no corroborative evidence before the Tribunal as to what precisely EG said to this new recruit and certainly nothing to suggest that EG thereby undermined the claimant. That being so, the Tribunal is not satisfied that this matter constituted or contributed towards a breach of the claimant's contract of employment.

1.(d) The minutes of the meeting on 15 January 2020

31. The evidence before the Tribunal is that this matter of the referral process fell primarily within the remit of EG and that the process was agreed within the team before the claimant sought to amend it in order that she could meet the participants. As the Tribunal has found, minutes to that effect were produced and circulated and there is no evidence before the Tribunal to support the claimant's contention that the minutes misrepresented what she had said in the meeting; specifically, that she wanted to restrict the window of opportunity for participants. In any event, when this point regarding timings was put to the claimant in cross examination (that the team had said this would not work for participants) the claimant accepted that and agreed that it was a genuine concern.

32. In these circumstances, the Tribunal does not find that this matter can be said to have undermined the claimant and is further satisfied that this did not constitute or contribute towards a breach of her contract of employment.

1.(e) Refusal of a family member at meetings

33. As the Tribunal has found above, quite simply the claimant did not ask to be accompanied by a family member at the meeting on 10 February. This only emerged at this stage in the claimant's subsequent answer to question 8 of Ms Arragon's 10 questions and, in any event, in that answer the claimant referred only to "A person, work colleague or outside person " and did not actually refer to a family member.

34. As to the meeting on 12 March, as set out above, in the grounds of appeal the claimant had only noted that, in her outcome letter, Ms Arragon had not mentioned her request "to be accompanied by a person (family member)" (which, as explained above, she had not actually requested) and at the meeting itself confirmed that she was happy to proceed without a representative, only later adding that being accompanied by a family member would have helped.

35. In respect of neither meeting, therefore, can it be said that the respondent refused to allow the claimant to be accompanied by a family member. Once more, therefore, the Tribunal does not find that this issue constitutes or contributes towards a breach of the claimant's contract of employment.

36. Having thus addressed paragraphs 1 and 2 in the agreed list of issues in respect of which it has made the findings set out above, it is not necessary for the Tribunal to address the issues contained in paragraphs 3 to 10 inclusive of that list.

Failure to make adjustments

37. In relation to the claimant's claim that the respondent failed to make adjustments, the following propositions (in no particular order) can be said to emerge from relevant case law in the context of the above statutory framework and the Code to which the Tribunal has had regard:

37.1 It is for the disabled claimant to identify the provision criterion or practice ("PCP") of the respondent or the auxiliary aid on which she relies and to demonstrate the substantial disadvantage to which she was put by that PCP or the non-provision of the auxiliary aid.

37.2 It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; she need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable. There must be before a tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: Project Management Institute v Latif [2007] IRLR 579.

37.3 There must be a causal connection between the PCP or non-provision of the auxiliary aid and the substantial disadvantage contended for: as was said in the decision in Nottingham City Transport Ltd v Harvey UKEAT/0032/12, "It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."

37.4 The test of reasonableness is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA.

37.5 Making a reasonable adjustment may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce.

37.6 "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP: Griffiths.

37.7 It is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 and HM Prison Service v Johnson [2007] IRLR 951.

37.8 It can be a reasonable adjustment if there is a prospect that the adjustment would prevent the claimant from being at the relevant

substantial disadvantage without there needing to be a good or real prospect: Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10. Thus, it is not for the claimant to prove that the suggested adjustment will remove the substantial disadvantage, it is sufficient if the adjustment might give the claimant a chance that the disadvantage would be removed and not that it would have been completely effective or that it would have removed the disadvantage in its entirety: see Griffiths and South Staffordshire and Shropshire Healthcare NH Foundation Trust v Billingsley UKEAT/0341/15 in which it is stated as follows:

> "Thus the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under Section 15(1) of the 2010 Act."

37.9 Notwithstanding the above, in Romec Ltd v Rudham [2007] UKEAT 0069/07/1307 it was held that the essential question for an employment tribunal is whether the adjustment would have removed the disadvantage experienced by the claimant. In that case, in remitting the issue to the same tribunal, the EAT directed that if the tribunal concluded that there was no prospect of the suggested adjustment succeeding, it would not be a reasonable adjustment: if, however, the tribunal found a real prospect of the adjustment succeeding it might be reasonable to expect the employer to take that course of action. Thus, an employer can lawfully avoid making a proposed adjustment if it would not be a reasonable step to take Royal Bank of Scotland v Ashton [2011] ICR 632. Similarly, at paragraph 6.28 of the Code it is provided that one of the factors that might be taken into account when deciding what is a reasonable step for an employer to take is, "whether taking any particular steps would be effective in preventing the substantial disadvantage".

37.10 Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step: Latif.

37.11 The question of whether it was reasonable for the respondent to have to take the step depends on all relevant circumstances, which will include the following:

37.11.1 the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

37.11.2 the extent to which it is practicable to take the step;

37.11.3 the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;

37.11.4 the extent of the respondent's financial and other resources;

37.11.5 the availability to it of financial or other assistance with respect to taking the step;

37.11.6 the nature of its activities and the size of its undertaking.

37.12 If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step that the respondent should have taken.

38. In the context of the above general propositions, the Tribunal moves on to consider the claimant's complaint in this case. First, it is repeated that the respondent conceded that the claimant was a disabled person at all material times by reason of a hearing impairment and that it had knowledge of that disability from 22 January 2020. Knowledge of the claimant being placed at a substantial disadvantage was not, however, conceded.

39. The Tribunal first addresses the asserted failure of the respondent to take steps to provide an auxiliary aid. In this regard the Tribunal has again utilised the numbering in that agreed list of Issues for the side-headings of the paragraphs below.

14 Was the provision of a family member and auxiliary aid?

40. Paragraph 6.13 of the Code provides, "An auxiliary aid is something which provides support or assistance to a disabled person." It is stated that auxiliary aids include auxiliary services, and the following example is given in paragraph 6.33, "A worker with a learning disability is allowed to take a friend (who does not work with her) to act as an advocate at a meeting with her employer about the grievance." Obviously, this example does not apply directly in the case of the claimant but parallels can be drawn.

41. In these circumstances, the Tribunal is satisfied that the provision of a family member to accompany the claimant at grievance meeting would amount to the provision of an auxiliary aid.

18 The PCP of not allowing family members to attend grievance hearings

42. The Tribunal reminded itself that it first must identify the PCP that the respondent is said to have applied: Environment Agency v Rowan [2008] IRLR 20. That is not contentious. The Tribunal is satisfied that, in accordance with section 10 of the Employment Relations Act 1999, the respondent had a PCP of allowing employees to be accompanied by a work colleague or trade union representative. Further, on the basis of the evidence before it, that PCP extended to not allowing family members to attend grievance hearings.

43. The Tribunal similarly reminded itself that in Rowan it was also stated that it must consider the nature and extent of the substantial disadvantage suffered by the claimant.

This aspect is less straightforward. The claimant clarified in cross examination that she was anxious at the meetings and this could have been alleviated had she had a family member present with her. Similarly, in submissions she stated that not being accompanied by a family member disadvantaged her as such support would have made a huge difference to her physical and mental health but, as found above, this was not a contention that she advanced with any clarity at the relevant time and, in any event, anxiety and the claimant's physical and mental health are not impairments or disabilities upon which she relies.

16/20 Knowledge of substantial disadvantage

44. The Tribunal has found above that the claimant did not raise with the respondent at the relevant times her wish to be accompanied by a family member at grievance meetings. In the absence of such matters having been raised with the respondent, the Tribunal is not satisfied that it knew or could reasonably have been expected to know that the claimant was likely to be placed at a substantial disadvantage by the lack of the auxiliary aid or the PCP. In this regard, in respect of the grievance meeting with Ms Arragon, it was put to the claimant in cross examination that the respondent needed to know of the substantial disadvantage and could not possibly know that on the basis of the information the claimant had provided. She was asked if she accepted that and she confirmed that she did.

17/21 The duty to take steps

45. It follows from the above findings that the Tribunal is not satisfied that the statutory duty provided for in section 20(3) of the 2010 Act for the respondent "to take such steps as it is reasonable to have to take to avoid the disadvantage", arising from either the PCP or the non-provision of the auxiliary aid arose in this case.

46. Having thus addressed the above paragraphs in the agreed list of issues in respect of which it has made the findings set out above, it is not necessary for the Tribunal to address the remaining issues contained in that list.

Summary

Constructive dismissal

47. In summary of this complaint, the question in issue in this case is whether, applying the approach of Lord Steyn in Malik, the respondent's conduct,

> 47.1. first, destroyed or seriously damaged the relationship of trust and confidence and,
>
> 47.2. secondly, was without reasonable and proper cause.

As Lady Hale noted in Gogay, "The test is a severe one".

48. In that context, for the reasons set out above, the Tribunal is satisfied, as to the first two factors in Western Excavating (ECC) Limited that the conduct on the part of the respondent did not constitute a breach of the contract of employment between it and the claimant amounting to a fundamental or repudiatory breach of that contract.

49. Given that decision thus far it is not necessary for the Tribunal to address the final two issues in Western Excavating (ECC) Limited of causation and affirmation.

50. As the Tribunal is not satisfied that the conduct on the part of the respondent constituted a breach of the contract of employment with the claimant it follows that the Tribunal is satisfied that her complaint of constructive unfair dismissal is not well-founded.

Failure to make adjustments

51. Given the Tribunal's findings above that the statutory duty to take steps to avoid the disadvantage arising from either the non-provision of the auxiliary aid or the PCP did not arise, it is satisfied that the claimant's complaint under section 21 of the 2010 Act that the respondent failed to comply with the duty under section 20 of the 2010 Act is not well-founded.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 29 September 2022

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IN THE NEWCASTLE EMPLOYMENT TRIBUNAL CASE NO: 2201870/2020

BETWEEN:

MS. M. A. STEVENSON

Claimant

-and-

CITIZENS ADVICE COUNTY DURHAM

Respondent

RESPONDENT'S
LIST OF ISSUES

The basis upon which the Claimant puts her claim were discussed in detail with and recorded by EJ Aspden on 10 March 2022 (pp.130-133). The Claimant's witness statement seeks to go beyond that list referring to other allegations and incidents rather than just those confirmed to EJ Aspden. The Respondent opposes any expansion of the claim. The Claimant was ordered to provide further particulars, did so and then had a lengthy exchange with EJ Aspden. The Claimant has not indicated that the case management summary was incorrect.

EJ Aspden's order records the parameters of the Claimant's complaint. It does not record the Respondent's case. Accordingly, to try and assist the parties and Tribunal the Respondent has drafted this list of issues for discussion.

Constructive dismissal – Employment Rights Act 1996

1. Did the Respondent do the following things happen as alleged:

(a) After the respondent upheld a grievance in the Claimant's favour (in September 2019) about the conduct of Ms. Galloway, the respondent fail to take measures to prevent Ms Galloway from bullying and harassing the claimant in the future. In particular the respondent failed to:
   (i) get Ms Galloway to apologise;
   (ii) carry out a risk assessment; and
   (iii) try to keep the claimant and Mrs Galloway apart.

(b) On 4 November 2019 miss Galloway sent an email to the team asking to discuss training programme proposed start dates at a team meeting on 6th of November 2019. The claimant alleges that by doing so miss Galloway undermined the claimant.

(c) On the 13th of January 2020 miss Callaway told Nicola Crossman, a new training officer whom the claimant managed, that the claimant had given Ms. Crossman incorrect information during her induction. The claimant alleges that, by doing so, miss Galloway undermined the claimant.

(d) Eve Galloway prepared and circulated to the team minutes of a meeting that took place on the 15th of January 2020. The claimant alleges that, by doing so, miss Galloway misrepresented what the claimant said in the meeting an implied, incorrectly, that the claimant wanted to restrict the window of opportunity for participants to come in for an initial meeting, thereby undermining her.

(e) The respondent refused to allow the claimant to have a family member with her at meetings on the 10th of February on the 12th of March 2020. The claimant alleges that this was discrimination (as referred to above) and. In any event, meant the only person who could accompany her at the meetings was a colleague who was also a witness.

2. If so, did they amount to a fundamental breach of the Claimant's contract of employment? The Claimant relies on the implied term of mutual trust and confidence.
3. If so, did the Claimant resign on 30 March 2020 in response to the breach?
4. Did the Claimant delay for too long before resigning and did the Claimant affirm the contract?
5. Was the Claimant's dismissal unfair?

Constructive dismissal remedy

6. Is the Claimant entitled to a basic award if so, in what amount?
7. Is it just and equitable to make a compensatory award, and if so in what amount?
8. Should any reduction be made to the basic award on the basis of the Claimant's conduct pursuant to s.122(2) and 123(6) Employment Rights Act 1996?
9. Has the Claimant taken reasonable steps to mitigate her loss?
10. What amount has the Claimant received in mitigation and how much should be deducted from any compensation awarded?

Failure to make reasonable adjustments ss.20-21 Equality Act 1996

11. Specially, the Claimant complains that the respondent contravened in the EqA in failing to comply with the duty to make reasonable adjustments. The claimant relies on sections 20 to 21 of the Equality Act 2010.

12. Disability at the material times, by reason of hearing impairment has already been conceded by the Respondent.

13. Knowledge of that disability from 22nd of January 2020 is conceded. Knowledge of substantial disadvantage is not conceded.

Auxiliary aid s.20(5)

14. Was the provision of a family member an auxiliary aid under section 2011 of the Equality Act taking into account the EHRC code of practice?

15. Was the claimant put at a substantial disadvantage in comparison with persons without a disability if that auxiliary aid was not provided? Specifically the claimant claims; she had only recently been diagnosed with a hearing problem and her hearing aids where new. She was still trying to get used to hearing aids and felt vulnerable and stressed. She did not always catch all of what was said and so was it at a disadvantage compared with someone who was not hearing impaired. Therefore, an already stressful situation was made twice as bad. It was not reasonable to expect the claimant to rely on assistance or support from a work colleague because of all her colleagues were involved in the investigation and the claimant wanted to keep matters confidential and contained. Had she not been hearing impaired she would have been able to attend the hearing alone without being disadvantaged.

16. Did the Respondent know or could it reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage by the lack of auxiliary aid?

17. Therefore, did the respondent have to take such steps as was reasonable to have to take to ensure the claimant had a family member present at the meetings?

PCP s.20(3)

18. The Claimant relies on a practice of not allowing family members to attend grievance hearings. Did the Respondent have such a practice?

19. Did that alleged practice, put the claimant at a substantial disadvantage under s.212(1) EqA in comparison with persons without a disability? (The claimant relies on the substantial disadvantage above).

20. Did the Respondent know or could it reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage by the practice?

21. Did the respondent have a duty to take such steps as it was reasonable to have to take to avoid the substantial disadvantage?

22. Would permitting the attendance of a family member have removed the substantial disadvantage?

23. Would that have been a reasonable adjustment to make?

Compensation – Reasonable adjustments

24. Is the Claimant entitled to compensation in respect of the failure to make reasonable adjustments and if so, in what sum? [*The Claimant avers £40,000 for injury to feelings; the Respondent avers that this is unrealistic and that any award should be no higher than the bottom of lowest Vento Band*.]