EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100139/2019

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Held in Glasgow on 21, 22, 23, 24, 25, 28 and 29 November 2022

Employment Judge C McManus

Tribunal Members: I Ashraf and J McCaig

10 **Miss S Mutter** — **Claimant**
Represented by:
Mr M Fulton -
La Representative

15 **Turning Point Scotland** — **Respondent**
Represented by:
Ms Mohammed -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The unanimous decision of the Tribunal is that:

- the claimant's claim of (constructive) unfair dismissal is successful and the claimant is awarded the total sum of **£2,819.87 (TWO THOUSAND EIGHT HUNDRED AND NINETEEN POUNDS AND EIGHTY SEVEN PENCE)**, being comprised of an unfair dismissal basic award of £1,881.60, a 25 compensatory award of £570.46 and an uplift of £367.81.

- the claimant's claim of breach of contract is successful and the claimant is awarded the total sum of **£1,426.15 (ONE THOUSAND FOUR HUNDRED AND SIX POUNDS AND FIFTEEBN PENCE)** in respect of unpaid notice entitlement.

30 - the claimant's claim of direct discrimination under section 13 of the Equality Act 2010 is unsuccessful and is dismissed.

- the claimant's claim of harassment under section 26 of the Equality Act 2010 is unsuccessful and is dismissed.

- the claimant's claim of victimisation under section 27 of the Equality Act 2010 is unsuccessful and is dismissed.

REASONS

Introduction and background

1. The claimant raised claims of unfair dismissal, breach of contract, redundancy payment and alleged discrimination on the grounds of the protective characteristics of disability and sex. The claimant was represented by her partner, who is not legally qualified. The respondent was represented by a solicitor. There has been significant case management of this case. There has been a number of Preliminary Hearings ('PHs') for the purpose of case management. The position at those PHs was as set out in the PH Notes issued shortly after those PHs. Case Management Orders were issued with some of these PH Notes.

2. The Note issued following the PH which took place in June 2021 set out my decision on the claimant's application for strike out of the response, and my decision on further procedure. The claimant sought to appeal my decision not to strike out the response. That application was not substantively considered by the EAT, on the basis that it had been made out of time.

3. The issue of whether the claimant was a disabled person in terms of section 6 of the Equality Act 2010 ("the Equality Act") was determined as a preliminary issue at the PH on 10 and 11 January 2022. My decision was on that issue was that there was not enough evidence for me to conclude that the claimant met the statutory definition of disability at the material time. The claims under the Equality Act 2010 which relied on the protected characteristic of disability were therefore dismissed.

4. I have applied Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('The Tribunal Rules') in dealing with this case. In my Note issued following the PH in June 2021, I set out the position with regard to further procedure in this case, and my reasoning for that.

5. The Final Hearing ('FH') had been scheduled to take place in September 2022. That was postponed, with the first scheduled day of that converted to a PH for case management. Further Case Management Orders were issued with that PH Note, dated 5 September 2022. In order to assist both parties, in that PH Note I set out my draft of the List of Issues for Determination by the Tribunal. Both representatives made various amendments to this List. In respect of the particular conduct complained of, these amendments continued throughout the hearing, in an attempt to focus on the matters which the claimant relied on in respect of her claims.

6. Following various correspondence in November 2022, this FH proceeded as a hybrid hearing, with the claimant and her representative attending remotely via video link and all others being in person at the Glasgow Tribunal Centre.

7. A Witness Order had been issued for Manager K. On the basis of evidence which had been provided by her, that Witness Order was waived in respect of her attendance at this FH. It was agreed that all other evidence would be heard at the arranged November 2022 dates and if, on the conclusion of that evidence, the evidence of Manager K was still sought to be relied on, then the proceedings would be sisted (put on hold) before submissions and a further hearing be scheduled for her evidence and submissions. It was not insisted that Manager K's evidence was necessary and the FH proceeded to submissions and conclusion.

8. The claimant relied on her own evidence and evidence from the two individuals who had worked with her as Lead Practitioners for the Women's Bail Service: Kevin Kelly and Jayne Brennan.

9. The respondent relied on evidence from Katherine Wainwright (respondent's former Head of HR), Wendy Spencer (now retired, former Director of Operations), Patrick McKay (Operations Manager), who had dealt with the claimant's grievance and Kenneth Crawford (Director of Finance and Resources), who had made the decision on the claimant's appeal of her grievance.

10. All evidence was heard on oath or affirmation. Evidence in chief was set out in witness statements.

11. The parties relied upon documents in an indexed and paginated Joint Bundle running to 543 pages. The documents in that Joint Bundle are referred to in this decision by the page number, which is in brackets, after the initials 'JB'). We were not referred to all documents in evidence. During the course of the hearing, additional documents were added to this Bundle. A substantial part of the respondent's Absence Policy was missing from the Joint Bundle and was added during the course of the FH. Additional documents were also added.

12. The claimant also relied on further documents in a separate claimant's Bundle, indexed and paginated, with numbers 1 - 11. Additional documents were also added to that Bundle during the course of the Final Hearing.

13. One of the potential issues identified for this FH was the possible application of Rule 50. No application under Rule 50 had been made at the stage of the PH on disability status. It was agreed at the outset of this FH that the specific nature of the surgery which the claimant had in January 2018 would not be referred to in this judgment. On that basis, no further action was taken under Rule 50.

Issues for Determination

14. The issues determined were:

Constructive Dismissal

15. On the basis that the claimant accepted that she had resigned, the Tribunal required to make findings in fact in respect of the following conduct, which was the alleged conduct relied upon by the claimant as being acts or failure by the respondent which were in material breach of the implied contractual term of mutual trust and confidence:

    a. That HR questioned and called the claimant into a meeting about the legitimacy of her illness

b. That the claimant was told that HR were disputing whether she would be paid or not while off sick

c. That the claimant was asked to take annual leave for her absence for surgery

5 d. That the claimant was told that HR had advised that if she had any further unrelated surgeries, she would not get paid

e. That the claimant was told she must attend Occupational Health and then the appointment was cancelled.

f. That the respondent's Absence Policy was not followed in respect of
10 the claimant.

g. That the claimant's treatment by the respondent was not within the respondent's Absence Policy

h. That the decision to give the claimant a First Written Absence Warning was pre-determined before her Formal Absence Meeting

15 i. That Wendy Spencer and Katherine Wainwright had advised that they would revert to the Claimant following an investigation but never did

j. That the claimant was not advised of ownership of who gave the warning

k. That Manager M breached the claimant's confidentiality

20 l. That Manager K sent a text to the Claimant saying *"Despite what you think, it wasn't me who gave you the warning"* and then later alleged that it was HR Manager A who had issued the warning to the claimant.

m. That Manager K had said the Claimant was reacting *'just because she was an emotional person'*

25 n. That Manager M stated that the claimant had a "bad attitude" and was being *"negative"*

o. That the claimant received no supervision from 18 June 2018 to 30 August 2018

p. That the respondent's Redundancy Policy was breached in respect of the trial period of the job offered to the claimant as suitable alternative employment.

q. That the claimant was not paid redundancy pay which she alleged was due

r. That the grievance process followed by the Respondent was flawed

16. When considering its findings in fact with regard to these allegations, the Tribunal must determine:

a. Whether it was reasonable for the Respondent to have carried out these acts/ failures

b. Whether by these acts or failures the respondent acted in breach of contract.

c. Whether by carrying out these acts / failures, did the respondent, without reasonable and proper cause, conduct themselves in a manner calculated, or likely to destroy or seriously damage the relationship of trust and confidence between them and the claimant?

d. If there was such a breach, did that breach cause the claimant to resign i.e., did the claimant resign in response to that breach?

e. Did the claimant affirm the contract by any delay in resigning?

f. Is the claimant entitled to an unfair dismissal award, and if so in what amount, having regard to sections 118 – 126 of the Employment Rights Act 1996? 30

Jurisdiction

17. With regard to section 123 of the Equality Act 2010, and in particular section 123(3)(a), was the following conduct extending over a period:

a. the respondent's treatment of the claimant in respect of her absence for surgery

b. the issue to the claimant of a warning under the respondent's Absence Policy

5 c. the alleged mistreatment after the Formal Absence Appeal Meeting

d. the respondent's decision that the claimant was not entitled to a redundancy payment.

18. Does then the Tribunal have jurisdiction to determine the claims brought under the Equality Act 2010, with regard to the provisions on time limits in 10 section 123 of that Act?

19. In regard to the alleged conduct relating to the Grievance and the Grievance process, does the Tribunal have jurisdiction to determine a claim under section 13 Equality Act 2010 based on events which occurred after the termination of the claimant's employment with the respondent?

15 *Equality Act 2010*

20. In the event of it being determined that the Tribunal has jurisdiction to hear the claims brought under the Equality Act 2010, the following issues are for determination: -

s13 - Equality Act – (Less Favourable Treatment due to her Sex)

20 21. Was the Claimant treated less favourably by the Respondent because of her protected characteristic of sex, in respect of:

a. The respondent's treatment of the claimant in respect of her absence for surgery in January 2018 (with reference to the respondent's treatment of the claimant's identified comparator, Dean Kerrigan), that 25 treatment being the allegations made by the claimant regarding comments made around her informal meeting regarding annual leave, pay, further operations, and legitimacy (as set out in the bullet points under the heading of 'Constructive Unfair Dismissal' above.

b. The respondent's treatment of the claimant's absence in January 2018 and the timing of the claimant being advised that she would be receiving a waring in respect of that absence.

22. Was the Claimant treated less favourably by the Respondents because of her protected characteristic of sex (with regard to a hypothetical comparator), in respect of:

a. her trial period in an alternative post.

b. their decision that the claimant was not entitled to redundancy pay.

c. their dealings in respect of the grievance submitted by the claimant

23. With regard to the comparator identified by the claimant (Dean Kerrigan):

a. Is the comparator the same as the Claimant in all aspects but for the gender.

b. Were the circumstances of the named comparator the same in all material respects as the Claimant.

24. Did the claimant suffer a detriment because oof any such discrimination on the grounds of her protected characteristic of sex (gender).

s26 - Equality Act (Harassment)

25. The following conduct is relied upon in the claimant's response to the Tribunal of 9 September 2019 as being conduct due to the claimant's protected characteristic of sex:

a. treatment of the claimant in respect of her absence for surgery in January 2018 (with reference to the respondent's treatment of the claimant's identified comparator, Dean Kerrigan) specifically allegations made by the claimant regarding comments made around her informal meeting regarding annual leave, pay, further operations, and legitimacy.

b. treatment of that absence in respect of management of that absence and the application of disciplinary proceedings (with reference to the respondent's treatment of the claimant's identified comparator, Dean Kerrigan) specifically the process of the hearing from which the claimant alleges she was told by her service manager that it was fait accompli.

c. Treatment that the claimant alleges after the appeal meeting, specifically:

   i. breach of confidentiality by her line manager,

   ii. further communication about her absence warning from her service manager,

   iii. her line manager calling her negative and saying she had a bad attitude on different occasions,

   iv. her service manager asked if she was just an emotional person,

   v. her supervision being withdrawn,

   vi. further breach in redundancy policy,

   vii. that HR said redundancy was never an option for her,

   viii. and that she was told an investigation was taking place for her discrimination and then learning it wasn't, and she was given an unfair grievance process.

d. did the respondent engage in the above acts

e. was it due to the Claimants sex?

f. Was the purpose or effect of the said conduct violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant

s27 - Equality Act (Victimisation)

26. Did the claimant do a protected act in terms of section 27 of the Equality Act 2010 while appealing the warning issued to her under the Absence Management Policy?

5 27. If so, was the claimant subject to a detriment because of having done such protected act?

28. If so, what was that detriment?

Compensation

29. Is the claimant entitled to an unfair dismissal award, and if so in what amount,
10 having regard to sections 118 – 126 of the Employment Rights Act 1996?

30. Should there be any increase or deduction to any unfair dismissal award and/or compensatory award to reflect any unreasonable non- compliance by either party to the ACAS Code of Practice on Disciplinary and Grievance Procedures?

15 31. Is the claimant entitled to any payment in lieu of notice period, and if so in what amount, taking into account any payments made to the claimant in respect of this notice period?

32. Is the claimant entitled to any award in respect of any breach of the Equality Act 2010, and if so in what amount, having regard to: -

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   a. any financial loss sustained as a direct consequence of any such unlawful treatment and

   b. any impact of any such unlawful treatment on the claimant

33. These are the issues on which this Tribunal has made its determinations.

Findings in Fact

25 34. The following material facts were admitted or proven:

35. The respondent is a charity providing various support services to the public related to a number of areas, including criminal justice and housing. They have approximately 1200 employees, including a substantial HR department. The HR department includes a Head of HR, with HR Business Partners for each area, all of whom are supported by HR Practitioners. There is a Health, Welfare and Wellbeing Lead within HR. The respondent has a number of policies and procedures in place, including a Sickness Absence Management Policy and Procedure ('the Absence Policy'), Grievance Policy, Dignity at Work Policy and Supervision Policy

36. The claimant was employed by the respondent as a Lead Practitioner. She worked within the criminal justice services. During the course of her employment with the respondent she obtained a SVQ in criminal justice. Funded by the respondent. The Service Manager was Manager K. The claimant's Line Manger was Manager M.

37. The claimant had macromastia. This caused her pain and psychological issues. She consulted her GP about this and was referred to an NHS surgeon. He recommended surgery. On 13/11/17, she had a pre-op assessment and was later informed that her surgery would take place on 26/1/18. The claimant spoke to Manager M and Manager K throughout this process. Manager M and Manager K knew the nature of the surgery which the claimant was having. The claimant told them the reason she was having this surgery, which was because she had been referred by her GP because of the pain and psychological issues.

38. There were discussions within the respondent's HR department at the time about the arrangements for pay when an employee was absent following cosmetic surgery. The claimant's surgery in January 2018 was not cosmetic surgery. It was surgery, which was medically recommended, on clinical grounds. It was elective surgery in the sense that it was not carried out on an emergency basis.

39. In January 2018, prior to the surgery date, the claimant was told by Manager K that HR had said that the claimant would have to take annual leave for the

date of my operation, that she may not get paid while she was absent, and that she would not get paid if she was to be absent for any, even unrelated surgery in the future. The claimant was upset at this position. She believed that it was out with the respondent's policies. She felt it was selective and unjust. She worried about the financial implications of being absent from work while she received from the surgery. Manager K asked the claimant to take annual leave for the day she had her surgery. Manager K sent an email to the claimant on 23/1/18 (JB500) stating *"Can you please submit annual leave for Friday before you finish up?"*. The claimant replied that she was wanting to talk to <Manager K> about that (JB500). Manager K replied *"Are you not going into hospital now tomorrow?"* (JB499). The claimant replied *"I am still going to hospital on Friday for my operation. I just had a few questions about requesting annual leave for that day, that I wanted to ask tomorrow."*

40. The claimant was called to a meeting with HR Manager A (HR Business Partner) and Manager K. The claimant was not told where within the respondent's Absence Policy that meeting lay. The claimant was told by Manager K that the meeting was because '*HR were disputing the legitimacy*' of the claimant's health issues and surgery and whether she would be paid or not while off sick. The claimant felt unsupported by her managers. At the meeting it was agreed that the claimant did not require to take annual leave to cover the surgery and recovery dates. It was discussed that the claimant would be referred to Occupation Health for a report to be carried out. The claimant was told that 14 days after her operation she would receive an appointment for an Occupational Health assessment and that she *'must'* attend that. That caused the claimant to be anxious about how she would be able to attend that appointment while recovering from her surgery.

41. The claimant's surgery was carried out on 26/1/18. The claimant was certified as unfit for work for an initial 4 weeks post the surgery date. The certificate was issued on the understanding that a further certificate could be issued, and that the claimant should return to work when she felt well enough to do so. That sickness absence certificate was provided by the claimant to the respondent. The claimant has a strong work ethic and wished to return to

work as soon as possible. That absence was her first sickness absence with the respondent. The claimant had received a certificate and an extra day's annual leave for 100% attendance in her previous four years' service with the respondent.

5 42. On 20/2/18, the claimant phoned Manager K. The claimant confirmed her return-to-work date (26/2/18), and informed Manager K that she had not been given an OH appointment. OH then phoned the claimant and offered to do the assessment on 28/2/18. The claimant noted that that was after her return to work. The claimant was told by OH that that would be fine. The claimant
10 agreed to go for that assessment. Manager K then cancelled that OH appointment. The claimant was not told why the OH appointment had been cancelled. She felt disappointed and confused that she had not had an OH appointment prior to returning to work, given that the importance of her attending an appointment with OH had been emphasised to her in the meeting
15 with Manager K and HR Manager A before the surgery. There had been email correspondence between Manager K, HR Manager A and Carole-Ann Yuill (respondent's Health, Welfare and Wellbeing Lead within HR) on 20 and 21 February about the claimant's referral to OH (JB203 - 205). Manager K had stated *"I spoke to Shauna this morning. She will be returning to work on*
20 *Monday and says she is much improved.".* Carole-Ann Yuill had replied *"Do you still require the OH report?".* HR Manager A had *replied "I think it would still be beneficial to have the appointment just to see if there are any adjustments we should be implementing or if there are any restrictions on Shauna due to medical reasons just now."* Manager K replied *"This won't be*
25 *necessary. I have spoken to Shauna and I am satisfied that she does not need the appointment. I have instructed her to bin the appointment letter as discussed."*

43. On her return to work after her surgery, the claimant had a return-to-work meeting with Manager M. Manager M did not say anything to the claimant at
30 that meeting to indicate any concern about her absence or that any action may be taken under the respondent's Absence Policy because of that absence. Manager M completed a return-to-work form after this meeting

(JB208). There is no indication on that form that any action under the Absence Policy would follow. There is a list of options on the form under *'Further action required'.* That includes *'Formal absence meeting to be arranged'.* No box is ticked to indicate any further action.

5 44. On 14/4/18, the claimant received a letter from Carole Anne Yuill (copied to <Manager K>) dated 12 April 2018 and headed *'Formal Meeting to Discuss your Attendance'* (JB211-212). The claimant had received no prior indication of that. The letter informed the claimant *'You are required to attend a Formal Meeting to discuss your sickness absence…'* The claimant was shocked and
10 upset by this.

45. Clause 5 of the Absence Policy (JB178 – 193(aa)) states *"For the purpose of this Policy and Procedure, unless there is good evidence to the contrary, all absences notified will be regarded as being for genuine reasons."* It sets out the circumstances where Occupational Sick Pay will not be made. Those
15 circumstances include *"where there is a demonstrable good reason for the line manger believing that the reason given for the absence is not accurate or genuine or there is not a medical reason for the individual's absence."* None of those circumstances applied to the claimant's absence. Clause 78 of the Absence Policy sets out certain 'trigger points'. One trigger point is where an
20 employee has had *"a continuous period of sickness absence lasting for 4 weeks or more"* (JB193(l)). The Absence Policy then states at that clause 76 *"When an employee's sickness absence records reaches a trigger point, their line manager will in all usual circumstances arrange a Formal Advisory Meeting."*

25 46. The claimant had an absence of 4 weeks following her surgery in January 2018. The claimant had a return to work meeting with Manager M . There was no indication to the claimant at that meeting that she had reached the trigger point or that further action may follow.

47. On 4 April 2018, Manager K had sent an email to HR Manager A (HR
30 Business Partner), who had replied on the same day (JB210). Manager K had stated *"I have a FAM with Shauna this week so just wanted to check in*

with you beforehand. I'm assuming that an advisory warning would be appropriate in her case (elective surgery) despite an excellent absence history.". HR Manager A had replied *"Thanks for checking and hope you had a nice long weekend! Yes, I would say she is due an advisory warning if she has hit the trigger."* The respondent had issued guidelines to managers on exceptions which may be applied in circumstances where an employee's absence has hit trigger points in the Absence Policy (JB196). The email communication between HR Manager A and Manager K makes no mention of the guidance, those exceptions or any possibility or consideration of exceptions being applied. It makes no mention that there should be discussion with the claimant at the Formal Advisory Meeting and consideration of the circumstances before the decision is made. It does not say that the decision on whether or not to issue the warning lies with the manager.

48. The Formal Advisory Meeting took place on 19 April 2018. Present at that meeting were Manager K, HR Manager A and the claimant. The respondent's minutes of that meeting are at JB213-214. The guidance on the application of those exceptions was issued to the respondent's managers. The claimant had not had sight of that guidance at that time. Before the meeting started, Manager K told the claimant that it was decided that she would receive a formal written warning for her absence. The decision to give the claimant a First Written Absence Warning was determined before the claimant's Formal Advisory Meeting. Manager K told the claimant that HR had told her she must issue this. At the meeting, Manager K told the claimant that she should investigate the exemptions for absence warnings and urged the claimant to consider her right to appeal.

49. The claimant believed that because of the nature of her surgery, prior to her being given the opportunity to discuss at the Formal Absence Meeting, the decision had been made that she be issued a warning for her absence.

50. On 8/6/18 the claimant received letter from Manager K dated 4 June 2018 and headed *'Outcome of the Formal Absence Advisory Meeting'* (JB 215-

217). The claimant was informed in that letter that she was *"being issued with a Formal First Written Advisory Warning".*

51. On 14 June 2018 the claimant sent an email to Katherine Wainwright (Head of HR) informing that she was appealing the decision (JB218). There was further email correspondence between the claimant and Katherine Wainwright on 14 June re this (JB218 – 221). The claimant set out her grounds for appeal as *"The warning was disproportionate and that there has been a defect in the process followed and that the defect was material and could have affected the formal meeting"* and *"Due to the nature of my surgery I feel that I was discriminated against as I was advised that HR had discussions with my line manager regarding cosmetic surgery and suggestions that I may not be paid for my recovery period. I was also advised that the decision of the first written warning was made prior to the formal absence meeting taken place, this is because I was advised that HR informed my manager to issue this before any discussions with myself. I was informed that this warning was issued as a direct result of elective surgery and that should I have any period of absence for cosmetic surgery in the future I would not be paid. I am happy to discuss the reasons surrounding my surgery and how this has impacted on me physically and mentally."*

52. Katherine Wainwright wrote to the claimant on 2 July with formal invitation to the appeal hearing (JB223). That letter notes the grounds of appeal as:

    a. *"procedural flaw – that you believe that a decision was made prior to the hearing*

    b. *That the decision was not reasonable"*

53. The day before the appeal meeting, the claimant spoke with Manager M Wallace about taking Kevin Kelly into the meeting as a witness. The claimant explained to Manager M that she didn't want to get her involved. Manager M said to the claimant that anything she told her would be in confidence as a friend. The claimant opened up to Manager M that she was really upset about the whole ordeal and that she felt extremely let down and sad. The claimant told Manager M what she believed to have occurred in respect of the issue

of the warning to her. The claimant emphasised to Manager M that the conversation was as a friend and that she wished it to remain confidential. The claimant said to Manager M that she didn't want to talk to Manager K about it again as she found it so awkward and upsetting.

5 54. The appeal was before Wendy Spencer (Director of Operations) and Katherine Wainwright. It took place on 6 July 2018. The claimant was visibly extremely upset at that meeting. At the start of the meeting, Wendy Spencer told the claimant that she should never have been treated that way, that she should never have received a warning and that she shouldn't therefore be
10 having to go through this process of appeal. Wendy Spencer said this at the start of the meeting because she recognised that the claimant was upset. At this meeting Katherine Wainwright denied that Manager K had been told by HR that she must give the claimant a warning. The claimant asked who then had given her the warning. She was told that it was issued by her service
15 manager (Manager K).

55. The claimant was accompanied by Kevin Kelly (Lead Practitioner Women's Bail Service). There was no discussion at this meeting about the claimant's ground of appeal that she felt *'discriminated against'*. The claimant was not asked about why she felt this. The respondent's notes from this meeting are
20 at JB224. These were not sent to the claimant at the time. The notes state: -

"Shauna was upset. Wendy informed the positive outcome overturned decision given.

Katherine said she types as they talked. We work together on appeals.
25 *Weren't putting you through any more stress so give outcome quickly.*

Info come from is what we need to understand so that there are no further issues?

Went to doctor. Issues surgery, risks measured. Informed the work – appointments. Informal meeting prior to sickness. Before meeting going
30 *ahead – disputing paying myself. Disputing – annual leave day. <Manager*

K> told her that. Informal meeting. 2 days before the operation. Discuss was getting paid. No mention of cosmetic. Appointment for occupational health. Didn't get one then. Off for 3 weeks. Cancelled. Back at work. Driving and being bumped. Advised at the start advised to give the warning. No point in the meeting taking place – meeting irrelevant. From that meeting – a letter sent out – 57 days for the letter. Just <Manager K> in the Dolls House.

Getting the correct information and correct support. We will find out and sort it out. Years and years of pain and anxiety, low self esteem and so on. Process has been stressful. You've had – stressful and not supported in the way I would want. How sorry I am. We will write to that effect.

Informal meeting included <HR Manager A>"

56. There was discussion at the meeting that steps would be taken to find out why the claimant had been treated the way she was. That is reflected in the notes of the meeting at JB224 and in the outcome letter (JB225). The claimant and Kevin Kelly believed from that discussion that the claimant would be receiving feedback from those steps.

57. Wendy Spencer wrote to the claimant on 9 July with confirmation of her decision (JB225). Her letter included the following:

"I am sorry that you found the meeting so upsetting, that it had left you worried and that you did not feel supported. As stated, your procedure (length of absence and that it was one procedure that concluded positively with no ongoing absence) would meet an exception. We will check into the procedure and advice and information provided at each stage to find out why there were delays and why the information you received was not what we would intend so that it does not happen again.

I hope that this will give you some closure on what has been a difficult time for you. I am glad that your return to work has gone well. May we also take this opportunity to say how much we value your work at the women's Supported Bail Service."

58. Shortly after the appeal meeting, Wendy Spencer spoke to Manager K about this situation and Katherine Wainwright spoke to HR Manager A. There was no feedback to the claimant after those discussions.

59. Within an hour of the appeal meeting ending, Manager K sent a text message to the claimant. This said *"despite what you've been saying, it wasn't me who gave you your warning."* The claimant believed that Manager K had sent her this message because Manager M had not kept her conversation with the claimant confidential, and had spoken to Manager K about that and told her everything the claimant had said. The claimant felt that she could then no longer trust Manager M . Manager K requested the claimant meet with her on the following Monday. The claimant worried about the situation over the weekend. At the meeting on the following Monday, Manager K again told the claimant that she had not issued the warning to her. Manager K told the claimant that it was HR Manager A from HR who had told her she must give the claimant a warning.

60. The claimant described to Manager K how emotional and distressed she had been at the appeal meeting with Wendy Spencer and Katherine Wainwright. Manager K asked the claimant if her reaction *was "just because [she] was an emotional person"*. The claimant felt this went to diminish the way that she was feeling.

61. The claimant received no communication from the respondent in respect of any follow up action taken by Wendy Spencer or Katherine Wainwright after the appeal meeting.

62. On 20 July 2018, two weeks after her receipt of the outcome of the appeal, the claimant was advised that she was at risk of redundancy due to service closure. The funding for the Women's Support Bail Service and the Community Payback Scheme, ceased. That funding stopped shortly after notification of it ending had been given. In the women's Bail Service, both the claimant and Kevin Kelly were put at risk of redundancy.

63. The respondent has a Supervision Policy. That policy sets out the importance of regular supervision meetings. The claimant had no supervision meetings in the period from 18 June 2018 to 30 August 2018.

64. In August 2018, Manager M called the claimant into a room to tell her that she was being negative and was having a negative impact on others in my team. Manager M referred to the claimant as having a 'bad attitude' and being 'negative'. The Lead Practitioners who the claimant worked within the Women's Bail Service, Kevin Kelly and Jayne Drennan, believed that the claimant was a positive member of the team with a hard-working and collaborative attitude. The work carried out by that team was challenging and support among the team members was important to them and to the success of the project.

65. The claimant's role with the Women's Bail Service came to an end on 17/8/18, when funding for that service ceased. Manager K confirmed to the claimant in email of 30 July that the official end date of that service was 17 August 2018 (JB502 – 503). After 17 August 2018, the claimant worked providing assistance at various services. On 21/8/18 she was offered the Lead Practitioner position with the Housing First project. The funding for that project was not fully in place at that time and it was not fully operational. The claimant was given a start date of 27/8/18 for the that position in Housing First. That position was offered to the claimant as being suitable alternative employment.

66. On 30 August 2018, Hazel Carey (Senior HR Business Partner (South)) wrote to the claimant (JB315(a)). That letter was headed *'Confirmation of Redeployment Following Consultation into the closure of the Women's Supported Bail Service and Community Payback Order Service'.* That letter included confirmation that the claimant *"will be transferring to the role of Lead Practitioner in Housing First from 27 August 2018. As this role is deemed a suitable alternative to redundancy there will be a 4 week trial period."*

67. The claimant understood that her trial period in the role of Lead Practitioner in Housing First was for 4 weeks, beginning from 27/8/18. The claimant

understood that within that 4 week trial period she was to decide if the role was suitable. On 14/9/18, the Housing First Lead Practitioner role that the claimant had been offered as suitable alternative employment still hadn't started. The claimant was working shadowing co-workers at a grade below, and at unrelated services. The claimant was concerned that she didn't have much work to do and that she did not have enough information on which to base her decision on whether to accept the post which had been offered ot her as suitable alternative employment. On 14 September 2014, the claimant sent an email to Hazel Carey including the following:

"I just wanted to check in with you regarding my redeployment as I was on the understanding that within the trial period new post for 4 weeks I could meet with HR to discuss if this post was suitable to me going forward. Could I initiate a meeting with yourself to have a further discussion regarding this please. I go on holiday on 20th September and return on 8th October."

68. Hazel Carey was on holiday, and so the claimant sent an email in the same terms to Katherine Wainwright (JB319 – 320). Katherine Wainwright replied to the claimant as follows:

"We'd be happy to discuss on your return from holiday on the 8th October and will treat it as an extension. I think some alternative redeployment options are possible. Unfortunately meeting cannot be accommodated today or tomorrow. Please just give Hazel or I a ring on your return from leave and we will arrange a mutually agreeable time."

69. The claimant was on holiday abroad from 21/9/18 to 5/10/18. The claimant understood from Katherine Wainwright's reply that it was mutually agreed that the trial period was extended. On 26 September 2018 HR Manager A sent an email to some employees, including the claimant as follows (JB324):-

"Hello.

I hope that you are keeping well.

I thought I would drop a note to each of you to check in, as the four week trial period for your new role has now ended. I trust that you are settling in well,

and please do not hesitate to contact me should you require any further support.

Kind regards."

70. There was no recognition from the respondent that the claimant had not actually started in the role which had been offered to her as suitable alternative employment.

71. The claimant had been searching for alternative employment because she did not know if she wished to accept the job which had been offered to her as suitable alternative employment. The claimant was offered a post with Salvation Army. On 12 September 2018, Manager M received a request for a reference for the claimant.

72. Liz Littler was the service manager for the role that the claimant had been offered as suitable alternative employment. On 19 September 2018, Liz Littler (Service Manager for Housing First) sent an email to Wendy Spencer, copied to Manager K and Kevin Staunton, (JB322) in the following terms:

"I have just been informed by Manager M that Shauna has asked HR for a meeting due to the fact that she is unhappy with her new role / job in Housing First.

I am stopping for annual leave shortly so just wanted to have a word before I go off. The new service of Housing First Consortium Glasgow is as yet not even up and running and she has currently been shadowing with the Peer support workers and ASCs. She has also gone to offer some support at Garscube service this week as they were very short staffed. I find it difficult to know how she can say she is unhappy with her new role as she has not yet actually started it.

I do know that Shauna interviewed for another post with the Salvation Army Housing First Service. She was successful with this and is awaiting a start date with them. I also know that she had been hoping for a redundancy package initially, before being offered the post here. Shauna has also not

mentioned this to me, as I would expect her to, nor to her service coordinator <Manager M>.

I will be back in the office on Monday 1st October if there is anything you need to know".

5 73. When the claimant returned to work after her holiday, she spoke to Liz Littler. The claimant aired her concerns about her new role having not yet started and that she was due to meet with Hazel Carey from HR later that day. The claimant met with Hazel Carey on 8 October 2018. At this meeting, the claimant set out to Hazel Carey her concerns that she did not know where her 10 new position would be based, that she was currently working with diminished responsibilities, that she didn't know what the hours of her new position would be and that she didn't know what exactly the job would be doing. Section 5.3 of the respondent's Redundancy Policy provides for *"a 4 week trial period actually in the post".* The claimant had not started the post which had been 15 offered to her as suitable alternative employment. At that meeting, Hazel Carey told the claimant that there were only two other possible alternative jobs for her. One of those was unsuitable due to conflict of interest because the claimant's mother is the service manager and it would be against the respondent's policies to allow the claimant to then work in that service. The 20 claimant considered the other role to be unsuitable because of the travel distance from her home. Hazel Carey's position to the claimant at that meeting was that the only other option would be to extend the trial period for a further minimum of 6 weeks. The claimant then asked what her option was for taking redundancy. Hazel Carey told the claimant that this was *'never an* 25 *option'* for her. Section 5.3 of the respondent's Redundancy Policy states: *"Should there be no other potentially suitable work available, you will remain entitled to receive a redundancy payment."* The claimant believed that section 5.1 of the respondent's Redundancy Policy allowed her to decide during the trial period of the role offered was suitable. This states: *"It is a* 30 *matter for you to determine whether or not a post offered to you as an alternative to redundancy is 'suitable' for you, having regard to pay, status, location, working environment, hours of work, or any other material factor.*

You will be given sufficient details about the alternative post to enable you to form an informed view." Section 5.4 provides that any trial period extension should be mutually agreed.

74. On 9 October 2018 the claimant sent an email to Hazel Carey (JB326 – 327) in the following terms:

"Further to our conversation on Monday, 8 October, I would like to inform you of my decision to reluctantly accept redundancy. For reasons of clarity, I would like to state why and how I have come to this decision.

Firstly, I would like to point out that the new job offer was to be made before my redundant position ended. My position ended on 20 August by which time I had not received an offer of a new position and this caused uncertainty. The new role that I was thereafter offered was also to begin within four weeks of my redundant role ceasing. This is now the 9th of October and the role has still not started and I am therefore still at unease. I still do not know the full detail about the job to understand how different it would be to my redundant role. For example, I do not know exactly what I'd be doing, what exact hours I would be working, or where the job will be based. I have been informed that there is a change in conditions as my shifts would change with weekend and evening work now included, and that I will be required to work public holidays. I will also have to always use public transport when I had previously paid for business insurance to use my car during support work.

Yesterday you had mentioned extending the trial period for a further six weeks however this would cause an extended period of the unknown, unsettlement and unrest. I therefore reluctantly decline this offer. You also suggested offering two alternative positions but both are unsuitable and unsustainable. One due to distance and the other a professional conflict of interest. I am additionally aware that these roles have night shifts and 12 hour shifts involved.

I feel extremely let down by the organisation regarding the lack of support and empathy offered over the past 12 months. I have been through a lot and have been mentally affected by what happened at work and had recently been

given an apology from Turning Point Scotland before I was told soon after that I would be losing my job. Having been unfairly treated through my ill health and having therefore been subject to unnecessary stress due to mismanagement I would have expected better support through this redundancy. On the contrary, one of my management staff told me during this process that I was being 'negative'. This comment only compounded my frustration and sense of helplessness within the organisation.

Due to the above factors and level of stress that I have unfortunately suffered to date, I sadly feel forced into leaving the service. If I would therefore like to formally request my redundancy leave of five years' service. I would like to offer you my services until 31 October but understand if my proposed service manager wishes to negotiate this. I will contact Liz directly after this email to aid the transition.

I wish to state that I am thankful for the opportunity that you gave me to help others within my roles and hope that I can rely on you for a positive reference in future."

75. On 11 October Hazel Kayleigh sent an email to the claimant (JB325) headed 'Redundancy Meeting 8th October' in the following terms:

"Thanks for your email. Whilst we understand that you wish to receive redundancy pay, we do not agree that you are redundant. The job role of lead practitioner is the same in terms of pay / status and job description and we did clearly highlight and explain the work pattern at the Housing First service during the consultation process with yourself; that being said we are happy to work with you to resolve any concerns you have around the specific hours of the service and try to accommodate your specific requirements via flexible working. Having to adjust to use public transport more rather than your own vehicle when at work is not unreasonable and using your own car exclusively does not form part of your contract of employment.

We do therefore believe that this is a suitable alternative vacancy (not just a different role) and do not consider it reasonable that you reject it for the reasons you state. There will be multiple options for you with TPS of suitable

alternatives beyond the two you have rejected. In addition, your new service is just beginning and although the new service has had some delay in full implementation it is in a period of development and build (the service is not one that was planned to start at 100% on a date) and so the extension of the trial period would allow the opportunity to experience the role more fully and for discussion on flexible working request (for specific pattern); you also taken annual leave since commencing. You have made as aware that you have been offered another job role outside the organisation; for clarity leaving for a new job is not a redundancy situation or would attract redundancy pay.

You have also said you feel forced into leaving, which we would take very seriously and are happy to explore you, but similarly that is not a redundancy situation.

I am sorry to hear that you feel so unhappy with Turning Point Scotland and we would be happy to discuss further with you to find some resolution. The organisation dealt with your appeal to a formal absence warning fully and fairly. There is no link between that and the service closure and the appeal process was confidential and was not a part of any discussion around the service closure or the support provided. The sudden ending of a service is always a difficult situation for all those working with the service and for the organisation and change undoubtedly is unsettling. The feedback we have had about the support provided to the team was generally very positive and again I am sorry that you do not feel that the support provided was helpful or adequate for you. If you could let us know what more or different supports would have been preferable we'd be happy to consider this going forward for any similar situations.

I am assuming you wish your email to be accepted as providing notice of resignation but it would be helpful if you would confirm this. You are required to serve your notice period unless agreed otherwise with the organisation; if you wish to request this please let me know.

We have valued your contribution to the organisation and are sorry that you are leaving."

76. In the meantime, the claimant was sent to work on another unrelated service, as the Housing First service was still not fully operational. Liz Littler sent an email to Kevin Staunton and Hazel Carey re that on 15 October 2018 (copied to Patrick McKay, as follows:

5 *"I have spoken to Shauna today and confirmed that she will finish up with TPS on 31 October. I have also arranged for her to go to Maryhill Moving On service from Wednesday 17th October until her end date of the 31st October. It seems the sensible thing to do as they have absence at Moving On and will benefit from the cover, whereas here at Housing First there is very little we*
10 *can do to keep Shauna busy."*

77. On 15 October, the claimant sent an email to Hazel Carey in the following terms (JB331):

"Thank you for your response on behalf of the organisation.

The actions that led to my disciplinary appeal were unfair and I have also
15 *since been treated differently. I was told that the initial mistreatment would be investigated but I never heard back as to why I was treated this way. Whilst I of course agree this was not the reason for service closure, it is entirely relative to my thoughts and feelings and directly links to why I feel I have been forced to leave.*

20 *In relation, I'm disappointed that having mentioned being labelled negative on three separate occasions now that I have had no verbal or written response. When I was extremely stressed and upset about my recent mistreatment, and further worried about my livelihood through risk of redundancy, I was dismissed as simply being negative. To my knowledge no one else at risk of*
25 *redundancy was purposefully called into an office to solely discuss then being negative. I also believe it to be telling that I haven't had a scheduled supervision since my appeal meeting.*

I truly was hoping that I wouldn't be forced to take this action and that with time I would be able to get back to my previous happy and healthy working
30 *relationship (that we had prior to me notifying you of the nature of my*

operation) with you. This is why I try to see if time would perhaps make things better towards me as I am not a quitter. However, as highlighted, I continued to be given a lack of support and the redundancy process hasn't been fully followed. With everything that has happened before and during this process, I can no longer have faith or trust in the organisation treating me correctly.

I still feel sad and anxious about coming to work and that's not how things should be. I hope you will agree that I have consistently been an exemplary employee for Turning Point Scotland. For someone who has given nothing but full effort throughout the entirety of my employment, it is extremely disappointing that things have risen to this level.

I would like to request for this to be dealt with as soon as possible. I must stress that I am not leaving because I received external offers but rather have been forced to search for alternative employment because of the above situations. My request for leave in my previous email does not solely regard the suitability of a role, but additionally the treatment I have received as well as process discrepancies which further disillusion.

Please let me know if you would reconsider your stance as I may have to seek further legal advice otherwise."

78. Also on 15 October, Manager M called the claimant into an office and spoke to her with a raised voice. Manager M appeared to be angry with the claimant. She told the claimant that she had received a reference request for the claimant from East Renfrewshire Council. She told the claimant that she had a *'bad attitude'.* The claimant told Manager M that she had applied for a job with East Renfrewshire Council but that she had not received a conditional offer of employment from them and so didn't know that a reference request was being sent, and that if she had known she would have told her.

79. On 17 October, Hazel Carey sent an email to the claimant in the following terms (JB325):

"I am sorry if you still feel unhappy about the absence process which took place in June / July of this year, and would reiterate that I had your appeal

meeting in the July the warning was overturned. For the avoidance of doubt this was not a disciplinary process, it was a formal absence process under the organisation's sickness absence management procedure. I reviewed the outcome letter and I do not think that there was any further follow-up outlined in it - Wendy said she'd check into it and did so.

If you are unhappy with the content of the discussion you have had with your line manager (in terms of the word 'negative') and believed it was unreasonable and not justified you are able to discuss this with them to resolve it, or alternatively if you would like this to be treated as a formal grievance and it can't be resolved informally please let us know and we can commence this process. It is never our intention that employees are unhappy coming to work, and we would always wish to work with you to resolve any concerns you have. We use individual stress risk assessments to support employees who feel stressed about work to try and resolve or reduce the stressors.

You have raised supervision for the first time in the email below. You've not been working with Liz for very long and you also had annual leave in that time and have been clear with Liz that you are moving to the other role. Whilst ideally you would have had supervision you have had contact with Liz a few times and I don't think it is unreasonable or telling of any negative intent. Liz is highly approachable and I know has spent some time with you.

Being forced to leave is called a constructive dismissal and that you had an absence warning decision overturned but remain unhappy around that and that your manager appeared to tell you that you were coming across as negative would not, in my view, be adequate reasoning. I do not think that you are asking for leave (see below highlighted) but for an additional payment to be made in your correspondence but please clarify if you are requesting leave. We would not pay redundancy because you are unhappy.

We would dispute that the redundancy process has not been followed. Again, if you could let us know what more we could have done what you feel we could have done differently to support you better we will certainly take this on

board for future similar situations. In addition, due to newt services coming online we now have a number of new late practitioner roles which would be clear suitable alternative opportunities and we would be happy to discuss these new roles in more detail with you. It is still our position that the role at Housing first is a suitable alternative to redundancy, we consider your rejection of it and your reasons for that unreasonable and we would be happy to accommodate you to continue in that role or to move to another. You seem to be saying that you will not do it because you think the relationship between employee and employer there has been damaged beyond repair, which we do not see at all, and that would be a different issue entirely.

In short there is no change in the organisation's position and we will take forward the formal grievance procedure around your line manager using the word negative to you that is what you wish us to do. Please could you confirm if that is the case?"

80. On 21 October, the claimant sent an email to Katherine Wainwright with the heading *'Grievances'* and in the following terms:-

"I formally request to raise two formal grievances regarding the issues previously raised within the organisation. I have tried to resolve these issues informally but feel the response content to be unsatisfactory.

Firstly, I fully believe that I am positioned as redundant as my role was made redundant on 17 August and I still rightfully entitled my redundancy leave. Having spoken with the ACAS and Unite, I now know that I am within my rights to leave under redundancy rather than give giving any standard notice as I was led to believe) as my trial period concludes with a lack of success. I have acted thus far only to solve this matter professionally and amicably as to not lose my rights.

This matter surrounds discrepancies within the redundancy process and in particular(but not limited to) the following points:

1. *a new position is to be offered before a role is made redundant and this was not the case.*

2. *The new rule is to start within four weeks of the rule being made redundant and this was not the case.*

3. *I was to be given full details of the new position but I still have not been given detail of (amongst other material details where this position would be based.*

4. *Within my trial period I was to try the new position and therefore decide suitability as the new role has yet to start, it is impossible to see the certainty that it is suitable.*

5. *Nine weeks after my role was made redundant, I still do not know what I to be doing day to day. The job that I have been doing shadowing others some at lower level, in variable different services cannot be reasonably seen as suitable for a number of reasons including diminished responsibility and lack of challenge in relation to my experience and skill set. I have been told that I am just acting as an extra body and that finding something to do for me has been difficult. In addition, I am currently working over 6 miles from my previous base and have been required to work back shift which I had never done in my redundant role. Weekend work is also to be included, using my car to get to and from support has been disallowed and holiday requirements have changed. My day-to-day conditions have certainly changed even if the broadness of contract paperwork claims otherwise.*

6. *Within an hour of your latest email reply from which I had mentioned legal action, I received a phone call to warn me that I will have to pay back my SV Q funding. This had been questioned continuously by my line manager since redundancy date. For the avoidance of doubt, in this email, when referring to my service manager and line manager, I am referring to those in my redundant role.*

7. *I have been shown no support from my line manager and service manager throughout the process. Instead I've been told I just being negative, recently that I have bad attitudes I with you both of these accusations and as mentioned above constant reiterance re SVQ money. My service*

manager in distortions had told me early redundancy trial that I am not subject to paying it (the SVQs funding) back.

8. *Since redundancy, I have worked under seven different managers and in four different services. I am unsure I correctly report to.*

9. *I have lost trust and confidence in the organisation to deal with matters like this correctly and fairly.*

10. *At our meeting on Monday, 8 October - which was intentionally requested by myself on 14 September regarding trial period to inform you of this matter - you stated that the three roles offered were the only going to be to me and that I was therefore limited choose between the three only option you said was to extend the trial for my potential role by a further minimum of six weeks. Extending this to a trial period of more than 14 weeks - when the standard practice is four week - is unreasonable, especially due to the material factors above and that I am, will be, and have been for some weeks, left in relative limbo. I therefore rightfully disagreed to the trial period extending any further. Regarding said other two positions, one is based in a different district outwith Glasgow, 15 miles from my previous base which would have been 25 extra miles of travelling per day from my home the other is a conflict of interest which is stated within turning point Scotland policy. Based on this film exhaustive accurate and entire information given to me, I made the decision to formally let you know that none of these positions could be said to be suitable and that I would like to rightfully follow redundancy procedure. I therefore unfortunately find the discrepancies regarding this in your emails to be wholly unreliable.*

My second grievance is the way I have been mistreated over the past few months this matter surrounds the heart stressed and upset caused by mistreatment and discrimination due to gender and mental health issues and in particular but not limited to the following points:

1. *The unnecessary ongoing dispute regarding the nature of my operation. I cannot find anything relating to this in your six absence management policy that would suggest it to be just. I find this therefore selective.*

2. *The unnecessary ongoing uncertainty regarding I would be paid while I was off sick recovering. Again there is nothing in your absence management policy stating that I wouldn't get pain again find this dispute to be unjust and selective.*

3. *Being told that I would have to take holiday leave for a day of operation due to the nature of my operation. I do not see this anywhere in your sickness absence management policy and find this unjust and selective.*

4. *If I was to require a further even if unrelated surgery that I wouldn't get paid for any subsequent time I would be off. This again I cannot find in your sickness absence management policy and found to be unjust and selective.*

5. *In the lead up to my informed absence, I was called into an unnecessary meeting because of the nature of my operation whilst similar cases in the workplace have not required this. I therefore find this to be unjust and selective. I also do not see this anywhere in your sickness absence management policy.*

6. *I was instructed that I would be required to attend occupational health 14 days after the date of my operation as to assess me for safely easing back into work. I was not provided with this and had to phone to request it. This was latterly as the appointment was made for after I returned to work.*

7. *I was told by my service manager before my formal meeting regarding my subsequent warning that the decision had already been made by HR. I believe this is a serious breach of rules and regulations and acts to diminish my rights.*

8. *My service manager told me when giving me my warning that there was no other alternative. In accordance with turning point Scotland policy however this is false.*

9. It took upwards of eight weeks to get my warning confirmed in writing.

10. I it was questioned by my line manager prior to my appeal why I was bothering to take someone in with me.

11. I was distraught throughout this whole period and it was evident for those present in my appeal meeting how much this mistreatment has affected me. The decision was rightfully overturned and it was said that the matter was going to be investigated. I still haven't heard the result investigation by Angus treated this way and what was to be done about it. I therefore think this matter ongoing with no conclusion. I have to stress that the actual reversal of the warning is of course not what I am unhappy about.

12. After my appeal there was a further breach of trust and confidentiality when encouraged to speak up as a friend not as a manager) when I said I was reluctant to do so I confidentially spoke with my line manager of my upset (regarding my service manager and HR) and it was immediately passed to my service manager who then texted me about it.

13. I was told by my service manager that it was HR Manager A from HR that was responsible for giving me my warning. HR said it was my service manager. The letter was signed by my service manager. These discrepancies amidst lack of ownership of who gave the warning trouble me further as I still don't know who gave me the warning and why. Again this leads me to believe it to be specific to the nature of my operation.

14. I've continued to feel victimised since my appeal meeting. I feel I have been nothing if not an exemplary employee since my start date as yet have been labelled as a negative attitude from my line manager and asked is it just because you are an emotional person from my service manager. I the only person to be called in to a room to be specifically told I am negative and fine very selective unjust. If I have an issue or problem I should be able to go to my line manager or service manager for assistance but I've been unable to do this.

15. *Since making the decision to appeal the warning in June I have not had a recognised supervision meeting which is supposed to be provided every six weeks. I find this telling of the fact that I have not been supported and how I have been treated since this all started.*

16. *The redundancy process has not been followed I've been told I'm not entitled to something I am entitled to and my line manager has continually question paying back my SVQ. My service manager had told me I wouldn't have to worry about it I then received a call within an hour of an email from HR regarding legal matter that I would have to pay back a speak you money*

17. *there has been a breach of the implied trust and confidence between employee and employer because of these instances and I feel this to be irreparable*

18. *I have for the first time in my life felt extremely anxious and upset about going into work because I am afraid of how I will be treated. I have broken down embarrassingly in front of my colleagues twice at work and several more times at home on my own and with friends and family*

19. *I have for the first time in my life had to seek medical help regarding stress and anxiety and low mood. I have received medication from my doctor at the sole reason is my mistreatment in the workplace. I am now unfortunately having to seek further medical assistance.*

I feel all of this was completely avoidable and could have been appraised at different stages. As much as my appeal served to rightfully reverse the decision of my warning it's never address the issue surrounding it and I continued to feel victimised and discriminated against since.

I wish to say with a record that I love the platform that I was given to help better people's lives it has been so rewarding and I appreciate the opportunity you gave me to do so. I am also extremely grateful to have made many friends within the organisation throughout the years and I am truly sad that it has come to this.

It is of course ironic that I feel an extreme lack of support from an organisation that for the most part offers great support to people. I understand you may feel offered and agrees that receiving these grievances and I do apologise for any perceived bluntness of my words. I do however feel that I need to finally stand up for myself and let you know that I feel wronged in the hope that these issues never appear again in the future.

In conclusion I would appreciate that these grievances are dealt with immediately requested initially from a redundancy leave to be honoured and secondly for the second matter to be addressed to a level that can be deemed satisfactory.

My next step will be to apply for early conciliation through ACAS before taking the matters to employment tribunal if necessary."

81. On 26 October the claimant sent an email to Katherine Wainwright as follows (JB505):

"Can I just confirm that I will receive the letter today? I'm going to be moving on.

I received your letter through the post regarding SVQ it mentioned that I was unhappy about repaying SB to costs but just to clarify, I have never said or meant this. I had only mentioned the SP in relation to my grievances. I believe under redundancy I wouldn't be subject to repayment.

I have also received my P45 and end of employment letter in the post yesterday. Again, I wish to clarify I've not resigned and wish to leave under redundancy. Obviously there is some dispute with this so I am now working under protest whilst we go through the grievance procedure we can hopefully resolve this as soon as we received word back from Tracey."

82. Katherine Wainwright replied to the email by her letter to the claimant of 26 October 2018 (JB376 – 377). She summarised what she saw as the grounds of the claimant's grievance. That summary did not capture of the issues of concern raised by the claimant in her grievance. It did not capture the claimant's position that the position offered to her as suitable alternative

employment had not started during the trial period. Katherine Wainwright informed the claimant that Tracey McFall (Strategy and Implementation Manager) was appointed to be the fact finding manager in respect of the grievance. The letter asked the claimant to contact Katherine Wainwright within three working days if she did not agree with the summary of her grievance grounds.

83. On 29 October, the claimant sent an email to Katherine Wainwright in the following terms (JB506):

"Having re-read the letters and emails that I have received I have to stress that I am extremely and increasingly disappointed with how things have been handled so far. I feel I've made my position abundantly clear directly with HR numerous times now and in some depth, through both my initial meeting and subsequent correspondence.

I now find myself in an escalated, additionally stressful, situation where I received my P 45 and end of employment letter whilst my redundancy is being disputed. I also did not resign. The mention of the 31st had immediately followed, in the same paragraph, the request for redundancy and was meant to professionally give you (the organisation) the courtesy of time to put everything in place and I would then leave amicably with redundancy. I have subsequently made two further request for redundancy and four requests in total. In complete contrast, my request for redundancy claim to have been somehow misconstrued and entered as resignation can you confirm this is the case?

In relation, are you able to confirm today with any certainty that I can expect redundancy payment?

With everything that has preceded as well as ongoing discrepancies, and the way things have been handled since the beginning of my initial meeting regarding this situation, I simply no longer trust or confidence in the organisation moving forward."

84. On 30 October the claimant sent an email to Katherine Wainwright in the following terms (JB507):-

"Due to the numerous factors which have preceded the redundancy process, those throughout, and in relation to my original courtesy of giving until 31 October to placate things and honour redundancy, as you have stated the grievance process will not solve things prior to the 31st I would formally I would like to formally resign with immediate effect. I believe there has been a clear breach of the implied trust and confidence between employee and employer.

There have been, as mentioned, a number of factors which have led to this which have been included in my correspondence with yourself and Hazel as well as in my proposed grievances. On top of these factors, I am also really unhappy with the way my requests, my grievances, and my upset have been handled since the beginning of my initial redundancy meeting with HR.

In addition, having said that I am stressed, anxious, upset and fearful about coming into work, no one from the organisation has called me or came to speak to in person to ask if I am okay. I would have loved some support or a kind word to appease the situation but feel it has been left to come to a head like this instead."

The claimant replied to Katherine Wainwright on 31 October 2018, in the following terms (JB379):-

"I would like to formally amend my grievance grounds to include all of the points raised in my initial grievance email. I do not wish for these to be summarised. As stated, this is two separate grievances and I would appreciate if they were dealt with as such.

In addition I would like to add the following grounds to my second grievance regarding mistreatment.

Since recently highlighting low mood at work along with anxiety, no one from the organisation, i.e. a manager, HR or otherwise called or came to speak to

me face-to-face to ask me if I am ok. There has been a distinct lack of concern, duty of care, and support.

Why were my repeated and clear requests for redundancy confused with resigning and why did I receive my P 45 and End Of Employment letter before redundancy was said to be honoured? Why did HR not speak with Liz regarding clarifying my position before sending these concerning letters?"

85. There was no attempt by the respondent to seek to resolve the claimant's issues prior to 31 October 2018. The claimant was sent her P45. There were several communications with the claimant that she would have to repay the respondent re SVQ (Scottish Vocational Qualifications) fees. The respondent later informed the claimant that she would not require to repay those fees to them.

86. The claimant started employment with East Renfrewshire Council on 2 November 2018. That role was within criminal justice. The claimant's salary in the new role was not less than her salary in her role with the respondent.

87. On 13 December 2018 Kevin Staunton (HR Business Partner) sent a letter to the claimant informing her that Tracey McFall had completed her fact finding report. In that letter, the claimant was invited to a Formal Grievance Meeting on 20 December 2018. The fact finding report (JB384 – 433) was sent to the claimant with letter dated 17 December 2018 (JB283). On 18 December 2018 the claimant sent an email to Martin Garkov (HR Administrator) stating that she had not yet received the fact finding report and therefor asking for the Grievance Meeting to be postponed. The Grievance Meeting was re-arranged to take place on 21 January 2019. On 14 January 2019 the claimant was sent a letter confirming the arrangements for the re-arranged Grievance Meeting.

88. On 25 January 2019 the claimant sent Patrick McKay a note of what she considered to be 59 separate discrepancies in the fact finding report (JB466 – 469). This included the claimant's concern that neither Kevin Kelly or Jayne Drennan (the only members of my working team) were not interviewed; that HR Manager A was not interviewed, despite it being her who Manager K

alleged had told her to give the claimant the absence warning and who had chaired the informal meeting prior to absence; that Hazel Carey and Katherine Wainwright were not asked questions about all concerns which were relevant to them or that there was no recognition that the claimant had had a meeting with Hazel Carey on 8 October 2018, and that Katherine Wainwright had claimed HR were *"never given the chance..."* to discuss me being unhappy in my post."

89. The claimant also raised that what she saw as key emails between herself and HR were missing from the fact finding report. That Liz Littler had said that the claimant had told her she was leaving for a job with Renfrewshire Council, and it was the claimant's position that she hadn't at that time been for an interview for the (East) Renfrewshire Council job and had never spoken with Liz Littler about it. The claimant said that she had not had a conversation with Liz Littler re her SVQ payment, as was alleged by her.

90. The decision in respect of the claimant's grievance was taken by Patrick McKay (Operations Manager). Minutes were taken of that meeting (JB446 – 455). The claimant was advised of the outcome by letter to her from Patrick McKay of 4 February 2019 (JB456 – 463). None of the claimant's grievance points were upheld. Not all of the concerns raised by the claimant were addressed. On 8 February Patrick McKay wrote to the claimant (JB470 – 471) stating that he had read over her document setting out the grievances before making his decision.

91. The claimant appealed the grievance outcome (JB475 – 477). The appeal hearing was arranged to take place on 15 February 2019 (JB472-473), then re-arranged for 26 February 2019. The claimant did not attend the grievance appeal hearing. The decision at that appeal was taken by Kenneth Crawford (Director of Finance and Resources). His decision was given to the claimant in his letter to her of 15 March 2019 (JB478 – 483). The claimant's appeal was not upheld. Kenneth Crawford set out his responses to the claimant's appeal points (JB484 – 492). That included a list of 31 points in respect of which Kenneth Crawford stated *"I do not believe it would serve and benefit to*

respond in such detail to the points below." . Not all of the concerns raised by the claimant were addressed.

Relevant Law – Constructive Dismissal

92. Section 95(1)(c) of the Employment Rights Acts 1996 ('the ERA') sets out that where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct, then that employee shall be taken as dismissed by his employer. This is known as constructive dismissal. Case law has developed in respect of constructive dismissal and which is relevant to the Tribunal's determination of a claim under section 95(1)(c). The issues agreed by parties' representatives as being the issues for determination by the Tribunal in respect of claimant's claim of constructive dismissal are identified with reference to the Court of Appeal's decision in ***Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.***

93. Following ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***, the test on application of section 95 is a contractual one. There must be a breach of contract by the employer. It may be either an actual breach or an anticipatory breach. That breach must be sufficiently important or serious to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. The employee must leave in response to the breach and not for some other, unconnected reason. Following ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***, the test of whether there has been a breach of the implied term of trust and confidence is objective. Following ***Mahmud v BCCI SA [1997] ICR 606, and Bournemouth University Higher Education Corp v Buckland [2009] ICR 1042 (EAT)***, in a claim in which the employee asserts a breach of the implied term of trust and confidence, he must show that the employer had, without reasonable and proper cause, conducted himself in a manner calculated, or likely, to destroy or seriously damage the relationship of trust and confidence between them. Following ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***, in a case involving the 'last straw', 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 trust and confidence. In such a case, the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? Although the final straw may be relatively insignificant, it must not be utterly trivial.

94. For a successful claim of constructive dismissal, there must be a causal link between the employer's breach and the employee's resignation – i.e. the employee must have resigned because of the employer's breach and not for some other reason, such as an offer of another job. It is a question of fact for the Employment Tribunal to determine what the real reason for the resignation was. To be successful in a constructive dismissal claim, the employee must establish that (i) there was a fundamental breach of contract on the part of the employer (ii) the employer's breach caused the employee to resign; and (iii) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

95. Where the Tribunal makes a finding of unfair dismissal, it can order reinstatement, or in the alternative award compensation. In this case the claimant seeks compensation. This is made up of a basic award and a compensatory award. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Provisions re. the maximum compensatory award are set out in section 124A ERA.

Relevant Law – Equality Act 2010

96. The claimant relies on section 13 of the Equality Act 2010. She relies on having been treated less favourably because of her protected characteristic of sex (gender). Section 13 states:

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

97. The claimant relies on section 26 of the Equality Act 2010 (harassment). The relevant provisions of section 26 are as follows:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) Violating B's dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

(2) In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) The perception of B;

(b) The other circumstances of the case;

(c) Whether it is reasonable for the conduct to have that effect.

98. Sex is listed as one of the relevant protected characteristics in section 26(5). This is with reference to gender.

99. The claimant relies on section 27 of the Equality Act 2010 (victimisation). The relevant provisions of section 27 are as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;

(c) Doing any other thing for the purposes of or in connection with this Act;

(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

Burden of Proof

100. In respect of the claimant's claims under the Equality Act and in respect of the constructive dismissal claim, the burden of proof is first on the claimant. In respect of each of those claims, the Tribunal required to consider the strength of all the evidence, presented to it by both parties, and decide whether the claimant has made out her case, on the balance of probabilities. The standard of proof applied in Employment Tribunal cases is the civil standard of proof of 'on the balance of probabilities'. Mr Justice Denning in ***Miller v Minister of Pensions 1947 2 All ER 372, KBD***, explained the civil standard proof in these terms:-

"[The degree of cogency] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.'

101. Section 136 of the Equality Act 2010 applies to any proceedings brought under that Act. 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 contravention occurred' (s136(2)). This statutory position follows the development of case law. The Court of Appeal had provided guidance on the standard of proof in civil cases (including

Employment Tribunals) in ***Igen Ltd (formerly Leeds Careers Guidance) and ors -v- Wong and other cases 2005 ICR 931, CA***, revising the guidance in Barton. In approving the Barton principles, the Court of Appeal said:

5 *"The statutory amendments clearly require the ET to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage,*

10 *which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."*

102. This relates to what is known as the 'shift' in the burden of proof. The guidance provided by the EAT in ***Barton -v- Investec Henderson***

15 ***Crosthwaite Securities Ltd [2003] IRLR 332*** ('the Barton Guidelines' referred to in Igen) is as follows:

"(1) Pursuant to s.63A of the Sex Discrimination Act 1975, it is for the Applicant who complains of (sex) discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude,

20 *in the absence of an adequate explanation, that the Respondents have committed an act of discrimination against the Applicant which is unlawful … These are referred to below as 'such facts'.*

(2) If the applicant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the applicant has

25 *proved such facts that it is unusual to find direct evidence of sex discrimination. …*

(4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to

30 *draw from the primary facts found by the tribunal.*

(5) *It is important to note the word is 'could'. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.*

(6) *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw … from an evasive or equivocal reply to a questionnaire …*

(7) *Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account … This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*

(8) *Where the applicant has proved facts from which inferences could be drawn that the Respondents have treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.*

(9) *It is then for the respondent to prove that he did not commit, or, as the case may be, is not to be treated as having committed that act.*

(10) *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*

(11) *That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.*

(12) *Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect*

cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

103. The Court of Appeal in Igen concluded that it *'may be helpful for the Barton guidance to include a paragraph stating that the ET must assume no adequate explanation at the first stage'*. In that way the Barton guidance has been amended by ***Igen***.

104. The approach in ***Igen*** was approved in by Lord Justice Mummery in ***Madarassy v Nomura International plc 2007 ICR 867, CA***. Both that case and Igen were approved by the Supreme Court in ***Hewage v Grampian Health Board 2012 ICR 1054, SC***.

105. In ***Hewage v Grampian Health Board 2013 SC(UKSC) 54***, the Supreme Court held that *"It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*

Codes of Practice

106. In determining the claims under the Equality Act 2010, we had regard to the Equality and Human Rights Commissions Code of Practice on Employment ('the EHRC') (2011).

107. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ('The ACAS Code') sets out guidance on how disciplinary and grievance processes should be handled by employers. When dealing with a disciplinary process decisions should be made based on reasonable investigations which have been carried out. When dealing with a grievance raised by an employee, employers have a duty to seek to resolve issues raised.

Submissions

108. Both parties' representatives spoke to their submitted skeleton submissions. These submissions are addressed in the decision section below.

Comments on Evidence

109. The claimant's representative raised concern that the Joint Bundle contained medical information on Dean Kerrigan, which was said to be sensitive personal data. The claimant's representative was concerned that this Bundle had then been sent to the witnesses. Dean Kerrigan himself and Jayne Drennan also expressed their concerns at this. We were not taken to these particular documents in evidence and did not read or consider them. The details of Dean Kerrigan's medical information was not relevant to the issues before us.

110. There was little dispute on the primary facts. The respondent did not contest much of the claimant's position in her evidence.

111. We found the claimant to be an entirely credible and reliable witness. Her position in evidence was consistent throughout and consistent with her position in the documentary evidence. We accepted the claimant's representative's submission that the claimant had given her evidence in a way that 'flowed'. The claimant answered questions fully, without hesitation or seeking to filter. She showed visible signs of being upset, both during her evidence and during the evidence of other witnesses. Breaks were taken as considered to be required. She did not attempt to avoid any questions. She was not guarded in her evidence. She made concessions where appropriate, e.g. that she had not raised with Manager M that she believed that Manager M had breached her confidentiality.

112. It was significant that in the claimant's witness statement, in respect of the redundancy situation, the claimant said *"I see the service closure as unrelated, however the subsequent treatment does interlink with the lack of support provided, with breach in policy and contract and with discrimination with refusal to honour my due pay".*

113. Although the claimant believed that Manager M had breached her confidentiality, we did not make a finding in fact in respect of that. We accepted the respondent's representative's submission that much of what had been discussed between the claimant and Manager M had also been discussed at the appeal meeting. We accepted her submission that given that there was evidence that Wendy Spencer had spoken to Manager K about the situation *'very shortly'* after the appeal meeting, that discussion could have prompted Manager K to contact the claimant. On the balance of probabilities, we found that the information to Manager K that the claimant believed it was her who had issued the warning came from Wendy Spencer. The deterioration in the relationship between the claimant and Manager M is likely to have then occurred because the claimant avoided Manager M , because she believed that Manager M had breached her confidentiality, and Manager M did not know that.

114. Kevin Kelly was a credible and reliable witness. We accepted his account that he believed that there was to be feedback to the claimant following the appeal meeting. We considered it to be significant that his witness statement was written by him some years ago, relatively near to when the events had occurred and when his memory

115. Jayne Drennan was a very impressive witness. She gave a credible account of events. We considered it to be significant that her witness statement was written by her some years ago, relatively near to when the events had occurred. We considered it to be significant that Jayne Drennan had also had issues with Manager K and Manager M , which had been dealt with by Jayne Drennan's manager and had resulted in an apology to Jayne Drennan from Manager K and Manager M . It was significant that there was no suggestion that those issues where related to Jayne Drennan's sex (gender). That suggested that there were wider issues with Manager K and Manager M's management style than purely towards the claimant. That supported Katherine Wainwright's position in respect of Manager K's lack of management expertise at the time.

116. Both Jayne Drennan and Kevin Kelly had witnessed deterioration in the relationship between the claimant and both Manager K and Manager M . Both Jayne Drennan and Kevin Kelly had witnessed Manager M use the word '*negative'* about the claimant. Both Jayne Drennan and Kevin Kelly did not find the claimant to be a negative influence on the team and could see no explanation as to why it would have been suggested to the claimant that they found her to be negative. Their evidence was that the team worked very well together, which was important given that they required to work with *"some of the most challenging women in the city in respect of their engagement with societal responsibilities."*

117. We did not find Katherine Wainwright to be an entirely credible witness. We accepted the claimant's representative's submissions that it was significant that her witness statement was written a considerable time after the events had occurred. We found her to be guarded in her answers to questions. She was not in a position to contradict the claimant's evidence that she had spoken to Manager M and Manager K and that they knew the medical reasons for her surgery before the informal meeting. We did not accept Katherine Wainwright's reliance on there being *'no push and pull'* in the email communication between Manager K and HR Manager A re the issue of the warning to the claimant. Katherine Wainwright sought in her evidence to place the ownership of the issue of the warning squarely with Manager K. The terms of the respondent's Absence Policy were not in dispute. It was not in dispute that the number of days the claimant required to be absent from work because of her surgery in January 2018 meant that she hit the trigger which would normally lead to a disciplinary warning being issued under that policy. We accepted that as the manager, Manager K was responsible for making the decision on the issue of the warning. However, she sought advice from HR. Her email correspondence with HR Manager A of HR on 4 April 2018 (JB210) is very significant. HR Manager A failed to inform Manager K of the exclusions / exceptions which could be applied HR should provide guidance to managers on factors which should be taken into consideration prior to issue of a disciplinary warning. On the evidence before us, HR Manager A failed to do that.

118. Wendy Spencer was a credible witness, however, on her own admission, she had limited recollection of events. The events relied on by the claimant occurred in 2018. Wendy Spencer has since retired. We accepted her position that when dealing with the appeal she had sought to resolve the situation. We accepted her position that she had told the claimant at the outset of the disciplinary appeal meeting that the warning would be overturned because she recognised that the claimant was upset. We accepted her position her reliance on the reference to 'closure' in her letter to the claimant confirming the outcome of the appeal. We accepted her position that it would not be her normal practice to say that further steps would be taken, and not to record that.

119. Wendy Spencer had sought to inform the claimant of the outcome at the beginning of the meeting. We accepted that she had hoped that by doing so the additional upset to the claimant of going through the appeal meeting would be minimised. In fact, that meant that all of the concerns raised by the claimant were not addressed, and the focus was merely on the warning being overturned. In treating the overturning of the warning as a full resolution, the respondent failed to recognise that the issues raised by the claimant were wider than purely the issue of the warning. The issues raised by the claimant in her appeal of the disciplinary warning included:

   a. Informing the claimant that the time off for her surgery in January 2018 should be taken as annual leave.

   b. Questioning the legitimacy of her absence in January 2018.

   c. Informing the claimant that further time off for cosmetic surgery would not be paid

   d. Starting disciplinary proceedings against the claimant in respect of that absence 8 weeks after the absence.

   e. Taking the decision to issue a disciplinary warning before hearing from the claimant at the disciplinary hearing.

120. Those issues were not all addressed or resolved by the overturning of the absence warning.

121. It was very significant that the evidence of both Katherine Wainwright and Wendy Spencer was that they were not asked about the position in the claimant's grievance that she had expected there to be further investigation and feedback to her on the reasons why she had been treated as she was in respect of her absence in January 2018. We were satisfied that had this been raised with Wendy Spencer at the time, she would have taken steps to feedback to the claimant on the steps which had been carried out. Manager K and HR Manager A had both been spoken to. Wendy Spencer and Katherine Wainwright could, at the stage of the grievance, have spoken to the claimant to clarify what feedback she was seeking and given that to her.

122. We found Patrick McKay to be credible but not an impressive witness. We accepted that he had sought to ensure that the claimant was not treated less favourably because of her sex (gender). We accepted his position that he was conscious of the nature of the grievance being uncomfortable and that he was *'conscious of being male'* in these proceedings. He gave no explanation for the failures to address all of the points raised by the claimant in her grievance. He was keen to emphasise his understanding that the claimant had accepted a job with Salvation Army which was essentially the same as the job which the claimant had been offered as suitable alternative employment, but at a higher rate of pay. That belief clearly coloured Patrick McKay's handing of the claimant's grievance.

123. We found Kenneth Crawford to be a credible but not an impressive witness. We took into account that he made concessions in his response to questions. He accepted that he had not addressed all of the issues raised by the claimant in her appeal. His evidence was of limited relevance to the issues for our determination. The grievance appeal was dealt with after the termination of the claimant's employment. That evidence was not then relevant to the claim of constructive dismissal. It was not relevant to the claim of harassment. Kevin Stanton had had no substantive involvement with the claimant prior to

dealing with her grievance appeal. The claimant had not been present at the appeal hearing. It was relevant to the claim of victimisation.

124. There was no explanation why the respondent had not called either HR Manager A or Hazel Carey as witnesses. Hazel Carey was present throughout the FH, instructing the respondent's representative. Given the emails from Hazel Carey which were relied on by the claimant, Hazel Carey's evidence would have been relevant.

125. The central issue was the respondent's failure to recognise that that claimant had been upset by her treatment by Manager K and that the fact that the absence warning itself was overturned did not remedy or address that upset. We did not accept Katherine Wainwright's position that there was no more that could be done except for the warning to be overturned. The claimant made it clear in her appeal letter that her concerns were wider than the issue of the warning. We accepted the evidence of the claimant and Kevin Kelly that they understood from the appeal meeting with Wendy Spencer and Katherine Wainwright that there was to be an investigation as to why events complained about had occurred and that the claimant would receive feedback on that investigation. We also accepted the evidence of Wendy Spencer that she was used to dealing with appeal matters and that it was not her practice to promise something and not set that out in the follow up letter. We considered the use of the word *'closure'* in Wendy Spencer's letter to the claimant to be significant. It was not disputed that at the meeting Wendy Spencer had made reference to further steps being taken to understand what had happened. It was then reasonable for the claimant and Kevin Kelly to have concluded from that that feedback to the claimant was expected. We accepted that was reasonable in these circumstances, and in particular taking into account the claimant's state of upset at the appeal meeting. Normally any relevant investigation would take place before the decision to overturn at appeal. We accepted the claimant's position as to why she did not chase for such further information prior to raising her grievance. We accepted the claimant's explanation for not having asked for the feedback earlier. We accepted that the timing of the claimant being put at risk of redundancy, 2

weeks after the appeal outcome, was significant and that in those circumstances it was reasonable for the claimant not for asked for the feedback before she raised her grievance.

126. We considered it to be very significant that the claimant raised within her grievance that she was awaiting a response from Wendy Spencer. We considered it to be very significant that that aspect of her grievance was not addressed by the respondent. It was very significant that neither Katherine Wainwright or Wendy Spencer were questioned about this at the stage of the claimant's grievance. Had that aspect of the claimant's grievance been addressed that could have resolved matters. The misunderstanding which had arisen at the end of the appeal hearing would have become apparent. We accepted Wendy Spencer's position that she was genuinely sorry for what had happened to the claimant and that she was seeking to resolve matters. Had Wendy Spencer been asked, and the feedback given to the claimant, that could then have brought the closure which was sought.

127. We made findings in fact in respect of the allegations which the claimant relied upon, as follows:

a. HR questioned and called the claimant into a meeting about the legitimacy of her illness

b. the claimant was told that HR were disputing whether she would be paid or not while off sick

c. the claimant was asked to take annual leave for her absence for surgery

d. the claimant was told that HR had advised that if she had any further unrelated surgeries she would not get paid

e. the claimant was told she must attend Occupational Health and then the appointment was cancelled.

f. the claimant's treatment by the respondent was not within the respondent's Absence Policy

g. the decision to give the claimant a First Written Absence Warning was pre-determined before her Formal Absence Meeting

h. The claimant believed that Wendy Spencer and Katherine Wainwright had advised that they would revert to the her following an investigation

5 i. There was no feedback to the claimant following the steps taken by Wendy Spencer and Katherine Wainwright after the appeal meeting when the warning was overturned

j. the claimant was not advised of ownership of who gave the warning

k. Manager K sent a text to the Claimant saying *"Despite what you think,*
10 *it wasn't me who gave you the warning"* and then later alleged that it was HR Manager A who had issued the warning to the claimant.

l. Manager K said the Claimant was reacting *'just because she was an emotional person'*

m. Manager M stated that the claimant had a *"bad attitude"* and was
15 being "negative"

n. the claimant received no supervision from 18th June 2018 to 30th August 2018

o. the respondent's Redundancy Policy was breached in respect of the trial period of the job offered to the claimant as suitable alternative
20 employment.

p. the claimant was not paid redundancy pay which she alleged was due

q. the grievance process followed by the Respondent did not address all of the points raised by the claimant

Decision

25 128. We addressed the issues which fell for our determination.

Constructive Dismissal

129. We did not accept the respondent's representative's position that the claimant resigned on 9 October 2018. The terms of the claimant's email of 9 October 2018 (JB326 – 327). email and the terms of the subsequent email correspondence between the claimant and Hazel Carey and Katherine Wainwright are set out in the findings in fact. Contractually, the claimant's position in her email of 9 October is that she will leave on the basis that she receives a redundancy payment. The claimant's position in cross examination was *"I never handed in my resignation. I never resigned. I didn't resign until 30 October, when I did with immediate effect".* That resignation was in the claimant's email to Kathrine Wainwright of 30 October 2018 (JB507). That resignation followed the claimant's email to Katherine Wainwright of 29 October 2018 (JB506), where the claimant again asked whether she would be receiving her redundancy pay. In that email the claimant also stated that she *"…simply no longer [had] trust and confidence in the organisation moving forward."* The claimant's email to Katherine Wainwright of 30 October 2018 stated *"….as you have stated the grievance process will not solve things prior to the 31st, I would like to formally resign with immediate effect."* We accepted that by raising her grievances the claimant had given the respondent the opportunity to resolve matters. We did not accept the respondent's representative's position that the grievance had been raised by the claimant after her resignation. Even if that were the case, the grievances would have been raised before the effective date of termination of employment (30 October 2018).

130. In the claimant's email of 8 October 2018 (JB326-327), the claimant first set out her concerns in respect of the job offered to her as suitable alternative employment having not yet commenced. The statutory right to a trial period in a redundancy situation cannot be contracted out of. The ERA provides that the trial period commences immediately after the original position is redundant. The respondent failed to recognise that. It was Patrick McKay's evidence that he thought that the claimant's trial period had *'not yet started'* but at no time was that position communicated to the claimant. We accepted

that by placing the claimant in various interim jobs, the respondent was seeking to retain the claimant as an employee. In those circumstances communication with the claimant is very important. There was no recognition to the claimant that her trial period had not in fact started. On the contrary, the claimant received communication informing her that her trial period had concluded (JB324 email from Hazel Carey of 26 September 2018). She had no supervision meetings, which could have provided the opportunity for discussion and better communication. The claimant's concern that she could not determine whether the job was suitable alternative employment because she had not yet started the job was a legitimate one.

131. The reasons set out by the claimant in that email of 9 October 2018 (JB326-327) were not then addressed by the respondent. We accepted the claimant's reliance on her treatment in respect of her absence in January 2018, and the subsequent deterioration in relationships with her managers, being raised in that grievance, and being a contributing factor to her decision to resign. The correspondence subsequent to the claimant's email of 8 October 2018 is significant because it shows that the respondent had an opportunity to resolve matters before the termination date of 31 October 2018. There was a failure to recognise that the trial period for the position offered to the claimant as suitable alternative employment could not have begun, because that position was not yet in place. On the evidence, the fact that the respondent had received a request for a refence for the claimant, and believed that the claimant had accepted a Housing job which was essentially the same as that offered to her as suitable alternative was significant. Patrick McKay's evidence was that it was understood that the claimant had accepted a housing job which was in effect the same as the position she was offered as suitable alternative employment, but with a higher rate of pay. It was clear from his evidence that that misunderstanding that the claimant had accepted that Housing job clearly coloured the respondent's subsequent dealings with the claimant. That was the focus in the subsequent correspondence with the claimant. That is not a relevant factor to be taken into account when considering whether a position offered is suitable alternative employment.

132. It was significant that the claimant was told that the "*leaving for a new job is not a redundancy situation or would attract redundancy pay."(*email from Hazel Carey JB325). That statement was factually and legally inaccurate. It shows a failure to understand the circumstances which lead to the right to a statutory redundancy payment. Entitlement to a statutory redundancy payment is on application of the ERA. The ERA contains provisions in respect of the statutory trial period for alternative employment offered as an alternative to redundancy. There is a general proviso that the new contract must take effect not more than four weeks after the old one ends (ERA s138(1) and s 146(2). Parties can enter into a contractual agreement for a trial period but cannot waive an employee's entitlement to a statutory trial period (s203), because any provision of an agreement or contract seeking to waive or exclude an employee's rights under the ERA will be void. There is no ban on an employee look for alternative employment while they are at risk of redundancy, or to accept any such offer they consider to be suitable. As at the time of that email from Hazel Carey, the claimant had not accepted any alternative employment: a reference had been requested from the respondent and any offer was conditional on that reference. In any event, acceptance of alternative employment does not void an employee's entitlement to a statutory redundancy payment. It was the claimant's position that she could not yet determine whether the position offered to her as suitable alternative employment ('SAE') was a suitable alternative. The respondent believed that the position was suitable alternative employment. Although information was given on the position, from which the respondent's position was that the claimant could reasonably concluded that the job was suitable alternative employment, that position does not recognise the statutory right to a trial period, when the individual is actually working in (trying) the alternative position.

133. In circumstances where the job offered as suitable alternative employment had not commenced in the trial period, it was not reasonable for the respondent to insist on the claimant not being entitled to statutory redundancy payment because it was considered that she had been offered suitable alternative employment. Had the trial period taken effect, that may have been

a statutory reason for non payment of redundancy. We did not require to consider whether or not the position offered was suitable alternative employment. The redundancy policy provides at section 5 that an employee may decide that the position they have been offered is not suitable. We did not accept the respondent's representative's reliance on clause 5.2 of the Redundancy Policy. The evidence does not support that being in the minds of the respondent at the time. On the evidence before us, in particular the evidence of Katherine Wainwright and Patrick McKay in cross examination, the reason the claimant was not paid redundancy pay was because it was believed that she had been offered a position which was suitable alternative employment and that she had accepted a job with another employer which was in essence the same as the position which had been offered to her as suitable alternative employment.

134. In all the circumstances, we concluded that it was not reasonable for the respondent to fail to properly communicate with the claimant in respect of the start date of the trial period. It was not reasonable for them to fail to inform the claimant that the trial period for the suitable alternative employment had not yet commenced. It was not reasonable for the respondent to determine that the claimant was not entitled to receive statutory redundancy pay because she had applied for external alternative employment.

135. As stated above, we did not accept the respondent's position that the claimant had resigned on 8 October 2018. The contractual position in the claimant's email of 8 October 2018 is that the claimant offered to leave on payment to her of redundancy pay. The claimant specifically set out in various emails as set out in the findings in fact that she was not resigning. She wished to take redundancy pay, in circumstances where the service she worked on had come to an end and her trial period had not started, although the respondent's position to her was that it had started and could be continued. The respondent's miscommunication on this is important. The trial period in the post offered to the claimant as suitable alternative employment did not start. The respondent refused to pay her redundancy. The claimant raised grievances about that situation and also about what she believed were

ongoing failures in respect of the treatment of her around her absence on January 2018. The claimant's grievances were not addressed timeously. The claimant was informed that those grievances would not be dealt with by 31 October. The respondent issued the claimant her P45. In all these circumstances, by these acts and failures, the respondent, without reasonable and proper cause, conducted themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between them and the claimant. The respondent acted in material breach of the implied term of trust and confidence. The claimant resigned in response to the respondent's failure to pay her redundancy pay in these circumstances and failure to deal with her grievances prior to 31 October. The respondent's breach of contract caused the claimant to resign. The claimant did not affirm the contract by any delay in resigning. The claimant had offered to leave on payment of redundancy pay. The respondent refused to pay her redundancy pay. The claimant then sought alternative employment, as was appropriate for her to do to secure income. At the same time, the claimant was seeking to resolve matters. She raised a formal grievance. It was the respondents' position that her grievances would not resolve matters by 31 October which caused the claimant to resign, with immediate effect. In consideration of ***Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA***, the act constituting the last straw in the context of the claimant's decision to resign was the respondent's position that the claimant's grievances would not resolve matters prior to 31 October. We accepted Katherine Wainwright's position in evidence that the reason for the claimant's resignation was not purely because of the redundancy situation.

136. For these reasons we concluded that the respondent acted in fundamental breach of the term of trust and confidence and the claimant was entitled to resign. The claimant resigned because of the respondent's unlawful conduct. That was an unfair dismissal in terms of the Employment Rights Act 1996 section 95(1)(c) and 136(1)(c). The claimant's (constructive) unfair dismissal claim is successful. The claimant is entitled to an unfair dismissal award and compensatory award.

Jurisdiction

137. It is very significant to the jurisdiction issue that the claimant raised in her grievance what she believed to be outstanding matters in respect of the way in which she was treated around her absence in January 2018, and that the respondent failed to deal with that during the course of the claimant's employment with them. We accepted the claimant's position that she believed that Wendy Spencer was to revert to her following investigation steps taken after the appeal meeting. That was the claimant's position throughout the contemporaneous documentary evidence. That was also Kevin Kelly's understanding. We accepted the claimant's explanation that she did not ask for that feedback before raising it in her grievance because she had been informed of the redundancy situation two week after the appeal hearing.

138. In terms of section 123 of the Equality Act 2010, we had to consider whether there was conduct extending over a period. We accepted that prior to the grievance being raised by the claimant, the respondent considered that the appeal and overturning of the warning had brought matters in respect of that to a close. However, the claimant clearly raised that as part of her grievance. It was clear from that grievance that the claimant believed that there were outstanding actions. At both the appeal stage and in her grievance, the claimant specifically stated that she felt she had been *'discriminated against'.* As of the time of their receipt of that grievance, the respondent then knew or ought to have known that the claimant was expecting there to have been an investigation and further feedback to her. The claimant also raised in her grievance her issues in respect of the respondent's decision that the claimant was not entitled to a redundancy payment.

139. We accepted the claimant's representative's position that because the issues were raised in the grievance, and not dealt with, on application of section 123 there was a continuing course of conduct. For that reason, we concluded that we had jurisdiction to consider the claims made under the Equality Act 2010.

140. 83. We have jurisdiction to determine claims based on events during the course of the claimant's employment with the respondent. The effective date

of termination of that employment was 30 October 2018. The grievance was raised by the claimant prior to the effective date of termination.

Equality Act 2010

141. In her claims under the Equality Act 2010, the claimant relied on her protected characteristic of sex (her gender). She relied on being a woman who had had surgery of the specific nature carried out. Although the respondent's representative's position was that the surgery which the claimant had in January 2018 was *'gender specific'*, we did not accept that position. That surgery could be carried out on males as well as females: the tissue which was removed is present in both genders. Both genders can have surgery to remove this tissue. We did not then accept the claimant's representative's position that there was sex discrimination because of the nature of the surgery itself. There was no evidence of the respondent's treatment of any man who had had that surgery carried out.

s13 - Equality Act

142. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. We considered the facts and whether discrimination was established on those facts. On application of the guidance of Lord Nicholls in ***Shamoon v RUC 2003 ICR 337***, we took the view that this was a case where we should focus on the single primary question of: did the complainant, because of the protected characteristic, receive less favourable treatment than others. We did not consider that Dean Kerrigan was an appropriate comparator. Dean Kerrigan had had a number of absences prior to his absence for elective surgery. The respondent did not suspect that Dean Kerrigan's elective surgery was not on medical grounds. The appropriate comparator would have been a male who required to be absent from work because of elective surgery which the respondent suspected was not on clinical medical grounds. Rather than focus on how a comparator might have been treated, if the claimant were able to show that the protected characteristic had a causative effect on the way that she was treated then it

would be inevitably adverse and amount to less favourable treatment than comparators would have received. Equally, if it was shown that the protected characteristic played no part in the treatment, then the claimant cannot succeed and there is no need to construct a comparator.

5 143. We first considered the treatment of the claimant prior to the disciplinary appeal. The issue before us was not that the claimant had been given a warning under the absence policy. The claimant accepted that that had been overturned and did not rely on that aspect in her claim before us. What we first required to consider was their treatment of the claimant in i.e. the claimant 10 being questioned about the legitimacy of her surgery, being told to take annual leave for the surgery, being told that she had to attend an appointment with Occupational Health, and that appointment then being cancelled, and the claimant being told that she would be issued with a warning prior to the Absence Policy hearing, the decision having been made prior to that hearing. 15 We made findings in fact that those events occurred.

144. We considered the evidence before us to establish what was the reason for this treatment. On the evidence before us, we concluded that Manager K's lack of management expertise at the time was a significant factor in these events occurring. Manager K's lack of management experience explains her 20 having the meeting with the claimant where she informed her that it was HR Manager A's decision to issue the claimant with a warning. Jayne Drennan's evidence that she also had issues with Manager M and Manager K was significant. There was no suggestion from Jayne Drennan that her treatment by them was because of her gender. Katherine Wainwright's evidence in her 25 witness statement about Manager K was that *"She was well respected professionally and with partners. I recollect thinking that she found conflict difficult and that she was on a journey around professional development around operating at a more senior level but that is not unusual and is subjective and very retrospective".* We considered it to be significant that the 30 claimant's position in her witness statement was that Manager K had *'urged me to consider my right of appeal'*. We considered that that position was inconsistent with a finding that Manager K was treating the claimant less

favourably because of her gender. We considered that that evidence was consistent with Kristen Abercrombie's lack of management expertise at the time and her believing that the advice from HR was that the claimant should be issued with a warning under the absence policy. On all the evidence before us, that was Manager K's consistent position throughout. The emails between Manager K and HR Manager A on 4 April 2018 (JB210) were significant. That email correspondence supported Manager K having the understanding that HR's position was that a formal warning should be issued under the Absence Policy when the trigger points are reached.

145. Katherine Wainwright sought in her evidence to place the ownership of the issue of the warning squarely with Manager K. The terms of the respondent's Absence Policy were not in dispute. It was not in dispute that the number of days the claimant required to be absent from work because of her surgery in January 2018 meant that she hit the trigger which would normally lead to a disciplinary warning being issued under that policy. We accepted that as the manager, Manager K was responsible for making the decision on the issue of the warning. However, she sought advice from HR. Her email correspondence with HR Manager A of HR on 4 April 2018 is significant (JB210). HR Manager A failed to inform Manager K of the exclusions / exceptions which could be applied. She also failed to refer Manager K to the Absence Policy and the requirement for discussion with the claimant at the meeting before the decision is made. HR should provide guidance to managers on factors which should be taken into consideration prior to issue of a disciplinary warning. On the evidence before us, HR Manager A failed to do that. We noted Katherine Wainwright's position in her witness statement that:

"<Manager K> felt that she had been strongly guided to issue a warning' and

"To my recollection, HR Manager A indicated they'd had a robust conversation about consistent absence management and the issuing of warnings generally and with another case that had been flagged in the monthly absence monitoring cycle as <Manager K> struggled with this – but that the claimant's case was not discussed in any depth in relation to a warning."

146. We therefore did not accept Katherine Wainwright's reliance on there being *'no push and pull'* in the email communication between Manager K and HR Manager A re the issue of the warning to the claimant. That is inconsistent with the position in Katherine Wainwright's statement that HR Manager A had said there had been a *'robust discussion'*.

147. For these reasons, we concluded that Manager K had believed that HR had told her that the claimant should be issued with an absence warning because she had hit the trigger.

148. We considered it to be significant that in her witness statement Katherine Wainwright's evidence was *"There was discussion as to whether elective or cosmetic procedures would be paid and how it would be treated – particularly in some cases if not certified by an NHS doctor and done privately."* Her evidence was that there was discussion that 'this was an interesting question'. Katherine Wainwright's position was that the claimant was called into an informal meeting because *'we didn't know the position'.* When it was put to Katherine Wainwright in cross examination that Manager K and Manager M did know the reasons for the claimant's surgery, prior to that informal meeting, Katherine Wainwright's evidence was *'I didn't know that level of detail'.* It was significant that in her witness statement Katherine Wainwright's position was:

"There was discussion as to whether elective or cosmetic procedures would be paid and how it would be treated – particularly in some cases if not certified by an NHS doctor and done privately. The fit note simply states 'surgery' on it (page 199)."

149. From that evidence we concluded that there was a belief within the respondent's HR department at the time that the claimant's surgery in January 2018 was for cosmetic reasons. That may have been because of Katherine Wainwright's failure to inform HR Manager A of what the claimant had told her about the surgery. The claimant did not have cosmetic surgery. This evidence was also significant in showing the respondent's treatment of male

employee who they believed required to be absent following cosmetic surgery.

150. Although not relied on in respect of being a comparator, we did consider the evidence of Katherine Wainwright in respect of treatment of a male employee who had been absent following a cosmetic surgery procedure to be significant. Katherine Wainwright's position in her witness statement re this was:

"I had looked at internal procedures around elective / cosmetic surgery before the appeal as I was interested and so was aware that the last person with a cosmetic procedure in similar circumstances was male (initials redacted here) (page 231 – 240) In that situation a warning had been issued and not all the absence was paid (page 241-250). This is the comparator I was aware of and I think it evidences that the claimant was not treated any differently or worse than a male comparator in a parallel situation. I believe this is a reasonable and good comparator as both were having cosmetic surgery. Both had surgery that requires a substantial recovery period. Both were provided with warnings based on absences relating the cosmetic surgical procedure from the first absence meeting. Both involved additional communication outwith and beyond the formal meetings, occupational health support and were overseen by a manager and supported by an HR Business Partner. The male comparator actually was disadvantaged more that the claimant as he was not paid for all his absence. I was satisfied that there was no direct or indirect discrimination."

151. The fact that Katherine Wainwright had looked at this at the time of the claimant's appeal and considered that male employee to be in similar circumstances as the claimant shows that at that time she believed that the claimant's procedure was for cosmetic reasons rather than being on medical (clinical) grounds. Katherine Wainwright sought to retract from that position under cross examination but we did not find her to be credible in that regard. She sought to set out what she understood as the meaning of '*elective surgery*' and referred to this as having. This evidence was significant in our conclusion that the claimant's sex (gender) was not a significant influence in

the respondent's belief (or at least suspicion) that the claimant's surgery was for cosmetic reasons. We found that it was the specific nature of the surgery which caused the respondent to suspect that it may be for cosmetic, rather than medical reasons. A man could have that same surgery: a man could have the same type of tissue removed as the claimant had removed. Surgery on a male for that reason may be for cosmetic reasons or may be on medical grounds. A woman could have that tissue removed for cosmetic reasons or on medical grounds. The claimant had the tissue removed on medical grounds.

152. We accepted that the Absence Policy allows for an informal meeting to take place and that this could take place prior to the issue of the warning. We accepted Katherine Wainwright's uncontested evidence that the male employee who had had cosmetic surgery had been invited to an informal meeting. We accepted her uncontested evidence that that employee had not been paid for all his absence following that surgery. On that basis, the reason for the claimant's surgery may have had an implication on her payments during her absence. Taking into account Katherine Wainwright's evidence on the discussions within the HR department re treatment of absence following cosmetic surgery, we concluded that the reason for the informal meeting with the claimant was to discuss the reasons for the claimant's absence, because it was believed that her surgery may be for cosmetic reasons. On the evidence before us, we concluded that Manager K's lack of management expertise at the time was the reason why she had failed to properly inform HR of the discussion she had had with the claimant in respect of the reasons for her surgery. On the evidence before us, we concluded that Manager K's lack of management expertise at the time, and her belief that it was HR's position that a warning should be issued, in circumstances where HR Manager A had failed to give her guidance on the exceptions which may be applied and the importance of prior discussion with the claimant were the reasons why Manager K informed the claimant before the meeting that she was to be issued with a warning. We accepted that the claimant was not given the opportunity to state her position at this meeting, before the decision was made. We considered the email correspondence between Manager K and

HR Manager A of 4 April 2018 to be significant and to be consistent with the claimant's position that the decision had been made prior to the meeting. That does not mean that we considered the respondent's actions to be appropriate or reasonable, but that was not the test to be applied here. We required to consider, on the evidence before us, what the reason for the treatment was.

153. We considered the evidence on the delays in the claimant being called to the meeting to discuss the absence and in the decision letter being issued to the claimant. In Katherine Wainwright's witness statement she said *"…importantly the length of time that the letter took to be issued to give the warning was significantly long and this added to the decision making to overturn the appeal."* and *"Certainly, the delay in sending the absence warning letter was something that had gone wrong and it was important to address it with the team*." We considered it to be significant that in her statement she said *"We reflected on communication and considered whether any further checks or balances should be added. Following the appeal meeting, the administration of outcome letters was reviewed to ensure none were substantially delayed."* On that evidence, we concluded that the reason for the delays was a lack of checks and administration failures.

154. On all the evidence before us, for the above reasons, we concluded that the reasons for the treatment of the claimant in respect of her absence in January 2018 was because:

    a. within the HR respondent's department at the time it was suspected that the claimant's surgery was for cosmetic reasons and was not on medical grounds, and

    b. HR Manager A failed to make it clear to Manager K that there were exceptions which could be applied in the claimant's situation (which would avoid issue of an absence warning, although the trigger under the policy had been reached), and

    c. Manager K's lack of management experience at the time and her failure to recognise that as the manager the responsibility for issue of a warning lay with her.

155. We could not properly conclude from the facts that the claimant's gender had was the reason for the treatment. An inference of discrimination on the grounds of the claimant's protected characteristic of sex (gender) could not then properly be drawn.

156. The claimant sought to rely on Dean Kerrigan as a direct comparator in respect of that treatment. The evidence was that that Dean Kerrigan had also been issued a warning under the Absence Policy because he hit the tigger. It was not disputed that Dean Kerrigan had complex and long-term health conditions which had caused him to have a number of absences from work. There was no evidence of any consideration of the exceptions to him. Dean Kerrigan's position was that he agreed that it was appropriate that he be issued with the warning, because of the level of his absences because of his ill health. We appreciated that the claimant sought to rely on Dean Kerrigan as a comparator in respect of the wider treatment around her absence, as set out above. We found that the reasons for that treatment were not because of the claimant's sex. We did not accept that Dean Kerrigan was an appropriate comparator. He did not have a one off long term absence following elective surgery. The respondent did not suspect that his elective surgery was purely for cosmetic reasons (although there was a cosmetic element to that surgery). We considered that the appropriate comparator was a male employee of the respondent who required time off for elective surgery where the specific nature of the surgery caused the respondent to suspect that it may be for purely cosmetic reasons, and not for medical reasons. Dean Kerrigan was not an appropriate comparator because there were material differences between him and the claimant. The specific nature of the elective surgery which he had did not cause the respondent to suspect that it was purely for cosmetic rather than medical reasons.

157. The claimant's representative's relied on ***Igen***. Following ***Igen***, it is for the Applicant who complains of (sex) discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the reason for the less favourable treatment was the claimant's protected characteristic. The first stage is for consideration

of the evidence. In the evidence before us we found, on the balance of probabilities, that the reason for the treatment of the claimant was not the claimant's protected characteristic of sex. The claimant therefore failed at that stage of the application of the guidelines. The claimant did not prove facts from which inferences could be drawn that the respondent treated the applicant less favourably on the grounds of sex. The burden of proof did not shift to the respondent.

158. We separately considered whether the claimant had been treated less favourably by the Respondents because of her protected characteristic of sex in respect of their dealings in respect of the grievance submitted by the claimant. It was a matter of fact that the respondent did not deal with some aspects of the claimant's grievance. Both the grievance decision and the appeal decision 'cherry picked' what issues raised by the claimant were addressed. We considered the evidence and drew conclusions on the reason(s) for that treatment.

159. It was clear from the evidence of all of the respondent's witnesses that they failed to understand that the claimant had concerns which were wider that the issue of the warning to her. They therefore all failed to deal with the claimant's wider concerns. This lack of understanding was apparent right through the internal proceedings and these Tribunal proceedings. All failed to realise that the claimant was concerned about:

a. Having been informed that the time off for her surgery in January 2018 should be taken as annual leave.

b. Having the legitimacy of her absence in January 2018 questioned.

c. Being informing that further time off for cosmetic surgery would not be paid

d. The delay in the initiation of the process which led to her being issued with a warning.

e. Being informed prior to the hearing that a warning was to be issued to her.

160. We accepted that the claimant was affected by the failure to address these points. We accepted Wendy Spencer's position that she had focused on the outcome of the appeal being that the issue of the warning was overturned. We accepted that that focus was the reason for her failure to revert to the claimant in respect of the reasons why the wider treatment had occurred. The claimant's sex was not part of that reason. We could not then properly draw an inference that the claimant's sex (gender) was a significant influence in the failure to revert to the claimant following further investigation after the appeal.

161. We considered the evidence on the reason for the way in which the respondent dealt with the claimant's grievance. We considered the timing of the reference request for the claimant to have been very significant. Prior to dealing with the claimant's grievance, Patrick McKay was of the understanding that the claimant had obtained a job with another employer which he understood to be the same as the job with the respondent which the claimant had turned down as not being suitable alternative employment. That was clearly significant to Patrick McKay. He emphasised in his evidence under cross examination that he believed that the claimant had accepted a job which was the same as what had been offered to her as suitable alternative employment. Although the grievance was raised by the claimant during the course of her employment with the claimant, it was after the respondent's receipt of a reference request for her, which is what caused it to be believed that the claimant had accepted that job. The claimant had not accepted that job at the time the reference request was made. She did not accept the housing job at all. On the evidence before us we concluded that Patrick McKay's belief that the claimant was leaving to take up a job with another employer which was in essence the same as the job the claimant considered not to be suitable alternative employment for her was significant. That did not however explain why he failed to deal with all of the points in the claimant's grievance. The respondent did not offer any explanation for that failure. We accepted the claimant's representative's reliance on Patrick McKay merely stating *"ok"* when it was put to him in cross examination that he had not dealt with all aspects of the claimant's grievance. The guidance in ***Igen*** is:-

"The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."

162. Although the respondent did not provide an explanation for that failure, the claimant did not prove facts from which we could conclude that that failure was because of the claimant's sex. That position was not put to Patrick McKay. Significantly, the claimant did not claim in her appeal of the grievance decision that the failure to deal with all of the aspects of the claimant's grievance was because of her sex. On the evidence before us we could not find, in the absence of an explanation, that the failure to deal with all of the claimant's grievance points, either at the first stage of the grievance or at the appeal was because of the claimant's sex. On application of the Barton Guidelines, amended by **Igen**, the burden of proof did not shift to the respondent in respect of those failures. On the primary facts, in considering the section 13 claim we could not properly draw an inference that the claimant's sex was the reason for the failures to deal with all of the claimant's points in her grievance.

163. We considered the evidence before us on the reason(s) for the respondent's treatment if the claimant in respect of the trial period. We accepted the respondent's position that steps had been taken to bridge the gap in the claimant's employment caused by the unusually quick ending of the finding for the Women's Bail Service. The reason for the trial period not having started was because the full funding for that service was not yet in place. The respondent placed the to work providing cover in various services and sought to treat the situation as an extended trial period because they sought to retain the claimant as an employee. The claimant's sex was not the reason for that treatment.

164. We considered the evidence before us on the reason(s) why the claimant was not paid redundancy pay. On the evidence before us the reason the claimant was not paid redundancy pay was because it was believed that she was being offered suitable alternative employment and because it was believed that she had secured another job, with a different employer which was very similar to the job the claimant had been offered as suitable alternative employment. The claimant's sex was not part of that reason. As part of our considerations on the evidence in respect of the reason for the non payment of redundancy pay, we took into account the claimant's evidence that Hazel Carey having said to her that redundancy was *'never an option'* for her. The respondent did not lead evidence to rebut the claimant's position that that had been said to her. No explanation was presented by the respondent for Hazel Carey having said that. The claimant had raised that issue in her grievance, and it was not investigated or addressed. Hazel Carey was present throughout the hearing before us. No explanation was offered to us as to why she did not give evidence. We heard evidence that Kevin Kelly had received a payment on termination of employment. Katherine Wainwright's evidence was that she believed that that payment had been made separate to the redundancy situation and because of Kevin Kelly's *'personal and health circumstances'*. There was no explanation offered by the respondent as to why the claimant's personal and health circumstances did not lead to a termination payment to her. We accepted Katherine Wainwright's position that in organisations in the third sector, such as the claimant, further considerations need to be given before a termination is made. That did not explain why in the claimant's health and personal circumstances it was not considered to be appropriate for her to receive a termination payment.

165. Although we considered that evidence, it did not detract from our conclusion that the reason for the non payment of redundancy pay to the claimant was that it was believed that because it was believed that she was being offered suitable alternative employment and because it was believed that she had secured another job, with a different employer which was very similar to the job the claimant had been offered as suitable alternative employment. The claimant claimed discrimination in respect of the failure to pay her redundancy

pay, not in the failure to make her a termination payment. The claimant did not rely on Kevin Kelly as a comparator. On the basis of all of that evidence, on the balance of probabilities we found that the reason for the claimant was as set out above. That reason was not because of the claimant's sex. The burden of proof did not shift to the respondent and it was not appropriate to draw any inference of discrimination in respect of that failure. The evidence on the reason for non payment of redundancy was clear.

166. The claimant's claims under section 13 of the Equality Act 2010 do not succeed because, on all the evidence before us, we found, on the balance of probabilities that the reasons for the claimant's treatment did not include the claimant's gender.

s26 - Equality Act (Harassment)

167. The conduct relied upon by the claimant in her claim under section 26 was unwanted and did have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The reasons for the treatment relied on in the claim under section 13 were relevant to what was relied in under section 26. The claimant's claim under section 26 did not succeed because, for the reasons set out above in respect of the section 13 claim, we did not find that the unwanted conduct was related to the claimant's protected characteristic of sex (gender).

168. We considered the findings in fact that had been made in respect of the conduct relied upon as being harassment in terms of section 26 which was not relied on in the section 13 claim. We did not make a finding in fact that Manager M had breached the claimant's confidentiality. We applied the balance of probabilities to the evidence before us. We accepted the respondent's representative's submission that the fact that Manager K had sent a text to the claimant could have been explained by Wendy Spencer having spoken to Manager K about what the claimant had said at the appeal hearing. Manager K's lack of management experience at the time explains her having had a meeting with the claimant informing the claimant that it had been HR Manager A decision to issue the claimant with a waring for her

absence. We concluded that Manager K's lack of management expertise was the reason why she asked the claimant if she was' *'just an emotional person.".*

169. We accepted Wendy Spencer's evidence that the redundancy situation would have impacted on the frequency of the supervision meetings. We did not accept that as a reasonable explanation for that failure, but we did accept that that was the reason. We could not then properly draw an inference of discrimination could properly be drawn.

170. It was significant that Jayne Drennan had also complained about the management style of Manager M and Manager K and that there was no suggestion from her that their behaviour towards her was because of her sex (gender). We found that the reason for Manager M having called the claimant negative and on several occasions told the claimant that she had a bad attitude, was Manager M 's poor management style at the time and because the claimant avoided Manager M after believing that Manager M breached her confidentiality, but did not explain that to Manager M . We considered it to be significant that the claimant admitted in her evidence that following her believing that Manager M had breached her confidentiality, she did not speak to her about that belief or how upset she was. We considered that to be understandable and the reason why, on the claimant's own evidence she then kept away from Manager M . We considered that to be the reason why there was the deterioration in the relationship between the claimant and Manager M , including Manager M then referring to the claimant as 'negative' and as having a 'bad attitude'. The evidence on her lack of management skills at the time also explained Manager K asking the claimant that if she was just an emotional person. We did not find on the evidence before us that the reason for that treatment was related to the claimant's gender.

171. The claimant relied upon alleged breach of the redundancy policy in her claim under section 26. We accepted that the redundancy policy had been breached. We considered all the evidence before us and made findings on the reason for that breach. As set out above, we concluded that the trial period did not start because the funding for that position was not in place. We

found that the claimant was placed on various services because the respondent had wanted to retain the claimant as an employee. The reasons for those breaches were not related to the claimant's sex.

172. We accepted Patrick McKay's position that in dealing with the claimant's grievance he was conscious of the nature of the claimant's surgery being sensitive and that he was conscious of his own gender. We accepted his position that he sought to deal with the grievance as sensitively as possible for those reasons. We found that the reason the claimant was not paid redundancy pay was because it was believed that the claimant was being offered suitable alternative employment and that the claimant had accepted a job with another employer, at a higher rate of pay, which was the same as the job she was refusing to accept as a suitable alternative to redundancy. On consideration of the section 26 claim, the reason for the treatment complained of was not related to the claimant's sex.

173. The claimant also relied in her claim under section 26 on Hazel Carey having said to her that redundancy was *'never an option'* for her. No explanation was presented by the respondent for Hazel Carey having said that. The claimant had raised that issue in her grievance, and it was not investigated or addressed. Hazel Carey was present throughout the hearing before us. No explanation was offered as to why she did not give evidence. The respondent did not lead evidence to rebut the claimant's position that that had been said to her. We accepted the claimant's evidence that Hazel Carey had said that to her. We considered the evidence before us to establish whether that comment was related to the claimant's sex. The terms of Hazel Carey's emails to the claimant were significant. It is clear from those emails that Hazel Carey's position to the claimant was that she was being offered suitable alternative employment. It was significant that the evidence was that the respondent had wanted to retain the claimant as an employee. That is why they had sought to bridge the gap and place the claimant in various services following the Women's Bail Service coming to an end when funding ceased. It is in those circumstances that the comment must be regarded. For those reasons, we concluded on the evidence before us that the reason Hazel

Carey had said to the claimant that redundancy was *'never an option'* for her was because the respondent wanted to retain the claimant as an employee. That reason was not related to the claimant's sex.

174. The claimant's claims under section 26 of the Equality Act 2010 do not succeed because we did not find that the conduct relied on was related to the claimant's protected characteristic of sex (gender). On the evidence before us we concluded that the reasons for the treatment were reasons which were not related to the claimant's gender.

s27 - Equality Act (Victimisation)

175. The claimant referred to 'discrimination' in both her appeal of the warning issued to her under the Absence Policy and in her grievance. In her appeal re the warning the claimant had stated:

"Due to the nature of my surgery I feel that I was discriminated against as I was advised that HR had discussions with my line manager regarding cosmetic surgery and suggestions that I may not be paid for my recovery period. "

176. The claimant does not allege at that time that she has been discriminated against on the grounds of one of the protected characteristics set out in the Equality Act 2010. She claims that she has been discriminated against *'due to the nature of [her] surgery."* For the reasons set out above, we did not accept that the nature of that surgery was gender specific. We did not accept that by appealing the warning which had been issued to her the claimant did a protected act in terms of section 27 of the Equality Act 2010 because we did not accept that at that time the claimant was claiming that she was discriminated against on the grounds of her sex (or any other of the protected characteristics).

177. In her grievance, the claimant specifically stated *"…discrimination due to gender and mental health issues…".* Gender is one of the protected characteristics in the Equality Act 2010. For that reason, we accepted that both the claimant's action in raising her grievance was a protected act within

the meaning of section 27 of the Equality Act 2010. It was action taken under that legislation.

178. We did not accept the respondent's reliance on discrimination not being discussed at either the appeal meeting or as part of the grievance process. That was a failure of the respondent. In circumstances where the claimant has set out in her grievance that she felt discriminated against, the obligation was then on the respondent to ask her the reasons why she believed that.

179. Having found that this was a protected act, we considered whether the claimant had been subjected to a detriment because she had done that protected act. The timing of when the claimant did the protected act (raised her grievances) was significant. The protected act was done on 21 October 2018 (by the claimant's email at JB372- 375). By that time, it had already been made clear to the claimant that they did not consider her to be entitled to redundancy pay. Events that occurred before the claimant did the protected act of raising her grievance could not have been because the claimant had done the protected act. There was no significant change in the respondent's dealings with the claimant after she did the protected act. On the evidence before us, the claimant did not prove, on the balance of probabilities, that she was subjected to a detriment because she had done the protected act. The claims under section 27 fail for that reason.

Compensation

180. For the above reasons, the claimant is entitled to an award in respect of her successful unfair dismissal claim. The claimant is not entitled to any award in respect of injury to feelings because, for the above reasons, the claimant's claims under the Equality Act 2010 are not successful.

181. The claimant is entitled to an unfair dismissal basic award. It was agreed that the basis of the calculation of the basic award based is the claimant having 5 complete years of service as at the effective date of termination of employment, being then aged 25, with a gross weekly wage of £376.32. IN his Schedule of Loss, the claimant's representative had made a deduction from the basic award to reflect the claimant's mitigation in obtaining alternative

employment. No deduction requires to be made from the basic award in respect if that. The claimant is awarded a basic unfair dismissal award of £1,881.60.

182. The claimant began alternative employment immediately after termination of her employment with the respondent and suffered no wage loss. There is therefore no wage loss element to any compensatory award. The claimant is entitled to compensation for loss of statutory rights. We considered it to be just and equitable for that element to be calculated on the basis of two weeks' wages, to reflect the two year period the claimant would have to be employed before gaining the statutory right to claim unfair dismissal. The claimant's position in her ET1 is that her net weekly wage was £1236 a month. That equates to a net weekly wage of (£1236 x 12 / 52) £285.23. The claimant is awarded a compensatory award of (2 x £285.23) **£570. 46.**

183. The respondent's representative sought a deduction from any unfair dismissal or compensatory award made to the claimant, on the basis of their position that the claimant had resigned on 9 October and had raised her grievances after resigning on that date. For the reasons set out above, we did not accept that the claimant had resigned on 8 October. We found that the claimant had raised the grievances prior to her resignation, and that the issues raised in those grievances and the respondent's failure to deal with these grievances prior to 31 October caused the claimant to resign. We did not accept that respondent's representative's submissions that a deduction should be applied. The claimant had sought to resolve matters by raising a grievance prior to resigning. The respondent was aware of the issues in the grievances but did not seek to resolve them while the claimant remained employed by them. In these circumstances, we accepted the claimant's representative's position that an uplift should be applied in respect of the respondent's failure to adhere to the ACAS Code of Practice on Disciplinary and Grievance Procedures ('The ACAS Code').

184. The ACAS Code at 4.23 recognises that the size and resources of an employer should be taken into account when deciding on relevant cases and that it may sometimes not be practicable for all employers to take all of the

steps set out in ACAS Code. It was relevant that the respondent is a sizeable organisation with a substantial HR department. Although the respondent's position was that the action taken against the claimant under the Absence Policy was not disciplinary, we took into account that the ACAS Code refers to discipline as *"..rules covering such matters as…..absence…".*

185. Specifically in respect of the guidance on dealing with grievances, the ACAS Code states (emphasis in bold as per the Code):-

- *"Employers and employee should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- *Employers and employees should act **consistently.***
- *Employers should carry out any necessary **investigations** to establish the facts of the case.*
- *Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.*
- *Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.*
- *Employers should allow an employee to **appeal** against any formal decision made."*

186. The claimant was allowed to be accompanied and to state her case and an appeal was granted, and made. There was no evidence before us to conclude whether or not the respondent acted consistently in their dealings with the claimant's grievance, in comparison to others. We considered the time period which elapsed between the claimant raising her grievances and the grievance hearing to be significant. There was no explanation presented to us for that. It was significant that the claimant made it clear in her emails that she sought resolution prior to 31 October but that we heard no evidence of any attempt by the respondent to address or resolve the issues prior to that date. Tracey

McFall was appointed as fact finder. She did not attempt to meet with the claimant to obtain her position in respect of the issues raised in the grievances.

187. In all these circumstances, we considered that an uplift should be applied to reflect the respondent's failure to deal with the claimant's grievance timeously. It was also relevant that when the grievances were dealt with, all necessary investigations did not take place. We accepted the claimant's reliance in her list of *'discrepancies'* in the fact finding report and in particular her reliance on the failure to interview relevant individuals.

188. We took into account that in her grievance the claimant had raised concerns around the issue of the warning to her for her absence in January 2018 and that the respondent had focused on the warning being overturned and had not dealt with the claimant's wider concerns. That was compounded at the grievance stage, when the respondent failed to deal with all of the issues raised by the claimant in her grievance. That was significant because if the respondent had dealt with all of the issues raised in the claimant's grievance and had done so prior to the date of termination of the claimant's employment, that could have had the effect of the claimant remaining in employment with the respondent.

189. We calculated the compensatory award which was just and equitable to be made to the claimant, on application of sections 118 – 126 ERA. Section 207A(2) TULR(C)A 1992 provides:-

"If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent."

190. We took into account the guidance from ***LJ Underhill in Lawless v Print Plus EAT 0333/09***, that the relevant circumstances to be taken into account

when applying the provisions (although that related to now repealed DDP statutory provisions) varied. His guidance was that relevant factors may include the size and resources of the employer. Relevance would depend on whether the factor aggravated or mitigated the culpability and/or seriousness of the employer's failure. Relevant factors should include:

- whether the procedures were applied to some extent or were ignored altogether
- whether the failure to comply with the procedures was deliberate or inadvertent, and
- whether there were circumstances that mitigated the blameworthiness of the failure to comply.

191. We decided that in all the circumstances it was just and equitable to apply an uplift of 15% to both the unfair dismissal basic award and compensatory award. That factor took into account the relatively short period within which the claimant expected the respondent to deal with her substantial grievances and reflects the respondent's unreasonable failure to comply with the ACAS Code of Practice in respect of the claimant. That uplift is (15% of £1881.60) £282.24 + (15% of £570. 46) £85.57 = £367.81.

192. No deduction was sought in respect of any contributory action by the claimant. The Tribunal did not consider that the claimant was guilty of any blameworthy action and no deduction was applied for contribution. The total award to the claimant for unfair dismissal is (£1881.60 + £570.46 + £367.81) **£2,819.87.**

193. The claimant's claim for breach of contract is successful for the reasons set out in respect of the constructive dismissal claim above. For those reasons there has been a breach of contract. The claimant received no payment in respect of notice on termination of employment. The claimant had five complete years of service as at the date of termination (30 October 2018). We did not hear any evidence in respect of any contractual right to notice in excess of the statutory notice entitlement. We did not accept the claimant's representative's basis of quantification of the breach of contract claim. That

is based on the entitlement to notice period. As we did not hear any evidence on any contractual entitlement to notice period in excess of the statutory notice period, in accordance with the provisions on notice in the ERA, the claimant is entitled to payment in respect of 5 weeks' notice, at net pay (5 x £ £285.23) £1,426.15. The award to the claimant in respect of breach of contract is **£1,426.15**.

Employment Judge

19 December 2022

Date of Judgment

Date sent to parties