EMPLOYMENT TRIBUNALS

Claimant: Ms M Tams
Respondent: HM Prison and Probation Service

Heard at: Wales
On: 19, 20, 21, 22 & 23 May 2025, 30 September 2025, 1 & 2 October 2025 (in chambers).

Before: Employment Judge Shotter
Mr K Ghotbi-Ravandi
Ms CO Peel

REPRESENTATION:

Claimant: Nigel Ginniff (counsel)
Respondent: Mr A Tinnion (Counsel) & Mr Price Rowlands (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant was not unfairly dismissed contrary to section 95(1)(c) of the Employment Rights Act 1996 , the complaint of unfair dismissal is not well-founded and is dismissed.

2. The Claimant's claims of disability discrimination which allegedly occurred on or before 11 January 2024 were presented out of time, there was no conduct that formed part of conduct extending over a period in respect of which the Claimant presented a timely claim at the end of that period. It is not just and equitable to extend the time limit. The claims are therefore dismissed.

3. The claimant was not subject to disability discrimination, and claimant's claims of disability discrimination brought under sections 13, 15 and 20 to 21 of the Equality Act 2010 are dismissed.

REASONS

Preamble

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Code V: Kinley CVP fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 1298 pages, the contents of which I have recorded where relevant below. In addition, the Tribunal was provided with a bundle of witness statements and separate documents consisting of written submission by both parties, an agreed cast list, chronology and agreed list of issues. The Tribunal has not included all the points raised in the written and oral submissions before it in these written reasons, however, it has taken them all into account before arriving at the judgment.

2. The respondent concedes the claimant's disability is a musculoskeletal impairment affecting her shoulders, right knee and lower back, including right sided sciatica and piriformis syndrome. A number of adjustments have been made in this final hearing ranging from breaks as and when needed (for the claimant) and reading out parts of documents.

3. Given the parties' indication that the allocation was insufficient, it was agreed the Tribunal would deal with liability first, and if the claimant succeeds in any of her claims, case management to remedy.

4. The hearing was adjourned the morning of day 4 on the 22 May 2025 due to a personal matter involving counsel which necessitated an adjournment, and re-listed for 3-days on 30 September 2025. It is unfortunate that Mr Tinnion was unable to attend the reconvened hearing and he was replaced by Mr Price Rowlands part way through. Mr Rowlands relied on the closing submissions produced by Mr Tinnion which had a number of blanks. It was agreed that for a fair hearing to take place Mr Rowlands should be given the opportunity to contact Mr Tinnion so that the blanks can be filled in if possible, and after oral closing submissions had been made on behalf of the respondent the hearing was adjourned to give Mr Rowlands the opportunity, with Mr Ginniff giving oral submissions supplementing his written submissions in the afternoon.

5. The respondent produced the 2021 Safer Working Practice document referred to at paragraph 12 of Ms Forman's statement and two emails sent on 28 May 2021 sent at 19.46 and 21.46 and to NPS Wrexham, attaching the document. The documents were not objected to by Mr Ginniff, and they have been admitted into the evidence.

The pleadings

6. The claimant was a Band 3 Residential Support Worker for the Probation Service based in Wrexham. She started her employment on 18th September 2017 and remained employed until 18th March 2024 when she resigned without notice. Early conciliation started on 11th April 2024 and ended on 22nd May 2024. The claim form was presented on 10th July 2024. The claimant brings the following complaints:

1. Constructive unfair dismissal contrary to section 95(1)(c) of the Employment Rights Act 1996 ("the ERA");

2. Direct discrimination relating to the claimant's disability contrary to section 13 of the EqA;

3. Discrimination arising from the claimant's disability contrary to section 15 and 39 of the EqA;

4. Failure to make reasonable adjustments in respect of the claimant's disability contrary to sections 20, 21 and 39 of the EqA.

Agreed issues

5. The parties agreed the issues as follows. The numbering set out in the list of issues has been duplicated by the Tribunal in the reserved judgment and these are the issues it decided after hearing all of the evidence, written and oral submissions.

Jurisdiction – EQA claims

1. Given the dates of ACAS Early Conciliation (11 April – 22 May 2024), were the Claimant's claims based on the Respondent's conduct (whether acts, omissions or detriments) which occurred on or before 11 January 2024 presented prima facie out of time?
2. If yes, did that conduct form part of conduct extending over a period in respect of which the Claimant presented a timely claim at the end of that period?
3. If not, is it just and equitable to extend time in relation to the claim, and if so, for what further period?
4. If yes, was the claim timely presented within that further period?

Claim 1: Direct disability discrimination (s.13 EQA 2010)

5. Did the following conduct occur:

a. on or around 16 August 2023, the Respondent commenced a disciplinary process involving the Claimant;

b. the Respondent excluded the Claimant from the workplace and attempted to transfer the Claimant to a different site/place of work.

6. To the extent it did, did the Respondent treat the Claimant less favourably than an actual comparator.

7. For the purposes of determining this issue, the comparators will be Donna Hughes and Brian Harry. In the alternative, the Claimant relies on a hypothetical comparator of an employee subject to the disciplinary process but without the Claimant's disability.

8. If the Claimant was treated less favourably, was that because of her disability?

Claim 2: Discrimination arising from disability (s.15 EQA 2010)

9. Did the following conduct occur:

a. by letter dated 16 August 2023, the Respondent instigated a disciplinary process involving the Claimant in bad faith.

10. If it occurred, was that unfavourable treatment of the Claimant by the Respondent?

11. If it was, was that unfavourable treatment because of the following 'something':

a. The Claimant's need for reasonable adjustments.

12. Did that 'something' arise in consequence of the Claimant's disability?

13. Were the following aims legitimate:

a. Ensuring all employees comply with the Respondent's dignity and respect at work policies and procedures.

b. Ensuring all employees comply with health and safety requirements for the benefits of residents and staff within the Respondent's care

c. Ensuring disciplinary allegations raised are investigated fairly, reasonably and consistently in accordance with the Respondent's policies and procedures.

14. To the extent those aims were legitimate, was the Respondent's treatment of the Claimant a proportionate means of achieving that aim?

15. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Claim 3: Failure to make reasonable adjustments (ss.20-21 EQA 2010)

16. During the relevant period, did the Respondent fail to provide:

a. An ergonomic chair
b. A footrest and/or;
c. An adjustable monitor.

17. If it did, did this cause the Claimant, because of her disability, the following substantial disadvantage in comparison to the Respondent's staff who did not have the Claimant's disability, and if so from what date:

    a. The Claimant says her pain and suffering were aggravated, and not having the correct equipment made things worse.

18. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

19. Would the auxiliary aids have avoided or materially reduced the substantial disadvantage:

    a. The Claimant suggests that providing the correct auxiliary aids, as recommended in the workplace assessment.

20. Did the Respondent provide those aids (either at all or on a timely basis)?

    a. The Claimant says it would have been from 28 August 2022, when a workplace assessment report was produced.

21. If not, was the Respondent under a duty to have to make those adjustments and/or provide those aids for the Claimant which it breached by not making/providing them, or did the Respondent discharge any duty it had to make reasonable adjustments for the Claimant taking into account (a) any other adjustments made for her (b) any other adjustments available to her, at the time?

Claim 4: Unfair (constructive dismissal) (ss.94-98 ERA 1996)

Constructive dismissal

22. Was the Claimant dismissed?

23. Did the Claimant's employment contract contain the following implied terms:

    a. implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee;
    b. implied term imposing a duty on the Respondent to conduct a fair disciplinary process.

24. Did the Respondent do the following things:

25. Investigation process / findings:

    a. the Respondent did not discuss the allegations with the Claimant before it began a formal investigation into those allegations;
    b. the Respondent informed the Claimant that Allegation 2 had been dropped by letter dated 13 November 2023, not before;
    c. the Respondent investigated Allegations 1 and 3 when those allegations should have been regarded as minor matters of performance or capability excluded from a disciplinary investigation;

d. instead of investigating solely facts, investigating officer, Marcus Bedwell invited comment, opinion and speculation, including his own;
e. investigating officer, Marcus Bedwell did not re-interview any witnesses after their initial interviews;
f. on 7 October 2023, investigating officer, Marcus Bedwell emailed a copy of the Claimant's interview transcript to Rhys Jones, one of the Respondent's witnesses, contrary to the Policy's confidentiality provisions and the GDPR;
g. on 6 October 2023, investigating officer, Marcus Bedwell did not mention to the Claimant that he had no evidence to support Allegation 4;
h. on 6 February 2024, investigating officer, Marcus Bedwell claimed a witness for Allegation 1 was also a witness for Allegation 4, even though she was not there that day and was not based there;
i. the Respondent sent the investigation report to the Claimant on 13 November 2023, not by 26 October 2023 as required under the Terms of Reference and para. 5.12 of the Policy;
j. the Respondent sent investigation documents and interview records to the Claimant on 22 November 2023, not before (the Safe Working Policy was only sent to the Claimant on 15 March 2024);
k. investigating officer, Marcus Bedwell shifted the meaning of Allegation 3 in order to ensure the Claimant could be found culpable;

26. Admission of new evidence:
    a. during the disciplinary hearing on 6 February 2024, the Respondent introduced a statement by the Claimant's line manager, Fallon Gallagher dated 15 December 2023 which should have been sent to her before the disciplinary hearing, and which should not have been accepted as evidence because she was not a witness to the facts, was irrelevant, and contained pejorative, prejudicial comments about the Claimant;
    b. at the appeal, hearing on 11 March 2024, appeal officer, Louise Forman referred and relied upon the Respondent's 'Safe Working Practice document, which had not been provided to the Claimant.
27. Delay:
    a. Pamela Roberts and Melissa Jones were not interviewed until 18 September 2023;
    b. Paula Thomas was not interviewed until 5 October 2023;
    c. the witness for Allegations 2 and 3, involving an incident said to have occurred on 2 August 2023, was interviewed on 4 September 2023;
    d. the Respondent interviewed Seth Pritchard (re: Allegation 5 and what happened on 13-14 November 2023) on 21 December 2023;
    e. Claire Paterek was interviewed on 5 December 2023, 3 weeks after 13-14 November 2023;
    f. Fallon Gallegher was interviewed on 15 December 2023;
    g. Alex Broe was interviewed on 19 December 2023;
    h. the Respondent's disciplinary process took 7 months (21 August 2023 – 15 March 2024), an unreasonably lengthy period of time;
28. Bad Faith:
    a. The Respondent did not raise allegations against members of staff, Donna Hughes and Brian Harry, both of whom were on duty with the Claimant on 2 August 2023;
    b. under the Respondent's policies, none of the matters the Claimant was accused of would be regarded as serious, let alone gross misconduct;

c. at a regular supervision meeting on 25 July 2023, the Claimant's line manager, Fallon Gallagher said nothing to the Claimant about any allegations;
d. on 3 August 2023, the Claimant's line manager, Fallon Gallegher said nothing to the Claimant about Allegations 2 and 3;
e. the Respondent shifted the meaning of Allegation 4 after the Claimant stated a high-risk resident had left on 27 July 2023, and was classed as high-risk generally, not just to women;
f. investigating officer, Marcus Bedwell did not tell the Claimant he had no evidence for Allegation 4;
g. Judith Magaw's letter to the Claimant dated 22 November 2023 materially changed the wording of the prohibition on discussing the details of the matter with witnesses;
h. the length of time/delay in conducting the Respondent's disciplinary process;

29. Continuing process when evidence lacking:
    a. the Respondent did not take the opportunity of reviewing the allegations once they knew the evidence was not strong and the lack of merit was apparent;
    b. the upholding of Allegation 3;
    c. investigating officer, Marcus Bedwell, Disciplinary Chair, Zelda Mulligan and Appeal Chair, Louise Forman took no account of the fact the rules required the Claimant to be outside on her own in order to complete welfare checks,

30. If that conduct occurred, was that conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?

31. If it was, did the Respondent have reasonable and proper cause for that conduct? The Respondent accepts if it lacked reasonable and proper cause for conduct which otherwise breached the implied term of trust and confidence, any such breaches were repudiatory in nature.

32. If it did not breach the implied term of trust and confidence, did the conduct breach an implied term imposing a duty on the Respondent to conduct a fair disciplinary process? If it did, was that a repudiatory breach of contract on the Respondent's part?

33. If there was one or more repudiatory breach of one or both implied terms, did the Claimant resign in response (in whole or part) to one or more of those breaches?

34. If she did, did she timely resign in response to the breach(es) or did she wait too long and affirm the continued existence of her contract after the breach by her own conduct?

Unfair dismissal

35. If the Claimant was constructively dismissed, what was the reason (or principal reason if more than one) for her dismissal?

36. Was that reason a potentially fair reason for dismissal?

37. If it was, did the Respondent conduct a fair disciplinary process within the band of reasonable responses open to it at the time?

38. Was the Claimant's dismissal for the reason for which she was dismissed within or outwith the band of reasonable responses open to the Respondent at the time?

39. If the Claimant was unfairly dismissed, is there a chance she would have been fairly dismissed had a fair disciplinary procedure been applied? If yes, how great a chance?

40. Did the Claimant engage in culpable conduct which caused or contributed to her dismissal? If yes, to how great an extent?

Remedy – unfair dismissal

41. If there is a compensatory award, how much should it be? The Tribunal will decide:

    a. What financial losses has the dismissal caused the Claimant?

    b. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

    c. If not, for what period of loss should the Claimant be compensated?

    d. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

    e. If so, should the Claimant's compensation be reduced? By how much?

    f. If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

    g. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

    h. Does the statutory cap of fifty-two weeks' pay or £105,404 apply?

    i. What basic award is payable to the Claimant, if any?

    j. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Remedy – Equality Act claims

    a. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

    b. What financial losses has the discrimination caused the Claimant?

    c. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

    d. If not, for what period of loss should the Claimant be compensated?

    e. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

f. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

g. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

h. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

i. Did the Respondent or the Claimant unreasonably fail to comply with it the ACAS Code.

j. If so is it just and equitable to increase or decrease any award payable to the Claimant?

k. By what proportion, up to 25%?

l. Should interest be awarded? How much?

Evidence

6. The Tribunal heard evidence under oath from the claimant, who it did not find to be an entirely credible witness when she claimed the respondent had failed to make reasonable adjustments with regards to the footrest and adjustable monitor, which were in situ.

7. The Tribunal found the claimant's evidence was less than credible for the reasons it has set out below when dealing with the conflicts in the evidence. The claimant's witness statement had been written by her partner and she had checked it. When it was brought to the claimant's attention on cross-examination that the claimant had been absent prior to the accident at work, the claimant's explanation that she meant to say there was no major sickness as opposed to no sickness absence. The explanation was not credible, and the claimant was unable to give an explanation as to why absences amounting to weeks rather than days were only minor. The Tribunal concluded that the claimant knowingly made a statement that was incorrect to show her in a good light.

8. For example, whether or not the claimant had been provided with a footrest. The claimant alleged that she had not been provided with a footrest, which changed to the footrest provided but it being "wonky" and yet the claimant never complained about a "wonky footrest" until these proceedings. The claimant had a designated desk with a footrest and there was no requirement for the claimant to work anywhere else, such as reception.

9. The claimant also gave evidence that she had been approached by a prospective employer and this is why she had applied for the role, been interviewed and accepted the job offer. Later in cross-examination the claimant stated she had applied not for one job but two. The claimant's witness statement was silent about the job applications (plural) and accepting a job offer before appeal outcome and resignation, when it was clearly very relevant to the case of constructive dismissal. It was not credible the claimant would have remained in employment had the appeal

outcome been different, and the Tribunal found the reality was the claimant had resigned in the knowledge that she was to take up alternative employment soon after. In oral closing submissions Mr Ginniff attempted to resolve the confusion (and contradictions in the evidence) concerning whether the claimant had received and read the Approved Premises Safe Working Document in 2022. The claimant's evidence was contradictory. She maintained she had not seen the document, and on seeing the respondent's evidence that the document had been received and read, as acknowledged by the claimant. The Tribunal has dealt with this further below. Finally, the claimant's evidence that she would not have resigned had the appeal been found in her favour was not credible, given the claimant had accepted the offer of new employment and agreed a start date. It is notable the claimant produced no documents relating to her employment with a new employer until the Tribunal asked for this information, and no clear explanation was given for the lack of disclosure.

10. On behalf of the respondent the Tribunal heard from Fallon Gallagher, senior probation officer and the claimant's line manager from 2021 to 2023, Marcus Bedwell, senior probation officer and union representative who conducted the disciplinary investigation, Louise Foreman, head of operations for probation service in Wales, who dealt with the appeal, Judith Magaw, head of residential public protection and commissioning officer, and Zelda Mulligan, head of unpaid work and programmes CORRE for Wales probation and disciplinary officer who conducted the disciplinary hearing.

11. The Tribunal found the respondent's witnesses credible in the main and supported by contemporaneous documentation where possible. There were some minor inconsistences. The inconsistencies reflected a lack of knowledge about the site and the delay by the claimant in issuing proceedings with allegations going back a number of years, well beyond the three month time limit. The delay has affected memory and recollection, for example, Zelda Mulligan was aware of how the site was run, knowledge which Louse Foreman did not have in any detail. It is notable Marcus Bedwell made concessions when giving evidence, and the Tribunal was satisfied that there was no link whatsoever between the claimant's disability and the disciplinary allegations or process. The claimant did not use the word "conspiracy" however, the claimant believed that Fallon Gallagher was behind the entire disciplinary process starting from generating the complaints made by a number of employees through to the eventual appeal outcome. The Tribunal found there was no evidence of Fallon Gallagher knowingly or unknowingly manipulating the managers who dealt with the investigation/disciplinary process.

12. Taking into account all the evidence heard, the written and oral statements, documents to which the Tribunal was taken to (including the additional documents introduced during the hearing, and oral and written submissions and the agreed chronology, the Tribunal has found the following facts resolving conflicts in the evidence on the balance of probabilities:

Facts

17 The respondent has statutory responsibility for supervising offenders serving community sentences or released into the community from prison, and provides nationwide a number of Approved Premises to support high risk individuals on probation or released from prison. Plas Y Wern in Wrexham is one of the approved premises., and it was one of Fallon Gallagher's premises to which she had referred her cases in the past.

Respondent's policies and procedures relevant to this claim.

18 The respondent issued a number of policies and procedures including one dealing with disciplinary, attendance and safe working.

19 The respondent issued employees with an "Approved Premises Safe Working Document Plas Y Wern Wales" referred to in this Judgment and Reasons as the "Approved Premises Safe Working Document." In the agreed bundle the date of the safe working document was January 2022 crossed out and 2023 inserted in pen. At the reconvened hearing the respondent provided the 2021 version. The 2023 version is identical to the 2021 version and nothing hangs on the date change.

The Approved Premises Safe Working Document

20 The document sets out the following:

23.1 The objective was to ensure health and safety of its employees and other persons.

23.2 All staff are required to read the document and sign a register confirming that they had read and understood its contents.

23.3 All staff have a legal responsibility to take reasonable care of their own health and safety whilst at work and that of colleagues "this includes following safe working practices, not creating unsafe working conditions, informing colleagues of known dangers and reporting any unsafe occurrences or situations…"

23.4 "The best strategy for dealing with hostage situations is to take preventative measures that make it difficult for such incidents to develop…ensure that staff know where you are."

Conduct and Discipline Procedure

21 In the 1 September 2017 document titled "Conduct and Discipline" managers need to decide whether there is an issue to be addressed and if there is they have a number of options ranging from "deal with the matter informally…deal with it as a performance or capability issue…arrange for it to be investigated informally." There was no requirement for managers to deal with issues informally at the outset, and there was no requirement for a line manager to discuss the allegations with the claimant before it began a formal investigation into those allegations.

22 Until the events set out below it appears the claimant had not been investigated or disciplined for misconduct.

23 In addition, the respondent had a grievance procedure which was well known to the claimant, who raised a number of grievances during her employment.

The claimant

24 On the 18 September 2017 the claimant commenced her employment with the respondent as a residential worker approved premises , based at the Plas y Wern Approved Premises. Fallon Gallagher, senior probation manager, line managed the claimant from May 2021.

25 The claimant's responsibilities included supervising, monitoring and surveillance of residents and the day to day running of the premises. The claimant was not solely responsible as she worked with other residential workers ranging from one or two depending on the risk assessment of individuals released from prison, including whether they were drug addicts and threatened/were abusive towards women.

26 The claimant was issued with a contract that included in para 11 under the title "Standards and Behaviour" "as a civil servant…you are expected to meet high standards of professional and personal conduct and behaviour…" The "Summary of The Principal Terms and Conditions of Employment" confirmed "procedures, policies and rules relevant to your employment are set out on the NOMS My Services pages and related documents."

27 Health and safety was key, and it involved keeping individuals safe. In excess of fifteen members of staff working shifts were employed on the site, together with two residential support workers and two key workers. There was always risk on the site, and if that risk was heightened there would be three residential support workers to manage the high risk when ordinarily there would be two residential support workers per shift. The key workers worked 9-5 Monday to Friday, and residential support workers worked 24 hours 7 days a week. Given Plas Y Wern was an approved premises for male offenders lone female working was not allowed.

Reasonable adjustments

28 As a result of the claimant's partner's ill-health, the claimant worked from home during the COVID pandemic and went back to the office in June 2020 with adjustments in place. The claimant had been allocated a desk reserved for her sole use when working. Other employees hot desked. The claimant could sit at her allocated desk which had a monitor and footrest.

29 On the 24 November 2020 the claimant raised a grievance seeking special paid leave/working from home alleging disability discrimination on the grounds that her partner was potentially impacted by the Covid Pandemic and a risk assessment had not been carried out. As a result the claimant continued to work from home and recommendations were made.

1 February 2021 Fallon Gallagher commenced her employment at Plas Y Wern as senior probation officer

30 On the 1 February 2021 Fallon Gallagher commenced her employment at Plas Y Wern as senior probation officer reporting to Claire Andrews, Area Manager. Fallon Gallagher was unaware of the grievances brought by the claimant in the past. She found the team dynamics and workplace culture "toxic" with members of staff clustering together to form alliances and the claimant formed part of that culture and behaviour. The claimant had, in Fallon Gallagher's view "anti-social and anti-management attitudes, hostile and challenging…because she was never happy with direction, guidance or questions" and this was "anxiety provoking." Fallon Gallagher found the claimant to be more challenging to manage in comparison to other staff, who were "less resistance and challenging". In oral evidence on cross-examination Fallon Gallagher confirmed she had found the relationship was a difficult one and she felt "targeted" by the clamant. Fallon Gallagher's view of the claimant made her more careful with the treatment of the claimant, and when it came to the provision of the ergonomic chair (which the claimant already had been provided with but needed a smaller size) Fallon Gallagher wanted to get it right.

The claimant's grievance

31 By the 12 May 2021 the claimant submitted a second grievance after she had been informed by Fallon Gallagher that Covid shielding was due to finish, the claimant would be able to return to work and she was, in the words of the claimant, invited to a "review of risk assessment out of the blue." The claimant refused to attend the meeting. The claimant complained that Fallon Gallagher invited her to attend an informal meeting which the claimant declined to attend for a number of reasons including failure to give proper notice of meetings and " tried to disallow trade union representation." The claimant sought an outcome that she "continue to work from home in an environment I know to be safe" and requested another manager carried out the risk assessment.

32 The claimant was provided with the Approved Premises Safe Working Document. There was an issue raised by the claimant at this final hearing that she had not signed any document confirming she had received it, which raises a question mark over the claimant's credibility given the claimant had been provided with a copy and in the bundle there is an email from the claimant dated 8 June 2021 confirming she had read it. The document was sent to Plas Y Wern employees (including the claimant) on 28 May 2021 in an email marked high importance. In an earlier email sent on the same date similarly marked by Fallon Gallagher, the claimant and her colleagues were informed that a revised version of the Working Practice document would be sent out, "please ensure you read and sign at the front of the handover at the end of your shift." The email included the following "No lone female working – just a reminder that female staff must undertake care checks/lunch supervision and general movement in twos…I noticed that this isn't always been adhered to staff **MUST** follow procedure as a means of keeping themselves safe." The Tribunal finds as a matter of fact that the claimant was aware of the contents set out in the Approved Premises Safe Working Document and that there should not be any lone female working.

33 In August 2021 the claimant applied for and took up a full time post in the Colwyn Bay office working partly from home and partly in the office., where she remained until January 2022. The claimant then returned to Plas Y Wern. It is undisputed

evidence the claimant had a desk by two windows for air flow, a footrest, a riser for the laptop which Fallon Gallagher had suggested should be linked to a big screen.

The accident at work 15 April 2022

34 Contrary to her witness statement the claimant was absent due to sickness prior to her accident at work and her evidence that she was not gave rise to credibility issues. On 15 April 2022, the claimant had an accident at work and recovered damages against the respondent for a knee injury described by occupational health in a report dated 17 July 2022 as "musculoskeletal." The claimant returned to work with adjustments.

35 The claimant was absent 27 April 2022 to 4 May 2022 and remained absent from 14 May 2022 until 14 August 2022 due to a "musculoskeletal concern affecting her right knee."

Occupational Health Report 10 August 2022

36 In an occupational report dated 10 August 2022 the claimant was found fit for work as of 15 August 2022 with adjustments of reduced hours per shift and a workplace assessment. The claimant returned to work on the 16 August 2022 on a 5-week phased return. The 10 August 2022 assessment recommended a workplace assessment.

37 On the16 August 2022 a return to work meeting was held. A further occupational health report was requested. Fallon Gallagher asked for a DSE assessment which took place on the 25 August 2022.

38 Fallon Gallagher's notes in the bundle reflect the claimant was spoken to by Fallon Gallagher about health and safety measures including "staff reporting she was around site alone and had not communicated her whereabouts to staff. Maria has been spoken to…" The notes are supported by contemporaneous documents, namely an email sent by Brian Harry and Fallon Gallagher's response. On the 17 August 2022 Brian Harry wrote "Yesterday, 16/08/22 Maria left the office and was missing for at least half an hour. When she returned I noticed did not have a radio with her...I challenged her on this and reminded her we currently had 2 residents who warranted triple cover and no lone working. I told her that she had been gone for quite some time, she couldn't be seen on CCTV, she had no radio and one of the resident's behaviour had been escalating…I told her that that if she leaves the office she should at least tell other staff on shift, where she is going and to make sure she has a radio with her as well as the PAA as there are some locations around the grounds where the PAA's are out of range, the radios have much better range."

39 Fallon Gallagher's response confirmed "as discussed I have spoken with Maria and reinforced the need to follow H and S processes." The Tribunal found the claimant had been informed by three people, Brian Harry, Fallon Gallagher and the health and person safety specific point of contact (SPOC) the need for her to comply with health and safety provisions and the suggestion by the claimant that she was not told, was less than credible. .

40 The Tribunal concluded the claimant was well aware of the instruction that she should not be around the Plas Y Wern site alone and should communicate her whereabouts to staff as a health and safety measure, and there should be no lone working.

7 September 2022 Occupational Health report

41 A further occupational health report was obtained dated 7 September 2022 which confirmed that the Claimant had been diagnosed with Piriformis syndrome, advised that the claimant was fit for contractual duties but that she will require workplace adjustments including providing the claimant with an ergonomic chair "**which may** benefit her"[the Tribunal's emphasis]. It is undisputed the claimant had been provided with an ergonomic chair from a past DSE assessment. A further DSE assessment was required to establish what ergonomic chair was required, if any.

DSE risk assessment 16 September 2022

42 On 25 August 2022, a DSE risk assessment took place and the DSE report recorded the following:

42.1 the Claimant had a specialist chair from a past DSE assessment, but the base of the chair appeared to be too big and was not supporting the Claimant. The report recommended a new ergonomic chair.

42.2 there were no issues with the Claimant's screen/monitor; and

42.3 The Claimant had a footrest under the desk in the small office next to the reception. There was no footrest under the desk in the main reception office. The report suggested that the bending down to move the footrest caused the claimant aggravation with her back, legs and knees. No reference was made to the claimant having her own dedicated desk as a result of the health and safety of her partner, or to the footrest being "wonky" as asserted by the claimant during cross-examination. The claimant confirmed she had a dedicated desk that required an ergonomic chair, and a footrest under that desk. The claimant's evidence that she required a second footrest for a different desk was unclear given the claimant's position, which is that other people should not use her dedicated desk and chair when she was at work. The desk was located by a window required to protect the claimant's partner during a COVID pandemic. The Tribunal concluded, preferring the evidence given on behalf of the respondent, that the claimant had one dedicated desk, one ergonomic chair (to be replaced) and a footrest. There was no requirement for the claimant to sit at any other desk which as a matter of logic would require her to move all items, including the ergonomic chair from one place to another, and it would mean that the dedicated desk the claimant insisted on using as a reasonable adjustment would have been open for anyone else to use if the claimant was sitting at a different desk in a different office.

DSE assessment

43 The DSE assessment dated 25 August 2022 and signed off on16 September 2022 made a number of recommendations that were already being met by the respondent, for example, regular breaks. It recorded:

1. The claimant was "currently having physiotherapy."

2. A new ergonomic chair was required "that fits her size and supports parts of her body that requires support. **Doctors/specialist report should indicate which areas of Maria's body that requires support. Chair can be purchased to match her needs. Maria to contact her specialist/doctor for a report to identify which part of her body requires the additional support from a chair"** [the Tribunal's emphasis]. The claimant was to provide this information by 31 October 2022. The claimant never provided the information needed in order for the respondent to identify the correct chair.

3. "When the report is received and specific areas of back and hips identified, Maria's manager to confirm with approved supplier the appropriate chair for Maria and arrange the purchase of the chair. The chair is for the sole use of Maria and not for other people…"

4. There were no issues with the screen.

5. Footrest purchased for desks in main reception so Maria does not need to bend down under the desk to remove and transport her footrest when working in different offices.

6. Leg stool to be purchase for the smaller office when Maria has a flare up.

7. The footrest and leg stool were to be purchased by 31 October 2022.

44 In an email sent on the 21 September 2022 the claimant complained that nothing has been done "several weeks ago" The DSE report was issued 16 September 2022 5-days before the claimant started chasing, despite the fact that the claimant was to provide information about measurements from her GP/specialist report.

45 Between 21 and 27 September 2022 a number of emails were exchanged regarding the DSO report, occupational health advice and risk assessments, which the Tribunal has seen and read.

46 In an email sent on the 22 September 2022 to the claimant and her trade union representative, Fallon Gallagher set out a number of adjustments including flexible hours, breaks, suspended night working and confirmed "DSE considerations are ongoing as I await a report from H&S leads." There was an attempt to arrange a meeting to discuss the claimant's personal management which included trade union representation. There was an issue as to whether the claimant should be measured for an ergonomic chair as requested by the claimant who wanted a made to measure chair, or whether an ergonomic chair could be purchased that was not made-to measure. The claimant had been provided with an option of providing a letter from her doctor/specialist confirming which areas of her body required further support, and if she remained unhappy with the DSE assessment, an occupational health referral.

27 October 2022 meeting claimant and Fallon Gallagher

47 The claimant and Fallon Gallagher met to discuss the phased return and risk assessment recorded by Fallon Gallagher in a note that included the following ""Maria has not been willing to meeting informally to implement any risk assessment…Maria showed me some written examples of her recovery pathways that she had discussed with her physio …Maria has agreed to meet with me next week and review the DSE report which she states is 'crap.' I stressed that we could look at this together and go back to H&S with any feedback. Likewise I would draw on any recommendation in terms of equipment…"

48 In an email sent on 27 October 2022 from Clare Andrews, area manager, the claimant was told it was not standard practice to have measurements taken within a DSE assessment and she was required to obtain a letter from her doctor and "**once we have received this, Fallon will need to liaise with supplier and provide them with details of (1) height and (2) areas of your body you require support with, (3) your working arrangements i.e. how long would be spent on the chair during a typical working day. The supplier (who are the experts) would then identify the appropriate product and we would place an order for it via procurement**…" [the Tribunal's emphasis]. The advice reflect that given in the DSO report, which was again ignored by the claimant.

49 During this period the claimant was liaising with her physiotherapist/medical advisor, and reporting to the respondent about the physio requirements referred to in the note taken by Fallon Gallagher at the 27 September 2022 meeting. Given the claimant was under the care of her physiotherapist/orthopaedic consultant it was not unreasonable for the respondent to ask the claimant to provide her body measurements and areas of the claimant's body that needed support, for the chair experts to give advice on the type and size of ergonomic chair that should be provided. The Tribunal found it was unreasonable for the claimant never to provide this information, and her failure substantially contributed towards the delay in the respondent purchasing the ergonomic chair.

Fallon Gallegher dealing with the staff using the claimant's desk.

50 The claimant was absent from work from 27 April 2022 to the 11 August 2022, and on her return to work the claimant complained about other people using her desk.

51 In an email sent to all staff on the 28 October 2022 Fallon Gallagher reminded them about the claimant's requirement; "whose family member remains at heightened risk from CV-19…it has been agreed Maria will use a **specified desk whilst on shift** (as marked)" and various measures were set out with a request that "all staff support the above measures."

52 On 9 November 2022, the claimant sent an email and copy of a GP report dated 28 October 2022 plus other medical reports obtained prior to the claimant's accident at work. The GP report did not provide any of the information requested by the respondent; it merely stated that the claimant needed an ergonomic chair, which the respondent was aware of. The orthopaedic consultant's report did not provide the information requested either. The claimant had not provided the

respondent with the measurements, and this caused a delay. Had the claimant provided the information she was aware from the respondent including Clare Andrews' communication that an expert would identify the appropriate chair and an order placed. The delay was not attributable to the respondent and so the Tribunal found. The claimant had access to her GP, an orthopaedic consultant and physiotherapist who could have provide the necessary measurements. The respondent's managers, DSO and occupational health could not provide the necessary measurements given this was not their area of expertise and the respondent did not offer to provide employees with made to measure ergonomic chairs. . The Tribunal accepted Fallon Gallagher's evidence on this point, which was undisputed.

53 It is notable that nowhere in any of the communications does the claimant raise the issue of a footrest, leg stool and monitor. The claimant's concern was the ergonomic chair, and it was for the claimant to take the next step by providing the necessary information by 31 October 2022, which she has never done despite various communications exchanged internally and with the claimant about the provision of an ergonomic chair.

The ergonomic chair catalogue

54 Fallon Gallagher sent the claimant a brochure in an email sent on 16 November 2022 explaining again "there is no service provision in place anymore in terms of having you 'fitted'. It's important we get this right before ordering otherwise we run the risk of delaying timeframes. In the meantime, whilst I await a further update please take a look at the attached brochure…please let me know your preferences and then I can proceed with the order." Reference was made to having a meeting with the claimant to "review progress to date in terms of your return to work to ensure we are supporting you the best we can. Please let me know your preferences…" It is clear from the internal email exchange that the claimant needed to provide measurement information and to choose an ergonomic chair "to get the ball rolling" and the tenor of the correspondence was that there was no issue in providing the chair and Fallon Gallagher was attempting to actively manage the process and continued to email the claimant and finance department.

55 The claimant, who remained absent from work, did not respond until 26 November 2022, 10 days later. The claimant wrote; "I am not sure the ones listed will be suitable due to ongoing problems…especially at night…I am afraid picking a chair from a catalogue provided, only to end up with a chair that is too big for me and/or not suitable for the hours worked." The claimant was not working nights, and there was no reason to assume there would not be a suitable chair in the catalogue which had measurements, and the claimant made no reference to measurements and why she had failed to provide the respondent with the information previously requested. The Tribunal found that any delay could not be put down to the respondent.

56 The claimant having rejected the chairs in the catalogue Fallon Gallagher sought advice on the basis that the claimant was of slight build "the ergonomic chairs via the catalogue don't meet her needs – she is asking whether we can seek someone to come and measure her up for one." Fallon Gallagher asked for inquiries to be made as to whether this was possible, having informed the claimant earlier that a

chair made to measure would not be possible. She was unable to "bottom out" how to go forward, having asked colleagues, Human Resources, the DSE assessor and occupational health for guidance. The parties were at an impasse, the claimant insisted on a made to measure chair having refused the offer of a number of chairs advertised in a catalogue and Fallon Gallagher was unable to offer any other suggestion as her request did not "align" with what could be offered, namely, the choice of a number of chairs advertised in a catalogue.

57 On the 6 January 2023 Fallon Gallagher emailed the claimant about a number of matters "in reference to your chair, I can see that you are yet to respond to my request sent on the 16/11 whereby I asked that you identify a chair in the brochure and to come back to me so I may go ahead and procure. You{re} last response acknowledged receipt stating that you would take a closer look at this on your next shift….please come back to me as soon as possible so that I may proceed with the order."

58 The claimant emailed Fallon Gallagher on the 9 January 2023 as follows: "I attach the emails relating to the chair in response to the catalogue you sent where I explained these would not be suitable due to an ongoing underlying condition I have. Medical evidence relating to this condition is also attached…I have replaced the notice which was placed on the desk which someone removed.." The claimant had still not provided the measurements.

59 At no stage did the claimant's medical advisors or occupational health confirm the claimant required was a bespoke made to measure chair, the provision was for an ergonomic chair which had been offered and refused by the claimant, who was not prepared to try a chair from the catalogue.

60 Fallon Gallagher emailed the relevant health and safety officer on 27 February 2023 "Maria is stating the ergonomic chair available by the catalogue don't meet her needs due to her slight build – she is asking whether we can seek someone to come and measure her up for one. Can you make some inquiries as to whether this can be offered please? I have cc's H and S leaders in case they are able to assist at all."

Complaint by claimant about dangers of sole working without cover

61 In an email sent on 15 January 2023 the claimant raised a number of complaints about the risk to her of a colleague working in "Gemma's office" and "on a weekend it is just two members of staff with no other cover at all. I wouldn't feel safe or able to cope of my own. If there was an emergency it would be just down to me which is unsafe and unworkable." The Tribunal concluded that in this email the claimant was acknowledging that someone left on her own could result in an emergency and a possible health and safety breach.

Occupational health report 28 February 2023

62 The 28 February 2023 occupational health report recorded the claimant was fit for work, suggested that a direct referral for a work station assessment was made

and the claimant should not work night shifts "as this can aggravate her symptoms." There is no reference to the catalogue and the claimant's objections regarding the ergonomic chair of her choice the respondent was offering to purchase, and no reference to the claimant and/or occupational health discussing the need for measurements to be provided.

63 On 11 April 2023, the claimant was absent due to stress owing to the death of her father and returned to work on the 28 June 2023 before going absent again on the 17 August 2023 from which she did not return.

64 By 11 April 2023 the chair measurement issue had not been resolved, and the claimant had not taken up the respondent's offer of a chair from the catalogue. After the 11 April 2023 the Tribunal finds the respondent was not under a duty to make reasonable adjustments until the claimant returned to work. Further, the Tribunal found the claimant did not return to work initially due to the death of her Father followed by the instigation of a disciplinary process. Had the claimant confirmed a chair in the catalogue should be provided the respondent would have supplied an ergonomic chair in good time, and it was always open to the claimant (after the provision of the chair) to inform the respondent that the reasonable adjustment had not been met because the chair was unsuitable. The problem for the respondent was that the claimant was asserting the catalogue chairs were unsuitable without providing any cogent explanation as to why this was, coupled by measurements which in turn could have been viewed by a chair expert, as requested by the respondent in the 16 September 2022 DSE report and emails to the claimant. The Tribunal found there was no satisfactory explanation from the claimant why she had not provided the measurement information, including how long she sat in the chair, requested in order that the respondent could take professional advice and purchase the correct chair.

Occupational health report dated 23 May 2023

65 The respondent was advised that the claimant, following the death of her father, was not fit for work due to her current mental health symptoms; "**as a residential worker…involves interacting with former prisoners who are vulnerable and volatile** and she does not feel mentally resilient enough to return to her role at this time…" [the Tribunal's emphasis]. The description given by occupational health of former prisoners is notable, and supports the respondent's version as to why the health and safety requirements were in place to protect female workers.

66 Due to the claimant's absence on 6 June 2023 Fallon Gallagher held an absence management meeting with Microsoft TEAMS ("FARM") with the claimant, who was accompanied by her union representative. Adjustments were not discussed due to the claimant being absent with no end date. However, in an email sent on 13 June 2023 attaching the outcome letter dated 12 June 2023, it confirmed that "any workplace adjustments would need to be incorporated into any planned phased return **as per those recommended."**

67 During this period the claimant had triggered the respondent's absence management procedure.

The complaints

68 On 8 July 2023 Melissa Jones emailed the respondent, including Fallon Gallagher, complaining about the claimant arriving 35 minutes late for her shift that morning, and "she was rather abrupt with Pam when she was requesting Pam to vacate Gemma's room that Pam was going to use as a desk base. Maria stated she was sick of having to explain to everyone about her phased return and her adjustments…Maria then proceeded to say she doesn't like other staff coming to work here and conducting PDU work whilst on shift and leave everything for her to complete…Pam and Maria came into the main office and there was tension and words exchanged between them to the point where Pamela was deeply offended by Maria's comments but Maria was rather dismissive about this which added even more to the tension in the room. Myself and Paula witnessed the event in the main office and it did feel rather fraught and uncomfortable to be in the room."

69 Paula Thomas (who witnessed the alleged incident) emailed the respondent, including Fallon Gallagher, on the 8 July 2023 "I agree with all Mel has reported, though I will add that Maria was downright rude to Pam, it was totally unnecessary and she was not apologetic when it was pointed out to her she was basically out of order speaking like that to a colleague. She accused Pam of shirking her responsibilities…Maria continued to be passive aggressive towards Mel, myself, and Pam."

70 Paula Thomas described the claimant's behaviour towards a resident service user "Maria interrupted me with a resident at the hatch…he was calm and polite…came behind me at the hatch and immediately had an abrupt attitude towards him, which …[he reacted to] and the situation became inflamed…there was absolutely no need for Maria to intervene and only served to escalate his behaviour. I managed to talk him down, but he is now in a very negative mood ad said to Maria 'I'm covered in cuts and scars, you talk to me like you want me to cut myself when you say I can't have my meds, I'm seriously ill you know. Maria didn't respond."

71 Paula Thomas commented "there has been simply not need at all for any of Maria's rude behaviour this morning….i**f I'm asked to complete a shift with Maria in future, I will sadly have to refuse. I have never in almost 20 years of working in Probation said that about a colleague. Mel and Pam have also said the same**" [the Tribunal's emphasis].

72 After the complaints were received about the claimant's conduct, Judith Magaw, head of residential public protection, was copied in by Fallon Gallagher who wrote in an email dated 10 July 2023 sent at 14.29 to Clare Andrews "happy to pick this up at some point by means of a 1:1 discussion. **I will state that the behaviours noted below come as no surprise to me and I believe we have reached a point where Miss Tams would benefit from performance management-given recent events I am mindful this will be opposed and I have no doubt this will be used to form part of a wider grievance possibly towards myself**…staff not on shift that day were openly gossiping about the incident this morning…and encouraging wider staff dialogue which I reminded them was not appropriate and that all matters will be dealt with on an individual basis. Paula and Mel are both valuable PDU sessions and my concerns is that one person's conduct has compromised AP contingencies in terms of staffing arrangements" [the Tribunal's emphasis]. Fallon Gallagher took the view that the allegations could be serious.

73 Fallon Gallagher spoke with the three complainants on the 12 and 13 July, and with the claimant on 12 July 2023. Fallon Gallagher made short notes of her discussions, including the claimant, which are in the bundle. There is a credibility issue concerning whether that a face-to-face meeting took place. Fallon Gallagher had a responsibility to find out what had been going on, and she held individual team meetings with the complainants and attempted to hold a face-to-face meeting with the claimant. A contemporaneous note was taken and Fallon Gallagher's evidence concerning the claimant declining to discuss the staff complaints was more credible than the claimant's version of events, which was Fallon Gallagher told her she did not have the time to discuss matters with her. It is notable that the claimant, who was not slow in raising complaints, did not complain that she had tried to talk to Fallon Gallagher and the response was that she was too busy, including in her grievance. The contemporaneous note reflected the claimant complained about her colleague Pam, alleged bullying and "she cannot deal with the conflict and nor does she wish to." It was left that Fallon Gallagher would speak to the individuals, which is what in fact happened.

74 The Tribunal found on the balance of probabilities on 12 July 2023 Fallon Gallagher attempted to speak to the claimant concerning her alleged behaviour towards Ms Roberts, and the claimant refused to discuss the conflict.

75 On 27 July 2023 Amy McGinty raised a grievance against the claimant, and this was followed by a complaint from Donna Hughes.

76 Amy McGinty wrote "I cannot work with this staff member any more, Maria Tams, I have raised many complaints over the years…she is dangerous to work with as she does not listen to security or risk practices put in place, therefore putting other staff at risk. She refused to do simple tasks…she does not listen and therefore has no idea about residents and their needs or risks…She is extremely rude to staff, I have only ever raised on grievance previously and it was for a serious incident where Maria screamed and berated me, this attitude has not changed and is rude to staff members, contractors and residents alike…the stress she causes other staff members, especially myself, is unacceptable, she affects my mental health. I have been booking my shifts off with her for many years, and using my annual leave so I do not have to put myself through the stress, as it is getting to much with me, I can't sleep and extremely anxious to work with her due to her rude attitude and lack of work ethic." The outcome sought was she did not have to work with the claimant, who she wanted to improve.

77 Donna Hughes emailed Fallon Gallagher on 2 August 2023 complaining about the claimant as follows: "Myself and Brian have been utilised this week as RW cover due to our current staffing levels. Today my shift started at 12:00 noon until 20.00…Brian Harry and Maria Tams had been on shift since 08:00. Brian left at 16:00 which left myself and Maria in the general office. Upon supervising the 16.45 meal and starting the 17:00 care checks I became aware the 15:00 care checks had not been completed. Brian was conducting a three way meeting at this time. As a PSO with a great deal of time bound pieces of work to complete I was busy ensuring that the OALT referrals had been correctly filled out…my second issue is, whilst supervising the evening meal with the chef, I was aware of a vehicle sounding its horn very close to the AP. I used my radio to ask Maria if it was Pam outside as she was due to work 17.00-20:00 with myself and she does not have

a gate fob. Maria replied it was Pam; however Maria's gate fob was not working but that Pam was on site now. I came back to the office a little after 17:00 and was informed by Pam that when she entered the grounds Maria was already walking to her vehicle. This left myself and Mandy alone in the kitchen, with no one watching the cameras or being in a position to respond, should an emergency have developed which needed immediate assistance. The alarms would not have bene heard if I had used my PA either! Maria had to return to the buildings Pam does not have a fob to gain access. I would like this to be addressed with Maria please, as if we don't look out for each other on shift, anything could happen.

78 In light of the complaints Judith Magaw, head of residential public protection, took the decision to instigate disciplinary investigation. The claimant accepted in cross-examination that Judith Magaw did not make this decision because the claimant was disabled and needed reasonable adjustments. The Tribunal concluded the allegations were potentially serious and it was not a breach of contract for Judith Magaw to decide an investigation was needed given the health and safety implications. The claimant's case is that Fallon Gallagher should have spoken to her before escalation, having " a quite word" as per the ACAS Code of Practice. The Tribunal was satisfied that whilst this was a possible avenue, there was no obligation on the respondent to have an informal discussion and it was not a breach of the implied term of trust and confidence for a disciplinary investigation to take place, especially given the claimant's history of ignoring health and safety instructions as set out above.

79 Fallon Gallagher took advice from HR and on 1 August 2023 emailed a number of people including Judith Magaw with the advice that "MT to be managed with a three pronged approach inc FUAM (scheduled 3/8/23), investigation for conduct and performance management approach. Caseworker was clear in stating her alleged conduct on 8/7/2023 should be managed via the conduct/disciplinary process, particularly as 3 aggrieved staff members and that this are mirrored by pre-existing management concerns."

80 Judith Magaw completed the terms of reference in relation to the allegations raised and wrote to the claimant on 16 August 2023 setting out four allegations and transferring the claimant. The four allegations in short were as follows:

Allegation 1 – On 8 July 2023, the claimant was rude and disrespectful to P Roberts
Allegation 2 – On 2 Aug 2023, the claimant did not undertake 3pm care checks, did not advise colleagues care checks not completed, did not request assistance to complete care checks
Allegation 3 – the claimant left building before a colleague arrived, leaving colleague alone supervising residents
Allegation 4 – The claimant went alone to garden during time of 'no lone working', placing herself and colleagues at risk.

81 The claimant was informed "**While you are transferred to work in the CORRE you cannot get involved with your normal role at Plas Y Wern…without Judith Magaw or Claire Andrews' agreement. You must also not contact colleagues or other employees who could be involved as a witness in the investigation**…" [the Tribunal's emphasis].

82 The claimant was absent with stress from 17 August 2023. An occupational health report dated 29 August 2023 confirmed the claimant was not fit to return to work and occupational health could not determine when she would be fit.

The claimant's grievance

83 On the 18 August 2023 the claimant submitted a grievance alleging bullying and victimisation on the grounds of disability and age discrimination in relation to sick leave excusal, reasonable adjustments and personal management plan. The claimant complained she had not been provided with a foot stool and ergonomic chair referring to the October 2022 GP report. The claimant did not mention that neither she and/or the GP/consultant had been asked to provide measurements for the chair and the claimant had been told she could select any suitable chair from a catalogue and/or a chair expert would advise on the correct chair once the measurements had been provided. The claimant did not say an impasse had been reached because the measurements had never been provided. The claimant wrote "the only solution I have been offered is being asked to pick a chair from a few pages of an online catalogue which all appear unsuitable due to their size and proportions. **I took great pains to examine the specimen chairs and measurements to check comparative size. I communicated this in writing several months ago."** The claimant did not say that she had not provided the respondent with any of the measurements she had taken in order to check the comparable size and that she had ignored the respondent's request for this information. The claimant referred to the August 2022 DSE report recommending a chair. The claimant did not refer to the relevant part of the DSE report requiring her to provide via the GP/consultant, relevant measurements in order that a chair could be ordered.

84 With reference to the personal management plan the claimant complained about incurring the cost of a GP letter and a number of other matters including "as part of the PMP I have been allocated a desk which allows me to work socially distanced from my colleagues and near an open window to allow ventilation. There is a notice on the desk, agreed and signed by the manager, which alerts people that this desk is reserved for me due to PMP. On returning to work on the 29 June 2023…this notice had been removed and I was put in an awkward position of having to ask people to move…I raised this with my manager and…we placed a further notice on the desk. Within 24 hours of this notice being placed on the desk it was removed again whereupon I spoke to the manager and a further notice was placed on the desk…I told my manager that this was an issue of bullying and harassment and asked her to investigate it…no action has been taken, and although she was sympathetic, I feel appropriate action was never taken."

85 The claimant also complained about the respondent's use of the attendance policy during her absence and finally, the complaints that had been made against her by colleagues.

86 With reference to the complaints the claimant wrote: "On…16 August 2023…Clare Andrews…rang me…to inform that there were four complaints against me and went through them over the phone. This was followed by an email outlining the

complaints and informing me I was to be deployed to the CORRE team the following day…this has had a further negative impact on my mental health.

Appointment of investigation officer

87 On the 17 August 2023 Marcus Bedwell was appointed Investigating Officer and provided the terms of reference on the 21 August 2023.

88 On the 25 August 2023 a DSE assessment was carried out in the claimant's workplace.

89 On the 29 August 2023 occupational health provided a report in which it was confirmed the claimant was not fit to return to work, "current outlook unknown".

90 On 29 August 2023 Marcus Bedwell commenced his investigation and interviewed a number of witnesses during the following 5-week period:

91 On 29 August Fallon Gallagher was interviewed and she confirmed the welfare check had not been carried out 3pm on the 2 August 2023, providing details of the on duty staff confirming "that it was the case Maria left the building with one colleague remaining, **the high ROSH resident that was living at the AP had a history of behaviour that raised the risk towards lone female staff. This included the risk of knives and sadistic behaviour which was part of the risk assessment**" [the Tribunal's emphasis]. The description of the resident given in the interview by Fallon Gallagher was incorrect, and the suggestion by the claimant is that this was intentional to show the claimant in a more negative light. On cross-examination Fallon Gallagher confirmed the information regarding the high risk ROSH resident was incorrect and she had confused that resident with another. Fallon Gallagher confirmed there was a high risk resident on the 2 August 2023, triple cover was not necessary and guidance had been given to staff to be vigilant towards colleagues, no lone working and a risk summary board available to all staff. Fallon Gallagher gave her honest view of the claimant, which was "Maria can be challenging, sometime unnecessarily assertive with colleagues, can be disruptive and play to an audience in meetings…lacked respect for management and sometimes 'shirked" her responsibilities."

92 On the 4 September 2023 Donna Hughes was interviewed stating the claimant that she had twenty years' experience as recorded in the interview record, and "part of the responsibility and duty for Maria on that date was to carry out welfare checks at 9am, 11am, 1pm and 3pm. Donna maintains that the 3pm check was not carried out by Maria…her colleague Brian Harry was also working…that day but was in a different part of the building attending a MAPPA meeting."

93 Donna Hughes alleged the claimant had left the building on the 2 August and "this left only one colleague supervising the residents with no cover. This is a potential breach of safer working practice and failure to follow process. Donna explained at 4.45pm the evening meals for the residents were being prepared and that at 4.55pm she was aware that Maria was not in the building…Donna was surprised to see that Maria was not in the main office watching the CCTV camera that covered the car park because Pamela Roberts…had not arrived into the building to commence the evening shift which started at 5pm. Donna was further surprised

to see that Maria was in the car park and Maria then returned to the building to let Pamela in. Donna learnt from Pamela that she had been waiting in the car park unable to get into the building because she did not have a fob and also couldn't get anyone's attention, subsequently sounded her car horn…Donna explained…she was in effect left in the building on her own. A female chef was preparing the meals, but the duty responsibilities were with her and Maria…when one person was left lone working there would be no way of calling any back up in an emergency situation…this was the 'final straw" and that she not only felt let down by a colleague, but it was something that "you never did." Donna Hughes criticised the claimant's behaviour at work maintaining she was "difficult to work with." Donna Hughes "emphasised that 'safety' was the most important thing and that Maria had not considered this in her leaving the building early nearing the end of the shift."

94 On the 18 September 2023 Pamela Roberts was interviewed. In the record of interview she confirmed there was a reception and one office with two desks and three relief staff who needed to be accommodated. Pamela Roberts sat at a desk in the smaller office. The claimant had not arrived at work until 30 minutes after the shift, and when she did was allegedly rude to Pamela Roberts in respect of the desk and telling people she was on a phased return. It was recorded that Pamela Roberts confirmed she "felt she wasn't going to do anything about what Ms Tams had said to her and was aware that Melissa Jones made contact with the on call duty manager."

95 Pamela Roberts confirmed she had arrived for her duty shift on the 2 August, did not have a fob to enter the building, sounded the horn to draw attention to the fact she needed access and the claimant, who was in the car park, let her in at around 5.05pm.

96 On the 18 September 2023 Melissa Jones, divisional support hub manager, was interviewed. She dealt with the 8 July 2023 allegation interview confirming the claimant had arrived 35 mins late for her shift, staff had taken their seats at work stations. The claimant came in to where Pamela Roberts was stationed, raised her voice saying "shut up-get out" followed by "Pamela running into the main office….over 15 to 20 minutes an argument took place with the claimant "going at" Pamela Roberts, who was in turn "very upset and was going to cry and go home." Other criticisms about the claimant's behaviour at work were raised.

97 On the 5 October 2023 Paula Thomas was interviewed during which she alleged the claimant was "downright rude" to Pamela Roberts, it was shocking, totally unnecessary and the claimant was not apologetic and rude to another member of staff, the cook., and gave details of the alleged incident involving the claimant being rude to a resident describing how she had "lit the fuse" and then left and she felt this put us all at risk. Paula explained that she did not want to work the same shift as Maria is impossible" and her colleagues felt the same, she was "careful how she spoke with Maria because she was concerned about how she may react. Paula said she had informed the duty manager that 'I would like to make it known that if I am asked to complete a shift with Maria in the future, I will

sadly have to refuse. I have never in almost 20 years of working in probation said that about a colleague."

98 On the 6 October 2023 the claimant, accompanied by her union representative, was interviewed having provided Marcus Bedwell with a written statement. The claimant was made aware it was a fact finding meeting and she denied the allegations, maintaining Pamela Roberts was aggressive towards her and discriminatory. The claimant explained she had not made contact with the duty manager at the time "as I was quite upset with it." The claimant pointed out she was unable to sit any "inches away from someone else" and discussed the dedicated desk and notice on the desk." The claimant explained she was "a very able person, and she has a background in law and is able to express herself on paper. There may be some resentment in that respect."

99 With reference to the second allegation, namely the failure to undertake the 3pm care check, the claimant explained they were short staffed with two PSO's covering the residential worker shift, and it was also their responsibility to cover the 3pm check.

100 With reference to the third allegation the claimant accepted she had gone to the car and was in the car park when Pamela Roberts arrived and went back into the office to let her in.

101 With reference to the fourth allegation the claimant maintained she was "not alone, she was with an ex-resident. I wouldn't have gone out alone….she didn't feel that she was putting anyone at risk as there were three staff in the office and they were in a secure area." The claimant reporting how she had told a cleaner and mentioned it to "Keith 'You know that there was no lone working, as the cleaners have to go around together as well. The point that Maria was making was that Keith had no one told him he wasn't allowed on his own." The claimant alleged she was being bullied by manager, "I'm being bullied out of my job. I think a lot of people in this situation would have said I'm off…it's been a fishing expedition…Maria will be taking legal advice."

102 With reference to the allocated desk the claimant's union representative made the point "if the PMP was explained to people with regards to the desk…and it was directed to them that they cannot move that sign, this would be a step towards working in a normal working environment.

103 A number of communications between the claimant and Judith MaGaw culminating in a letter dated 10 October 2023 from Judith MaGaw confirming "it was my decision to instigate the investigation, this was done when matters were raised with myself. Once I was aware of the matters I arranged for the investigation to commence immediately. With regards to the investigation being completed within 28 days this is within the policy and we try to work with this. As you are aware you advised you were not well enough to attend work and as such an occupational health report was requested to advise if you were well enough to engage with the process. The report advised that at the time you were not well enough. It was my position to follow the advice within the report and I delayed the investigation. However, once I was aware that you had engaged with the other processes, I asked the investigating officer to make contact…I considered if

suspension was appropriate and decided an alternative…I am of the view that in order to allow the investigation to take place it is appropriate to remove you from your role temporarily as noted above without prejudice…you agreed you would undertake it. If you are not in agreement to undertake the alternative role please advise me…at this stage the investigation is underway, once I receive the written report, I will write to inform you of the next steps. This could include that there is no case to answer, it could be that I decide informal actions are required or it could be I decide there is a case to be considered in a formal disciplinary hearing…at this stage it is my view that the matters have the potential to be gross misconduct." There was a reference to the claimant's grievance and other issues she had raised.

104 The claimant was provided with a copy of the interview notes on 12 October 2023, which were amended and agreed.

105 On the 13 October 2023 Marcus Bedwell shared the notes of his investigation meeting with the claimant by inadvertently sending the notes to a colleague, Rhys Jones. The email which attached the notes was sent to the claimant and cc'd to Rhys Jones. It is clear from the email that the notes were for the claimant's records with no mention of the colleague who had no input into the disciplinary investigation. The Tribunal accept Marcus Bedwell's explanation that it was an administrative error as accepted by the claimant in cross-examination. Rhys Jones provided the on call notes and email records during the investigation

Grievance outcome

106 The claimant was sent the grievance outcome by Elinor Worthington, Woman's Justice Programme manager, on 20 October 2023 following the grievance meeting on 29 September 2023. With reference to the complaint relating to reasonable adjustments the timescales were found to have been too long and "as you agreed in our discussion, it is these detailed measurements with accompanying expert advice in terms of support to identify the specific chair that you need, this is now needed to resolve the issue…given the timeframes incurred during this process, this element of your grievance is upheld. Whilst the timeframes have been outside of what would be expected, I do not however concede from the evidence that this constituted discrimination, as whilst this has taken a long time, there has been action on the part of your line manager who has taken steps to resolve the issue, including via referrals to OH. My recommendation is that the relevant service is contacted as a propriety to identify the detailed measurements/requirements and secure the right chair and footstool."

107 With reference to the Personal Management Plan Elinor Worthington concluded that "the most likely explanation" for the reason for the removal of the sign on the claimant's desk was "cleanliness/tidiness" and "ideally the sign would have been replaced with a fresh notice." This part of the grievance was not upheld and attaching the sign to a wall was suggested.

Draft investigation report

108 Marcus Bedwell provided the initial draft report in October, with HR providing an input in relation to format, and by 7 November 2023 a revised investigation report had been sent to Judith McGaw. Judith McGaw kept the claimant updated, including the fact that HR was checking it. HR advised the report was "very thorough." The Tribunal found the report was extensive and ran to 28-pages plus appendices.

109 Marcus Bedwell took the view that allegation 2 (unprofessional conduct in relation to the 3pm welfare check) was not supported by evidence and this allegation was dropped on the basis that the evidence did not clarify that the 3pm welfare check was the claimant's sole responsibility, and his investigation had identified the welfare checks policy was reviewed by the AP manager.

110 Marcus Bedwell found the remaining allegations 1, 3 and 4 was supported by the evidence .

111 In a letter dated 9 November 2023 Judith Magaw invited the claimant to a disciplinary hearing regarding allegations 1, 3 and 4, informing the claimant no action would be taken in relation to allegation 2. The disciplinary allegations were as follows:

1. On 8th July at Plas Y Wern you were rude and disrespectful to Pam Roberts. This is potential unprofessional conduct.

2. …

3. On the 2 August you left the building before a colleague had arrived in the building (although you returned to let them in as they did not have a fob). This left only one colleague supervising the residents with no cover. This is a potential breach of safer working practice, and failure to follow process."

4. On 4 July having asked colleagues to accompany you to the garden you went alone. This was a concern as there was a resident who was assessed as no lone working. This placed yourself and colleagues at risk. This is a potential failure to follow management instruction and adhere to safe working in the Approved Premises."

<u>The claimant made contact with staff 14 November 2023</u>

112 On the 14 November 2023 the claimant rang the night staff working at Plas y Wern Approved Premises at 2am and disclosed the disciplinary hearing.

113 On the 22 November 2023 Judith Magaw wrote to the claimant informing her of new Allegation as follows: "Since the original letter I have been advised of a recent incident and I am writing to inform you that I have commissioned an investigation into the additional allegation…Allegation 5 –acted unprofessionally by failing to follow written management instruction per letter dated 16/08/23 paragraph 7, by contacting Plas Y Wern Approved Premises at 2am on 14/11/23 and disclosing details of the investigation and disciplinary process to staff."

114 As a result of the fifth allegation the disciplinary process was delayed. In a letter dated 24 November 2023 Marcus Bedwell invited the claimant to an interview to

discuss allegation 5 on 12 Dec 2023 with a deadline date for the submission of the report to the commissioning officer (Judith Magaw) by 2 January 2023. The claimant's position was people had colluded and she knew none of the witnesses worked nights. The claimant maintained allegation 5 was an act of bullying and the allegation misrepresented the paragraph 7 by claiming it was contacting Plas-Y-Wern when it was not to contact witnesses and the person spoken to was not a witness.

115 Marcus Bedwell investigated allegation 5 interviewing a number of people , including Claire Paterek, Fallon Gallegher and Alex Broe. Fallon Gallegher

116 On 13 December 2023 the claimant appealed the grievance outcome.

117 On the 21 December 2023 Seth Pritchard was interviewed and confirmed the claimant had rung "out of the blue…she's not somebody I know…I certainly would not say I'm a confidant of hers" stating the claimant had referred to the disciplinary and grievance, but no names. The information provided to the respondent by Seth Pritchard was that the claimant rang after midnight with the aim of speaking with any colleague that was on shift. There was a concern that the claimant had rung Plas Y Wern deliberately when she was instructed not to contact the site and not to speak to a witness, contacting the site may be a breach as there was a danger someone answering the phone would be one of the witnesses.

118 By the 23 December 2023 the investigation report was completed and sent to Judith Magaw, who recommended the claimant's case should proceed to a disciplinary hearing.

119 In a letter dated 2 January 2024 the claimant was invited to a disciplinary hearing in relation to allegation 1, 3 and 4 referred to above, and the additional allegation 5 that she had "acted unprofessionally by failing to follow written management instruction as per letter dated 16/08/23 paragraph 7, by contacting Plas Y Wern Approved Premises at 2am on 14/11/23 and disclosing details of the investigation and disciplinary process to staff." The disciplinary hearing was to take place on 18 January 2024 and it was deferred to another date pending the claimant's union representative availability.

Claimant's application for new employment outside the respondent

120 Before the investigation into allegation 5 and disciplinary hearing outcome the claimant applied for alternative employment with a new employer on two occasions. The claimant was provided with an application pack by Age Concern following an earlier communication on 30 January 2024.

9 February 2024 disciplinary hearing

121 Zelda Mulligan, the disciplinary officer, held the position of approved premises area manager for Wales Probation and line managed Fallon Gallagher. Zelda Mulligan did not have The Approved Premises Safe working document before her, and nor was a copy provided to the claimant prior to or at the disciplinary hearing.

She had before her the respondent's Conduct and Discipline Policy which stated that disciplinary matters are to be handled in the strictest confidence, and had taken the view after a discussion with HR and Judith Magaw that there may be a case to answer in relation to allegation 5. Account was taken of the investigation report and numerous documents provided by the claimant. The concept of no lone female working was explored with the claimant , who indicated she had not seen the Safe Working Practice document.

122 Marcus Bedwell replaced Annex 16 (a record of his interview with Fallon Gallagher) attached to the investigation report part way through the disciplinary hearing. The claimant objected and was given thirty minutes to read it before the statement was included in the evidence.

123 Zelda Mulligan concluded on the balance of probabilities that allegation 1 constituted unprofessional conduct, and allegation 3 was misconduct on the basis that "there was nobody at the hatch to watch the CCTV or to respond to an alarm from another colleague, and that the claimant was expected to know the risks associated with these things with her level of experience. Allegations 4 and 5 were unproven "as there was insufficient evidence to substantiate them." The claimant was issued with a two year final written warning as a sanction for allegation 1 and 3 cumulatively.

124 Zelda Mulligan was satisfied that the claimant was guilty of misconduct and not gross misconduct. In relation to allegation 3 she concluded the claimant was experienced and would have known that two staff were required to be on duty, and Donna Hughes had been put at risk when the claimant left the hatch to go to her car for personal reasons, because there was no one to ring the police if Donna Hughes was attacked. Zelda Mulligan when arriving at her decision did not investigate nor take into account the residents present on the 2 August 2023 as she took the view this information was not relevant to the potential risk caused by the claimant's conduct. Zelda Mulligan took the view that the replacement Annex 16 was opinion based, did not assist her and the information provided was not used when assessing whether the allegations were proven or not. The Tribunal found Zelda Mulligan had objectively considered the evidence before her, and the claimant together with her union representative were given a full opportunity to respond to all of the allegations, with the result that two of the allegations were found not to be proven, and in relation to allegation 3 the claimant had admitted it, albeit questioned her knowledge of the lone working policy, and with respect of allegation 1 the witness evidence was persuasive. The respondent's disciplinary procedure and ACAS Code of Practice was largely followed.

125 The disciplinary outcome was confirmed in a letter sent to the claimant dated 9 February 2024. The claimant, who was aware that she was not facing dismissal, appealed and 19 days later attended an interview with Age Concern before accepting the position before her appeal was heard.

126 The claimant was interviewed for a position with AGE Concern on the 28 February 2024, completed her DBS check on the 29 February 2024 and offered the job on the 1 March 2024, which the claimant accepted on the 6 March 2024 signing the contract of employment and stating "I look forward to working from you all."

The appeal hearing on 11 March 2024.

127 The claimant's appeal was heard by Louise Foreman, head of operations for Wales Probation based in Pontypool, who requested a copy of the signed Safer Working Practices document. A copy was provided on 11 March 2024 together with an email received from the claimant (referred to above) sent on 8 June 2021 at 14.18 confirming the claimant had read the document. Much has been made by the claimant by the fact that the respondent could not produce any document she had signed confirming she had received and read the Safer working Practice document. The Tribunal found the claimant's evidence less than reliable. The emails in question refer to a subject matter "Safer working Practice doc" and at 14.14 on the 8 June 2021 Fallon Gallagher wrote "Can I just get your confirmation that you have read the above?" The claimant's response on an email with the same heading was "Yes I have." This evidence undermined the claimant's evidence, which changed throughout the final hearing including at oral closing submission stage, to the effect that she had not been sent and/or not seen any Safer Working Practice documents, and the document eventually provided by the respondent was the wrong date and it could not be said it was the exact same document that may or may not have been provided to her in 2021. In the light of the respondent's evidence the claimant had no choice but to accept she had been provided with the Safer Working Practices document which she could not recall reading. The Tribunal concluded that throughout the disciplinary and appeal hearing the claimant was fully aware of the Safer Working Practices required by the respondent, and was using any argument she could to avoid an adverse finding against her in relation to the most serious allegation of all, that is allegation 3.

128 The claimant was supported by her union representative and was given a full opportunity to put forward the grounds of appeal including the penalty being unduly severe.

129 Louise Foreman was satisfied in relation to allegation 3 that the claimant had left the building before her colleague arrived and left one colleague supervising residents with no cover, particularly CCTV monitoring, without alerting her colleague against a health and safety requirement that there are always two staff on site as a minimum. Louse Foreman was satisfied the claimant had put her colleague at risk by her behaviour. In relation to allegation 3 the decision was downgraded to misconduct on the basis that it was "unduly severe."

130 The outcome was favourable to the claimant as she was issued with a first written warning on file for 12 months in relation to one allegation only, allegation 3 with allegation 1 being dropped.

131 Turning briefly to allegation 1, Louise Foreman took into account the claimant's Personal Management Plan sent to her by the claimant on 12 March 2024, and the witness statements set out in the investigation report concluding there had been no collusion. Louse Foreman was satisfied that the evidence produced "very late" by Marcus Bedwell during the disciplinary hearing was disregarded by Zelda Mulligan. In relation to allegation 1 the decision was overturned on the basis that there were mitigating circumstances including bereavement of the claimant's

Father and 'her designated chair being out of action' which had not been considered previously.

132 The appeal outcome was confirmed in a letter dated 15 March 2024 to which a number of documents were attached including the Safer Working Practice document in force August 2023 (an identical document to the one provided to the claimant in 2021).

Claimant's resignation

133 On the 18 March 2024 the claimant resigned with immediate effect. The 18 March 2024 was to have been the first working day after the appeal outcome letter. The Tribunal found the claimant resigned in order to take up her position with Age Concern on the 2 April 2024. The resignation letter set out the following alleged breaches of contract:

1. Failure to enforce the Personal Protection Plan,

2. Failed to make reasonable adjustments amounting to unlawful discrimination,

3. Failed to follow Policies, procedures, ACAS code of Practice and natural justice.

134 The effective date of termination was 18 March 2024.

Law

135 The law is agreed between the parties and set out in claimant's written submissions for which the Tribunal is grateful.

Constructive unfair dismissal

136 Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

137 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as at an end? The Court of Appeal "made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer."

The implied term of trust and confidence

138 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

139 The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be struck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Last straw

140 A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, 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?"

141 With reference to the Court of Appeal decision in Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. **The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer"** [the Tribunal's emphasis].

Employee must resign in response to repudiatory breach

142 The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation.

143 In the well-known EAT case of Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105 the EAT held "… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him" (per Arnold J).

Waiver of breach

144 Weston Excavating cited above; The employee "must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

145 In the well-known EAT case of W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT an employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract.

Discrimination

Direct discrimination

146 S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [disability] A treats B less favourably than A treats or would treat others.

147 An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from him. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator." This is relevant to the comparators relied upon by the Ms Tams who were not in the same or nearly the same circumstances as the claimant, and the Tribunal formulated a hypothetical comparator based on the evidence before it which did not assist the claimant.

148 Chief Constable of West Yorkshire v Vento (No.3) [2003] ICR 318 CA and Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, EAT as a "case comparison" misunderstanding that every case is dealt with on its own

individual merits. Further, there is no suggestion by the claimant that she relies upon a hypothetical comparator. In Vento the tribunal considered the circumstances of four other police constables (not all of whom were male) whose situations were not identical but were not wholly dissimilar either. It concluded that the claimant had been treated less favourably than a hypothetical male comparator. The EAT held that this was a permissible way of constructing a picture of how a hypothetical male comparator would have been treated. This approach was later approved by the House of Lords in the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

149 Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others."

150 A Tribunal should not assume a finding of unlawful discrimination from a finding that an employer acted unreasonably; there may be other explanations (if only simply human error): Bahl v Law Society [2004] IRLR 799 CA. More is required than simply a finding of less favourable treatment and a difference in the relevant protected characteristic. Where there is a comparator, the 'something more' might be established in circumstances where there is no explanation for the unreasonable treatment of the complainant as compared to that comparator; see per Sedley LJ in Anya v University of Oxford [2001] ICR 847 CA, and the discussion of those dicta in Bahl , per Maurice Kay LJ, observing (paragraph 101) that the inference of discrimination would not then arise from the unreasonable treatment but from the absence of explanation.

Disability discrimination arising from disability

151 Section 15(1) of the EqA provides-

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably because of something arising in consequence of B's disability, and

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

152 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

153 Mr Ginniff referred to the four elements to section 15(1), as explained by the EAT in Secretary of State for Justice and anor v Dunn EAT 0234/16:

1 there must be unfavourable treatment;

2. there must be something that arises in consequence of the claimant's disability;

3 the unfavourable treatment must be because of the something that arises in consequence of the disability; and

4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

154 Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT referred to by Mr Ginniff:

154.1 "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

154.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case**. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it** [the Tribunal's emphasis]. In the case of Mrs Tams the Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

154.3 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

154.4 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

154.5 This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

155 With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: Hensman v Ministry of Defence UKEAT/0067/14/DM.

Disability discrimination – failure to make reasonable adjustments

156 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, **to take such steps as it is reasonable to have to take to avoid the disadvantage** [the Tribunal's emphasis]. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

157 The duty to make adjustments under S.20 EqA applies where the lack of provision of an auxiliary aid puts a disabled person at a substantial disadvantage in relation to a relevant matter.

Burden of proof

158 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

159 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748 to which the Tribunal was referred by Mr Piddington. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts

160 With reference to the burden of proof the Tribunal found that it had not shifted to the respondent in relation to the discrimination complaint brought under section 13 of the EqA. It had shifted in relation to the claim brought under sections 15, 20-21 of the EqA and based on the respondent's witness evidence and supporting contemporaneous documentation, the Tribunal was satisfied the respondent provided an explanation untainted by disability discrimination. The Tribunal has explored this further below.

Jurisdiction – discrimination claims

161 With reference to the first issue dealing with time limits, namely, given the dates of ACAS Early Conciliation (11 April – 22 May 2024), were the Claimant's claims based on the Respondent's conduct (whether acts, omissions or detriments) which occurred on or before 11 January 2024 presented prima facie out of time, the Tribunal found the allegations which had occurred on or before the 11 January 2024 were out of time.

162 With reference to the second issue dealing with time limits, namely, if the answer is yes, did that conduct form part of conduct extending over a period in respect of which the Claimant presented a timely claim at the end of that period, the Tribunal found there was no such conduct for the reasons set out below dealing with the separate acts of alleged conduct relied on by the claimant.

163 With reference to the third issue dealing with time limits, namely, if there is no conduct extending over a period, is it just and equitable to extend time in relation to the claim, and if so, for what further period, the Tribunal found it was not just and equitable taking into account the fact the claimant had not provided a good reason for failing to issue proceedings (for example) for an alleged failure to make reasonable adjustments) outside the statutory 3 month time limit. The claimant had union representation throughout, she described herself as having a law background, was aware of the statutory 3 month time limit and it is clear from the findings of facts, intended to seek legal advice. Further, the passage of time has prejudiced the respondent's witness recollection and given the weakness in the claimant's claims, the balance of prejudice falls on the respondent. The Tribunal concluded on the evidence before it that the claimant had no intention of issuing proceedings for discrimination within the statutory time limit, which is unsurprising given her own default in providing the respondent with the necessary information in order that it could order an appropriate chair, and this was not a reason for her resignation. The claimant resigned because she had found alternative employment that better suited her against a background of her colleagues having taken against her, complaining about her attitude towards them and colleagues raising grievances which resulted in a disciplinary investigation and hearing, and she was unhappy with the disciplinary outcome. This is a case where the claimant did not accept valid allegations had been made against her, the respondent decided to investigate them as possible acts of misconduct/gross misconduct, and this is why she had applied for alternative employment, accepted it and at the same time continue with the internal processes in the knowledge that she was no longer going to be employed with the respondent in any event.

164 With reference to the final issue, namely, If yes, was the claim timely presented within that further period, the Tribunal found it was not. The claimant's evidence that she was waiting for a favourable appeal outcome whereupon she would have continued in her role with the respondent was not found to be credible when it came to the disability discrimination complaints.

Claim 1: Direct disability discrimination (s.13 EQA 2010)

165 Turning to the direct disability discrimination complaint the Tribunal found the following on the balance of probabilities.

166 With reference to issue 5(a) it is not disputed on or around 16 August 2023, the respondent commenced a disciplinary process involving the claimant. The Tribunal found the commencement of the disciplinary process was the result of allegations being made against the claimant by colleagues and there was no causal connection with the claimant's physical disability, in short, the claimant was not disciplined because she was disabled and the claimant's evidence suggesting

that Fallon Gallagher was in some way behind the allegations and process because the claimant was pressing for auxiliary aids had no basis whatsoever.

167 With reference to issue 5(b), namely, did the respondent exclude the claimant from the workplace and attempted to transfer the claimant to a different site/place of work, the Tribunal found the claimant was transferred to another site and due to sickness absence did not take up the position. The claimant was excluded from Plas Y Wern, and there were reasons for this that were not discriminatory, namely, keeping the claimant away from witnesses/potential witnesses during the disciplinary process.

168 With reference to issue 6, namely, did the respondent treat the claimant less favourably than an actual comparator. For the purposes of determining this issue, the comparators are Donna Hughes and Brian Harry. In the alternative, the claimant relies on a hypothetical comparator of an employee subject to the disciplinary process but without the claimant's disability. The respondent accepts it did not do either of those two things to the two comparators the claimant has named. The respondent accepts the claimant was treated less favourably than those comparators by not commencing a disciplinary process against them on the 16 August 2023, not transferring them to a different site and excluding them from Plas Y Wern. This is the first matter to be established before there can be a finding of direct discrimination.

169 The second matter that must be established is whether that the less favourable treatment was on the ground of the protected characteristic, and to decide this the Tribunal can consider the actual and/or hypothetical comparator relied on.

170 An actual comparator exists when there is no material difference between the circumstances relating to the claimant's case and the comparator's case. Section 23(1) of the EqA, states, "(1) On a comparison of cases for the purposes of section 13…. **there must be no material difference** between the circumstances relating to each case" [the Tribunal's emphasis]. Where the circumstances of a comparator are not materially the same as those of the claimant, a Tribunal may take account of the way in which the respondent treated that person if there are some relevant similarities between their circumstances to see whether an inference of discrimination can be made: See Chief Constable of West Yorkshire Police v Vento [2001] IRLR 124 (EAT), at paragraph 7, per Lindsay J.

171 Lord Scott of Foscote in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337, at paragraphs 107-110 encapsulated the legal principles when dealing with comparators:

"107. There has been, in my opinion, some confusion about the part to be played by comparators in the reaching of a conclusion as to whether a case of article 3(1) discrimination - or for that matter a case of discrimination under section 1(1) of the Sex Discrimination Act 1975 , or under section 1(1) of the Race Relations Act 1976 , or under the comparable provision in any other anti-discrimination legislation- has been made out. Comparators come into play in two distinct and separate respects.

108. First, the statutory definition of what constitutes discrimination involves a comparison: “treats that other less favourably than he treats or would treat other persons”. The comparison is between the treatment of the victim on the one hand and of a comparator on the other hand. The comparator may be actual (“treats”) or may be hypothetical (“or would treat”) but “must be such that the relevant circumstances in the one case are the same, or not materially different, in the other” (see article 7). **If there is any material difference between the circumstances of the victim and the circumstances of the comparator, the statutory definition is not being applied. It is possible that, in a particular case, an actual comparator capable of constituting the statutory comparator can be found. But in most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator.** In **Khan's** case [2001] ICR 1065 one of the questions was as to the circumstances that should be attributed to the statutory hypothetical comparator. It is important, in my opinion, to recognise that article 7 is describing the attributes that the article 3(1) comparator must possess…

…Secondly, comparators have a quite separate evidential role to play. Article 7 has nothing to do with this role. It is neither prescribing nor limiting the evidential comparators that may be adduced by either party. The victim who complains of discrimination must satisfy the fact-finding tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. **This may be done by placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class. Comparators, which for this purpose are bound to be actual comparators, may of course constitute such evidential material. *But they are no more than tools which may or may not justify an inference of discrimination on the relevant prohibited ground*, *e g sex. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim*. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator, e g, under article 7 , by no means disqualifies it from an evidential role.** It may, in conjunction with other material, justify the tribunal in drawing the inference that the victim was treated less favourably than she would have been treated if she had been the article 7 comparator.

In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim.” [the Tribunal’s emphasis].

172 Mr Ginniff submitted the claimant was disciplined because she was a "thorn in the side" of Fallon Gallagher due to her repeated requests for reasonable adjustments and Fallon Gallagher was "getting her defence in" before the claimant attacked her with a grievance. He argued the "weight" of the issues that became the subject of the disciplinary process was in the control of Fallon Gallagher, who provided information. Mr Ginniff did not suggest Fallon Gallagher had dishonestly fabricated/enhanced the allegations made by the claimant's colleagues to ensure the claimant was disciplined. The evidence before the Tribunal was that Fallon Gallagher was carrying out her managerial responsibilities when a number of potentially serious allegations were raised against the claimant and this had nothing to do with the claimant's disability and reasonable adjustments. Mr Ginniff further submitted that there were major flaws in the disciplinary process, and this was because of the failure to manage the reasonable adjustments. The Tribunal did not agree on the evidence before it that there were major flaws, it accepted there was flaws, for example, the introduction of new evidence, but this was down to incompetence and taking into account the conscious and unconscious thought process of the respondent's witnesses, was satisfied it was not causally linked to the claimant's disability and reasonable adjustments.

173 The Tribunal accepted the submissions of Mr Price Rowlands that the named comparators were not like for like, especially Brian Harry who was at a meeting at 3pm on the 16 August 2023 and could not have carried out the 3pm check. . Both named comparators were not facing the raft of disciplinary allegations brought against the claimant, particularly allegation 3 which was potentially the most serious one. The circumstances of Donna Hughes and Brain Harry were materially different to the claimant, who has failed to "satisfy the…tribunal that, on a balance of probabilities…she has suffered discrimination falling within the statutory definition." The claimant had not adduced evidence from which an inference can be drawn that she was treated less favourably than she would have been treated because of her protected characteristic disability.

174 Turning to a hypothetical comparator, the Tribunal finds on the balance of probabilities that the respondent would have treated a hypothetical comparator in the same or similar circumstances as the claimant in exactly the same way.

175 With reference to issue 8, namely, if the Claimant was treated less favourably, was that because of her disability, the Tribunal found it was not. In short, the fact the claimant was disabled was irrelevant as the treatment complained of was the result of four potentially serious allegations brought against the claimant in a short period of time. The Tribunal does not intend to repeat the allegations; however, it notes that a number of the claimant's colleagues at Plas Y Wern informed the respondent that due to the claimant's behaviour they would no longer work on shift with her.

176 In conclusion, the claimant has not shifted the burden of proof and her claim of direct disability discrimination fails.

Claim 2: Discrimination arising from disability (s.15 EQA 2010)

177 The Tribunal's starting point is that the claim is out of time and it has no jurisdiction to consider it. If the Tribunal is wrong on this point it would have found the following.

178 With reference to issue 9a, namely, "by letter dated 16 August 2023, the Respondent instigated a disciplinary process involving the Claimant in bad faith", the Tribunal found the Judith Magaw instigated a disciplinary process. It was her decision alone, and it was not a decision made in bad faith. Initially Judith Magaw suggested to Fallon Gallagher she had a one to one with the claimant, but as the allegations snowballed decided an independent investigation should take place before she made the decision whether to proceed to a disciplinary hearing.

179 With reference to the issue 10, namely, "if it occurred, was that unfavourable treatment of the Claimant by the Respondent", the respondent accepts it was and the Tribunal agreed.

180 With reference to issue 11, namely, "if it was, was that unfavourable treatment because of the following 'something': a) the Claimant's need for reasonable adjustments", the Tribunal found there was no causal link. The unfavourable treatment was because the claimant may have allegedly committed acts of misconduct/gross misconduct as reported to the respondent by her colleagues who gave supporting evidence and provided specific examples. In short, an investigation was required, for example, the claimant was fully aware of the health and safety obligations she was required to comply with, not only to secure her own safety but that of her colleagues who were working in difficult jobs that could result in violence, particularly against women as reflected in the Safe Working Practices document and instructions given to the claimant during her employment as referenced in the factual matrix above.

181 Mr Ginnifff's submission that the respondent had not discharged the burden of proof is not accepted. In respect of the unfavourable treatment the burden does rest with the respondent, and the evidence heard by the Tribunal does support the conclusion that the unfavourable treatment was not wholly or substantially by reason of the claimant's disability. Mr Tinnion, who conducted the cross-examination of the claimant, is correct in his submission that the claimant was incapable of explaining why the respondent did not instigate a disciplinary process in 2022, when the claimant was complaining about the size of the ergonomic chair she had been provided with and lack of a correctly measured ergonomic chair in September, October and November 2022. The respondent waited approximately 12 months before instigating a disciplinary process. The Tribunal preferred Mr Tinnion's written submission that there is no evidence the four complaints which resulted in the disciplinary investigation, were made because of, or in any way at all related to, the claimant's disability or need for any reasonable adjustments. Judith Magaw took the decision to instigate an investigation followed by a disciplinary hearing for the sole reason that employees had raised complaints about the claimant which could amount to misconduct/gross misconduct

182 With reference to issue 12, namely, did that 'something' arise in consequence of the Claimant's disability, the Tribunal found that it did, namely, the need for a

correctly measured ergonomic chair. The claimant has not satisfied the Tribunal that the specific adjustment of a footrest and height-adjusting monitor was reasonable for the reason set out below.

183 If this Tribunal is incorrect in its analysis, in the alternative, it would have gone on to find the following aims legitimate as conceded by the claimant in cross-examination:

a Ensuring all employees comply with the Respondent's dignity and respect at work policies and procedures.

b Ensuring all employees comply with health and safety requirements for the benefits of residents and staff within the Respondent's care

c Ensuring disciplinary allegations raised are investigated fairly, reasonably and consistently in accordance with the Respondent's policies and procedures.

184 With reference to issue 13, namely, "To the extent those aims were legitimate, was the Respondent's treatment of the Claimant a proportionate means of achieving that aim," the Tribunal found that it was. The claimant was aware of her duty to comply with a reasonable management instruction, treat colleagues with respect, and of the health and safety requirements fundamental to carrying out her contractual role, particularly in relation to keeping colleagues and residents safe from harm. The complaints went to the heart of the claimant's contractual responsibilities, and the instigation of a disciplinary investigation was a proportionate way of dealing with the allegations because it gave the claimant an opportunity to answer the allegations in full and when she did 4 of the 5 allegations were dismissed by the time the claimant's appeal had been heard.

Claim 3: Failure to make reasonable adjustments (ss.20-21 EQA 2010)

185 The Tribunal's starting point is that the claim is out of time and it has no jurisdiction to consider it. If the Tribunal is wrong on this point it would have found the following.

186 It is common to both parties that the DSE report recommending an ergonomic chair and footrest was provided on 16 Sept 2022 referred to above. The claimant's disability, the respondent's knowledge of it and its knowledge of the disadvantages arising from the claimant's chair and footstool arrangements are not in dispute. However, there is an issue for the Tribunal concerning the footstool and the claimant's evidence on this point was less than satisfactory, given on the one hand she had been allocated a desk under open windows which already had a footstool and yet, sought to persuade the Tribunal that a second footstool was needed because she wanted to use other desks. Throughout this hearing the claimant's position was that the allocated desk was vital to secure her partner's safety to such an extent that a notice was placed on the desk and people were told to move by the claimant if they were sitting on it. The claimant's evidence that she needed a footstool to work at other desks was not credible, taking into account her insistence that she needed an ergonomic chair fitted for her own use at the

allocated desk. The claimant gave no satisfactory evidence that she needed an adjustable monitor, and Fallon Gallagher's evidence that the claimant had a suitable monitor was preferred, supported by the fact that at no stage did the claimant raise a complaint about the respondent failing to provide an adjustable monitor when she was complaining about the lack of a measured ergonomic chair. The DSE report confirmed that there were no issues with the screen.

187 With reference to issue 16, namely, "during the relevant period, did the Respondent fail to provide an ergonomic chair", the Tribunal found that it did but there was good reason for this. The claimant had a footrest and a suitable monitor, and there was no failure on the part of the respondent in regard to these auxiliary aids.

188 The relevant period when the duty to provide the ergonomic chair arose is the DSE report before the respondent on the 16 September 2022 referencing the disadvantages arising to the claimant by her existing ergonomic chair, which was too large. The Tribunal accepted this caused the claimant, because of her disability, a substantial disadvantage in comparison to the respondent's staff who did not have the claimant's disability, and aggravated her medical condition because she was not supported correctly following her accident at work. Other adjustments were in place, for example breaks from sitting.

189 With reference to issue 18, namely, "did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage" the respondent accepts that she was.

190 With reference to issue 19, namely, "would the auxiliary aids have avoided or materially reduced the substantial disadvantage", the claimant relies on the recommendation in the workplace assessment to support her case, and the Tribunal is satisfied that providing a correctly measured ergonomic chair would have avoided or substantially reduced the disadvantage. The Tribunal was not satisfied the claimant had discharged the burden of proof in respect of the footrest and adjustable monitor, given the evidence before it that she had a suitable monitor and a footrest on the desk she had been allocated.

191 With reference to the key issue 20, in respect of the correctly measured ergonomic chair is whether the respondent provide that auxiliary aids either at all or on a timely basis? The Tribunal found that the correctly measured ergonomic chair was not provided and the delay is down to the claimant's refusal to provide any measurements through her GP and/or consultant and/or physiotherapist despite it being made clear to her in the DSE report signed off on the 16 September 2022 that "chair can be purchased to match her needs. Maria to contact her specialist/doctor for a report to identify which part of her body requires the additional support from a chair. "The claimant was to provide this information by 31 October 2022. The claimant never provided the information needed for the respondent to identify the correct chair. Had the claimant provided the information, which she clearly possessed as she had calculated the chairs on offer in the catalogue were too large for her without even trying them, the respondent would have been in a position to provide the chair she needed in a reasonable time frame.

192 If the claimant was in any doubt that she was required to provide the measurements, on the 27 October 2022 in an email from Clare Andrews, the claimant was told it was not standard practice to have measurements taken within a DSE assessment and she was required to obtain a letter from her doctor and "**once we have received this, Fallon will need to liaise with supplier and provide them with details of (1) height and (2) areas of your body you require support with, (3) your working arrangements i.e. how long would be spent on the chair during a typical working day. The supplier (who are the experts) would then identify the appropriate product and we would place an order for it via procurement**…" [the Tribunal's emphasis].The advice reflected that given in the DSO report, which was again ignored by the claimant.

193 When Fallon Gallagher sent the claimant a brochure in an email dated 16 November 2022 she explained again "there is no service provision in place anymore in terms of having you 'fitted'. It's important we get this right before ordering otherwise we run the risk of delaying timeframes. In the meantime, whilst I await a further update please take a look at the attached brochure…please let me know your preferences and then I can proceed with the order."

194 The claimant was aware that the respondent would not be providing her with a made-to-measure ergonomic chair, and once she provided the information regarding measurements specialist advice would be taken and the chair provided. As found by the Tribunal above, during this period the claimant was liaising with her physiotherapist/medical advisor, and reporting to the respondent about the physiotherapy requirements. Given the claimant was under the care of her physiotherapist/orthopaedic consultant, it was not unreasonable for the respondent to ask the claimant to provide information concerning the time she spent sitting in the chair, her body measurements and areas of the claimant's body that needed support, for the chair experts to give advice on the type and size of ergonomic chair that should be provided.

195 The Tribunal found the claimant did not return to work initially due to the death of her Father followed by the instigation of a disciplinary process, and there was no duty on the respondent to make reasonable adjustments during the claimant's absence. Had the claimant confirmed a chair in the catalogue should be provided the respondent would have supplied an ergonomic chair in good time, and it was always open to the claimant (after the provision of the chair) to inform the respondent that the reasonable adjustment had not been met because the chair was unsuitable. The problem for the respondent was that the claimant was asserting the catalogue chairs were unsuitable without providing any cogent explanation as to why this was, coupled by failing to provide measurements which in turn could have been viewed by a chair expert, as requested by the respondent in the 16 September 2022 DSE report and emails to the claimant.

196 The Claimant says the respondent should have provided the auxiliary aids from 28 August 2022, when a workplace assessment report was produced. The Tribunal did not agree. First, the workplace assessment took place on the 25 August 2022 and the report was not produced until 16 September 2022. It was not reasonable to expect the respondent to have provided an ergonomic chair immediately upon either receiving occupational health advice that the claimant "may benefit" from an ergonomic chair or the DSE report. The problem in the

claimant's case when considering what a reasonable period was before the respondent has breached its duty is the part she played in the delay coupled with the lengthy periods of absences when there was no duty on the respondent to make reasonable adjustments. It was not reasonable for the respondent to provide an ergonomic chair before the claimant provided the information sought.

197 With reference to issue 21, namely, "if not, was the respondent under a duty to have to make those adjustments and/or provide those aids for the claimant which it breached by not making/providing them, or did the respondent discharge any duty it had to make reasonable adjustments for the Claimant taking into account (a) any other adjustments made for her (b) any other adjustments available to her, at the time", the Tribunal was not persuaded the claimant required a footrest and adjustable monitor as alleged.

198 On the claimant's own account at this hearing she had a "wonky footrest" a term and criticism used for the first time. It is notable the claimant never mentioned the state of her footrest during the relevant period when she was seeking the ergonomic chair, which was the main issue for the claimant. The Tribunal preferred Fallon Gallagher's evidence that the claimant had a monitor, which she assisted the claimant with. There was no evidence whatsoever before the Tribunal that the claimant needed a second footrest apart from the claimant informing the respondent at various intervals that this was required so she could work in reception. Objectively assessed, the claimant's position made no sense given her insistence through the relevant period that she be provided with a separate desk away from the people under open windows to protect her partner from Covid. The Tribunal struggled to understand how the claimant could on the one hand assert she required her own desk and special chair, which no one else should use, and on the other, a footrest so that the claimant could sit at another desk on a different chair in reception. The Tribunal did not find the claimant's evidence in this regard credible, concluding the respondent was not in breach of its duty.

199 The Tribunal concluded the claimant had one dedicated desk, one ergonomic chair (to be replaced) and a footrest. There was no requirement for the claimant to sit at any other desk which as a matter of logic would require her to move all items, including the ergonomic chair from one place to another, and it would mean that the dedicated desk the claimant insisted on using as a reasonable adjustment would have been open for anyone else to use if the claimant was sitting at a different desk in a different office

200 Turning to the ergonomic chair, the Tribunal has referred to the background of this above and reiterates that the claimant was required to provide measurement information through her GP and/or other medical expert. The claimant was under the care of a physiotherapist and consultant orthopaedic surgeon, and on her own account as set out in her grievance, had carried out a contrast between the measurements in the catalogue provided to her and the measurements she needed. It is notable that at no stage did the claimant provide the respondent with the information she allegedly had, and this is the sole reason why the ergonomic chair was delayed and ultimately not supplied. It was a straightforward matter for the claimant to have provided the respondent information within her capabilities as she was supported by her GP, consultant and physiotherapist. The claimant's GP and consultant had provided reports which are in the bundle.

201 The respondent had a duty to make reasonable adjustments. It was not reasonable to expect the respondent to provide an ergonomic chair without the claimant's measurements, and had she done so the respondent would have taken expert advice and a suitable chair provided. It is notable the claimant was aware from the outset she was to provide this information, and yet kept silent when she raised complaints including a grievance, which was partly found in her favour. The Tribunal took the view that its role was to objectively assess all the evidence before it, and in doing so concluded on the balance of probabilities the respondent was not in breach of its duty. For the avoidance of doubt there was no obligation on the respondent to provide a bespoke ergonomic chair made specifically for the claimant without further information justifying why a public body should go to such an expense when there were a number of chairs available that could have been suitable for her.

202 Had the claimant's complaint brought under section 20-21 of the EqA not been struck out on jurisdiction grounds, the Tribunal would have struck it out in any event.

Claim 4: Unfair (constructive dismissal) (ss.94-98 ERA 1996)

203 With reference to issue 22, namely, "was the Claimant dismissed?", it is undisputed the claimant resigned on the 18 March 2023 and took up her new employment on the 2 April 2023 two weeks later.

204 With reference to issue 23, the Tribunal found the Claimant's employment contract contain the following implied terms:

204.1 implied term imposing a duty on the parties not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee;

204.2 implied term imposing a duty on the Respondent to conduct a fair disciplinary process.

205 With reference to issue 24, namely, did the respondent do the following things the Tribunal found as follows

Investigation process / findings:

205.1 With reference to issue 25a, namely "the Respondent did not discuss the allegations with the Claimant before it began a formal investigation into those allegations;" the Tribunal found there was an attempt to discuss the first allegation which the claimant rebuffed. Thereafter, there was no attempt and the respondent proceeded to a disciplinary investigation in accordance with its own procedure. There was no requirement for the respondent to discuss the four allegations with the claimant before proceeding to investigation. The Tribunal was satisfied that whilst this was a possible avenue, there was no obligation on the respondent to have an informal discussion and it was not a breach of the implied term of trust and confidence for a disciplinary investigation to take place,

especially given the claimant's history of ignoring health and safety instructions as set out above.

205.2 With reference to issue 25b, the Respondent did inform the Claimant that Allegation 2 had been dropped by letter dated 13 November 2023, not before. The Tribunal was satisfied there was no obligation on the respondent to have an informal discussion about dropping allegation 2 before formal notification as given to the claimant, and it was not a breach of the implied term of trust and confidence for the respondent to confirm the position in a letter dated 13 November 2023.

205.3 With reference to issue 25c, namely, "the Respondent investigated Allegations 1 and 3, when those allegations should have been regarded as minor matters of performance or capability excluded from a disciplinary investigation;" the Tribunal did not agree. The claimant had downplayed the potential seriousness of the allegations. At the outset of the investigation those allegations could not have been regarded as minor matters of performance or capability excluded from a disciplinary investigation. The Tribunal found the respondent was entitled to deal with the allegations raised against the claimant under the disciplinary policy following an independent investigation as opposed to informal/formal performance management. The matters raised could have amounted to acts of misconduct as opposed to the claimant's view that they were "minor matters of capability or performance." The claimant, who was supported by her union representative, was given sufficient of opportunity to set out her response to the allegations. The investigation manager was not directly involved with the claimant, the relevant managers, and witness based in Plas Y Wern. Marcus Bedwell was not in a position to ascertain whether the allegations were minor, or required a disciplinary hearing at the outset of the investigation, and in any event, the decision to proceed with the investigation lay with Judith Magaw who decided, not unreasonably, the allegations should be investigated. .

205.4 With reference to issue 25d, namely, "instead of investigating solely facts, investigating officer, Marcus Bedwell invited comment, opinion and speculation, including his own," the Tribunal found his job was to weight the evidence and say should I recommend this going forward or not. As a result of his analysis allegation 2 did not proceed to a disciplinary, and this is an example that clarifies the extent of his role. The Tribunal found a reasonable and independent investigation was carried out, approached by Marcus Bedwell with an open mind with the result that allegation 2 was dropped early on in the process.

205.5 With reference to issue 25e, namely, "investigating officer, Marcus Bedwell did not re-interview any witnesses after their initial interviews," the Tribunal found there was no requirement for a re-interview. The claimant was supported by the union representative throughout, did not request any witness be re-interviewed and did not ask for witnesses to attend the disciplinary hearing.

205.6 With reference to issue 25f, namely, "on 7 October 2023, investigating officer, Marcus Bedwell did email a copy of the Claimant's interview transcript to

Rhys Jones, one of the Respondent's witnesses, contrary to the Policy's confidentiality provisions and the GDPR;" the Tribunal found this did happen. During cross-examination the claimant accepted it was a one off mistake. The Tribunal found the evidence of Marcus Bedwell that it was an inadvertent one of mistake to be credible, and found the breach had no positive or adverse effect on the disciplinary process taken as a whole.

205.7 With reference to issue 25g, namely, "on 6 October 2023, investigating officer, Marcus Bedwell did not mention to the Claimant that he had no evidence to support Allegation 4" the Tribunal found this is correct. However, by this stage the investigation report had not been finalised, there was no requirement for this information to be offered up and there was no breach by the respondent of the implied term of trust and confidence.

205.8 With reference to issue 25h, namely, "on 6 February 2024, investigating officer, Marcus Bedwell claimed a witness for Allegation 1 was also a witness for Allegation 4, even though she was not there that day and was not based there." the Tribunal found that the claimant did not provide any satisfactory evidence this allegation had taken place and even if it had, it amounted to a breach/ fundamental breach of contract. The Tribunal was not taken to any relevant documents and there is nothing in the claimant's witness statement.

205.9 With reference to issue 25i, namely, "the Respondent sent the investigation report to the Claimant on 13 November 2023, not by 26 October 2023 as required under the Terms of Reference and para. 5.12 of the Policy," the Tribunal found Marcus Bedwell prepared the initial draft report in October, with HR providing an input in relation to format, and by 7 November 2023 a revised investigation report had been sent to Judith McGaw. Judith McGaw kept the claimant updated, including the fact that HR was checking it before the claimant was sent the report. In short, the claimant was updated and providing her with a copy of the report on the 13 November 2023 was not a breach of the implied term of trust and confidence. The Tribunal accept oral submissions put forward by Mr Rowlands that Marcus Bedwell had reasonable and proper cause to act as he did, and the claimant was not prejudiced in any way.

205.10 With reference to issue 25j, namely, "the Respondent sent investigation documents and interview records to the Claimant on 22 November 2023, not before (the Safe Working Policy was only sent to the Claimant on 15 March 2024)," the Tribunal found the clamant had sufficient time to prepare her response, and she was fully aware of the contents of the Safe Working Policy as set out in the factual matrix above. Better practice would require any policies relied on in a disciplinary process should be provided and/or capable of being accessed on the intranet early on in the process, however, the respondent's default in this regard did not prejudice the claimant in any way given her experience, knowledge and the number of times she had been reminded by the respondent that there should be no lone working and other health and safety requirements as recorded above.

205.11 With reference to issue 25K, namely, “investigating officer, Marcus Bedwell shifted the meaning of Allegation 3 in order to ensure the Claimant could be found culpable,” the Tribunal found Marcus Bedwell investigated the allegations made by the claimant’s colleagues that were before him. There was no getting away from the fact that allegation 3 was potentially serious as it could have amounted to gross misconduct and a possible dismissal. The Tribunal had no evidence before it that Marcus Bedwell shifted the meaning of allegation 3, and the respondent was not in breach of the implied term of trust and confidence.

.

Issue 26 Admission of new evidence:

206 With reference to issue 26 a and b, namely,

206.1 “during the disciplinary hearing on 6 February 2024, the Respondent introduced a statement by the Claimant’s line manager, Fallon Gallagher dated 15 December 2023 which should have been sent to her before the disciplinary hearing, and which should not have been accepted as evidence because she was not a witness to the facts, was irrelevant, and contained pejorative, prejudicial comments about the Claimant”, the Tribunal accepts that Marcus Bedwell, part-way through the disciplinary hearing, introduced the correct statement of Fallon Gallagher, who raised the poor relationship she had with the claimant and was critical of her. The hearing was adjourned for 30 minutes and the claimant accompanied by her union representative was in a position to deal with the evidence in the disciplinary hearing and successfully make her point to such an extent that Fallon Gallagher’s evidence in the new statement was not relied on and discounted by Zelda Mulligan, who dismissed allegations 4 and 5. As found by the Tribunal above, Zelda Mulligan took the view that the replacement Annex 16 was opinion based, did not assist her and the information provided was not used when assessing whether the allegations were proven or not.

.

206.2 “at the appeal, hearing on 11 March 2024, appeal officer, Louise Forman referred and relied upon the Respondent’s ‘Safe Working Practice document, which had not been provided to the Claimant,” the Tribunal refers to its finding above, which is the claimant, who was very experienced in her role, was fully aware of the Safe Working Practice document and the health and safety requirement concerning her colleagues.

Issue 27: Delay:

207 With reference to issue 27a to h, including the claimant’s allegation that the investigation interviews took place between 18 September 2023 to the last interview of Alex Broe on 19 December 2023; and the disciplinary process taking 7 months (21 August 2023 – 15 March 2024), “an unreasonably lengthy period of time” according to the claimant, the Tribunal found 7 months is a long time for an investigation and completion of a disciplinary process per se, however, the Tribunal relying on its industrial experience is aware there are circumstances when investigations can take time, especially when new allegations come to light, the employee has been signed off unfit to work, there are a number of witnesses

to be interviewed, the parties involved in the investigation i.e. investigating officer, are not always available and there are difficulties securing a date for a disciplinary hearing, for example, in circumstances when a union representative is not available. In the claimant's case the Tribunal was satisfied, objectively assessed, the respondent did not breach the implied term of trust and confidence in the time it took it to deal with the entire disciplinary process, from start to finish, thoroughly and objectively as evidenced by the amount of documents generated by both parties with various allegations being dropped along the way culminating in the clamant being disciplined with a written warning for the most serious allegation of all. The Tribunal is aware that another employer may have taken a different view of the allegations, particularly allegation 1 and 3 resulting in a summary dismissal or final written warning for gross misconduct and not a 12 month written warning for misconduct.

208 The Tribunal found there were cogent explanations put forward by the respondent's witness for the delay, which includes a 6 week period when allegation 5 was investigated and the uncertainty over the claimant's health coupled with Marcus Bedwell's availability and that of witnesses. On the face of it 7 months from investigation to appeal is a lengthy period of time, however, there were good reasons for this and taking the whole process into account, the complexity of the evidence, the claimant's ongoing grievance and the fact that people were carrying out their day to day work responsibilities at the same time as dealing with the claimant, when on the claimant's own evidence, there are periods of understaffing, 7 months was not an unreasonable period and reflects the thoroughness in which the respondent approached this particular disciplinary process.

209 It is notable that the claimant was kept updated, for example, in a letter dated 10 October 2023 from Judith MaGaw; "it was my decision to instigate the investigation, this was done when matters were raised with myself. Once I was aware of the matters I arranged for the investigation to commence immediately. With regards to the investigation being completed within 28 days this is within the policy and we try to work with this. As you are aware you advised you were not well enough to attend work and as such an occupational health report was requested to advise if you were well enough to engage with the process. The report advised that at the time you were not well enough. It was my position to follow the advice within the report and I delayed the investigation. However, once I was aware that you had engaged with the other processes, I ask[ed] the investigating officer to make contact." Following the claimant making contact with staff members at 2pm on the 14 November 2023 a further investigation was carried out which delayed the disciplinary hearing taking place.

Issue 28 Bad Faith:

210 With reference to issue 28 a, namely, "the Respondent did not raise allegations against members of staff, Donna Hughes and Brian Harry, both of whom were on duty with the Claimant on 2 August 2023;" the Tribunal refers to its conclusion above in relation to the direct discrimination complaint and comparators. The Tribunal was satisfied there was no bad faith on the part of the respondent's managers when it dealt with the claimant's disciplinary process and grievance.

211 With reference to issue 28a, namely, "under the Respondent's policies, none of the matters the Claimant was accused of would be regarded as serious, let alone gross misconduct;" the Tribunal did not agree for the reasons set out above. The respondent acted in accordance with policies and procedures, and the claimant was well aware of the seriousness of the allegations, including the breach of health and safety relating to her colleagues when she went to her car on personal business before the end of her shift and left a colleague unprotected.

212 With reference to issue 28c, namely, "at a regular supervision meeting on 25 July 2023, the Claimant's line manager, Fallon Gallegher said nothing to the Claimant about any allegations;" the Tribunal found Fallon Gallagher said nothing to the claimant about the allegations. There was no duty on Fallon Gallagher to advise the claimant of a potential disciplinary allegation at any stage, including in a supervision meeting. The Tribunal agrees with submissions put forward on behalf of the respondent that Fallon Gallagher acted with reasonable and proper cause when she did not discuss potential disciplinary matters at a supervision meeting. It is notable that other managers dealt with the disciplinary process, not Fallon Gallagher.

213 With reference to issue 28d, namely, on "3 August 2023, the Claimant's line manager, Fallon Gallegher said nothing to the Claimant about Allegations 2 and 3;" the Tribunal repeats its conclusions set out above that Fallon Gallagher attempted to have a conversation with the claimant.

214 With reference to 28e, namely, "the Respondent shifted the meaning of Allegation 4 after the Claimant stated a high-risk resident had left on 27 July 2023, and was classed as high-risk generally, not just to women;" the claimant has not made out her case. The uncontroversial evidence before the Tribunal was due to the nature of the work there was a risk to staff at all times, and sometimes that risk was heightened to such an extent that three people were on duty as opposed to two. The risk was acknowledged by Occupational Health in a report following the death of the claimant's father, when it advised the claimant was not fit for work due to her current mental health symptoms; "**as a residential worker…involves interacting with former prisoners who are vulnerable and volatile** and she does not feel mentally resilient enough to return to her role at this time…" [the Tribunal's emphasis]. The description given by occupational health of former prisoners is notable, and supports the respondent's version as to why the health and safety requirements were in place to protect workers, particularly female workers.

215 With reference to issue 28(f), namely, "investigating officer, Marcus Bedwell did not tell the Claimant he had no evidence for Allegation 4;" the Tribunal found there was no requirement for him to do so and it was a matter for Judith Magaw to decide whether allegation 4 was to proceed to a disciplinary hearing, and when it did, for Zelda Mulligan to satisfy herself that there was insufficient evidence to uphold allegation 4 and dismiss that allegation, which she did. The respondent acted in accordance with the disciplinary policy and ACAS Code of Practice leaving it to the disciplinary officer to reach a conclusion on the evidence after the claimant has had an opportunity to review it and deal with the allegation fully,

which she and her union representative did. The Tribunal accepted Marcus Bedwell had proper and reasonable cause for including allegation 4 and there was no requirement for him to tell the claimant anything other than the contents of his investigation report.

216 With reference to allegation 28(g), namely, "Judith Magaw's letter to the Claimant dated 22 November 2023 materially changed the wording of the prohibition on discussing the details of the matter with witnesses;" the Tribunal did not agree, concluding the 16 August 2023 letter taken as a whole and given its common sense meaning could be interpreted to mean the claimant was transferred away from Plas Y Wern so that she did not come into contact with staff there, and needed to get the agreement of Judith Magaw or Claire Andrews if she wanted to get involved, and this would include ringing staff whilst they were on night duty working at Plas Y Wern and ringing staff who could be witnesses at any time.

217 The 16 August 2023 letter set out the following: "**While you are transferred to work in the CORRE you cannot get involved with your normal role at Plas Y Wern…without Judith Magaw or Claire Andrews' agreement. You must also not contact colleagues or other employees who could be involved as a witness in the investigation**…" [the Tribunal's emphasis].

218 In the 22 November 2023 Judith Magaw wrote to the claimant informing her of new Allegation as follows: "Since the original letter I have been advised of a recent incident and I am writing to inform you that I have commissioned an investigation into the additional allegation…Allegation 5 –acted unprofessionally by failing to follow written management instruction per letter dated 16/08/23 paragraph 7, by contacting Plas Y Wern Approved Premises at 2am on 14/11/23 and disclosing details of the investigation and disciplinary process to staff."

219 It is uncontroversial that the claimant acted as alleged and Judith Magaw took the view an investigation was required. It was carried out expediently. On the 21 December 2023 Seth Pritchard was interviewed and confirmed the claimant had rung "out of the blue…she's not somebody I know…I certainly would not say I'm a confidant of hers" stating the claimant had referred to the disciplinary and grievance, but no names. The information provided to the respondent by Seth Pritchard was that the claimant rang after midnight with the aim of speaking with any colleague that was on shift. The claimant accepted she rang the site and the Tribunal found it was not a breach of contract for the allegation to be investigated.

220 With reference to issue 29c, namely, the length of time/delay in conducting the Respondent's disciplinary process; the Tribunal has dealt with this above.

<u>Allegation 29 Continuing process when evidence lacking</u>

221 With reference to issue 29a, namely, "the Respondent did not take the opportunity of reviewing the allegations once they knew the evidence was not strong and the lack of merit was apparent;" the Tribunal has dealt with this above. In addition, the Tribunal was satisfied that the process followed by the investigating officer, dismissing officer and appeal officer correctly dealt with whether evidence was lacking or not in an objective and fair way culminating in the claimant being issued

with a written warning on her file for 12 months in relation to allegation 3 and all other allegations dropped. An example of the respondent reviewing the allegations was Marcus Bedwell concluding there was no case to answer in relation to allegation 2, Zelda Mulligan, having reviewed the evidence, concluding there was no case to answer in relation to allegations 4 and 5, and Louse Foreman concluding there was no case to answer in relation to allegation 1, upholding allegation 3 which she was entitled to do on the evidence including the claimant's own admission.

222 With reference to issue 29b, namely, the upholding of Allegation 3; the Tribunal found the respondent had taken into account the important issue of health and safety in relation to allegation 3, and from its industrial experience, the Tribunal is aware that some employers would have dismissed the claimant for such a serious health and safety breach bearing in mind she was fully aware of her health and safety obligations and yet chose to ignore them and put her colleagues at risk by getting ready to go home early. The claimant admitted to going out to her car before the shift had ended without informing her colleague. Zelda Mulligan, and Louise Forman were entitled to reject the claimant's case that she completed welfare checks on her own given the health and safety instructions that there should be two members of staff on duty and the claimant had chosen to leave the CCTV room and building without informing her colleague to go to her car before the end of the shift. In issuing the claimant with a 2 year final written warning downgraded on appeal to a 12 month written warning for going out to her car before the shift had ended without informing her colleague, Zelda Mulligan and Louise Forman acted with proper and reasonable cause.

223 With reference to issue 30, namely, "if that conduct occurred, was that conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee", the Tribunal found that it did not for the reasons set out above. Mr Ginniff submitted with reference to Malik/Mahmud v BCCI SA [1997] UKHL 23) the respondent's actions or failures to act amounted to unreasonable conduct which breached an implied term imposing a duty to conduct a fair disciplinary process. He argued the entire disciplinary process was unfair, bad faith was involved, the disciplinary process was continued despite the paucity of evidence, it was delayed and the outcome of allegation 3 was a breach of a non-specified duty in a Practice document that had not been produced to the claimant until after the Appeal hearing and which document might not have been that which applied at the time of the allegation and which appeared to be advisory only. This underlined the justification for the claimant's resignation by reason of her loss of trust and confidence in the respondent. The Tribunal did not agree for the reasons already stated. The entire disciplinary process was fair and carried out in accordance with the ACAS Code of Practice, with the exception of the introduction of new evidence. It would have been preferrable for the claimant to have been provided with The Approved Premises Safe Working Document before the disciplinary hearing, however, such a failure was not an unfairness and nor did it go to the heart of the contract. The claimant was aware of the Policy, she had read it and as an experienced residential worker in approved premises who had been told a number of times by managers about safe working practices, she was fully aware that "All staff have a legal responsibility to take reasonable care of their own health and safety whilst at work and that of colleagues this includes

following safe working practices, not creating unsafe working conditions, informing colleagues of known dangers and reporting any unsafe occurrences or situations…" The claimant was cognisant of the fact that she should not have left her colleague unprotected and unaware of the fact that the claimant had gone to her car on private business. The strength or otherwise of evidence against the claimant was correctly and fairly dealt with.

224 With reference to issue 32, namely, "if it did not breach the implied term of trust and confidence, did the conduct breach an implied term imposing a duty on the Respondent to conduct a fair disciplinary process", the Tribunal found there was no such breach. The Tribunal considered whether Marcus Bedwell introducing an amended statement part-way through the disciplinary hearing, which was admitted in evidence and the hearing adjourned for thirty minutes for the claimant to read it, could be a repudiatory breach of contract on the respondent's part, and decided in the particular circumstances of this case that it was not given Zelda Mulligan did not take that evidence into account and allegation 5 was dropped. In short, there was no repudiatory breach on the part of the respondent.

225 Louse Foreman's decision in relation to allegation 3 was not capable of amounting to a "last straw" and there was no course cumulatively amounting to a fundamental breach of contract entitling the claimant to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited (above). The appeal outcome was a reasonable act in the circumstances of this case, and did not contribute in any way to the breach of the implied term of trust and confidence: Omilaju (above).

226 With reference to issue 33, namely "if there was one or more repudiatory breach of one or both implied terms, did the Claimant resign in response (in whole or part) to one or more of those breaches", the Tribunal found (a) there was no repudiatory breach and if it was wrong in its analysis, (b) the claimant resigned because she was unhappy when her colleagues raised the disciplinary allegations that resulted in a disciplinary process and the appeal outcome. The claimant had lined up another job to go to. The Tribunal found, as set above, the claimant had obtained alternative employment having applied for the role in January 2024, which she accepted following an interview on the 6 March 2024. The claimant's evidence on cross-examination is that she intended to return to work had the appeal been found in her favour and her "name cleared". The fact that this was the claimant's stated position undermines her evidence that the cumulative acts set out in the list of issues and alleged act of disability discrimination were causative of her resignation. The Tribunal accepted the written submission produced by Mr Tinnion that "none of the long list of other things C has complained about were an effective cause of her decision to resign…her resignation was proximately caused by one thing only, namely, her unsuccessful appeal against Allegation 3. The upholding of Allegation 3, and the substitution of a First Written Warning for a Final Written Warning for that conduct, were a reasonable disciplinary outcome, not breaches of the implied term. Thus Claimant has failed to establish that she was constructively dismissed."

227 Finally, with reference to issue 34, namely, if she did, did she timely resign in response to the breach(es) or did she wait too long and affirm the continued existence of her contract after the breach by her own conduct, in relation to the

alleged discrimination the Tribunal found the claimant waited too long and affirmed the contract. In relation to the disciplinary process her resignation was timely, however, as there was no breach of the implied term of trust and confidence in the entire disciplinary process, the timing of the claimant's resignation was not relevant. It is notable the claimant was seeking alternative employment outside the respondent from January 2024, which she had accepted before the disciplinary and appeal outcome was known, and this was another reason for her resignation. Colleagues were complaining about her behaviour; managers were managing her conduct and absences through the disciplinary and absence procedures and so the claimant sought and obtained employment elsewhere.

228 There is no requirement for the Tribunal to consider any of the remaining issues.

229 In conclusion, the respondent was not in breach of contract, the claimant was not unfairly dismissed and her complaint of constructive unfair dismissal is not well founded and dismissed.

230 The Claimant's claims of disability discrimination which allegedly occurred on or before 11 January 2024 were presented out of time, there was no conduct that formed part of conduct extending over a period in respect of which the Claimant presented a timely claim at the end of that period. It is not just and equitable to extend the time limit. The claims are therefore dismissed.

231 The claimant was not subject to disability discrimination, and claimant's claims of disability discrimination brought under sections 13, 15 and 20 to 21 of the Equality Act 2010 are dismissed.

Approved by:

Employment Judge Shotter
6 November 2025

JUDGMENT SENT TO THE PARTIES ON:

17 November 2025

Kacey O'Brien

FOR THE TRIBUNAL OFFICE:

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/