EMPLOYMENT TRIBUNALS

Claimant: **Ms P L Rickman**

Respondent: **The Secretary of State for Justice**

Heard at: **Colchester and East London Hearing centres**

On: **4, 5, 6 July, 3 August and (in chambers) 4 August 2016**

Before: **Employment Judge Moor**
Mr P Quinn
Mr M Wood

Representation

Claimant: In Person
Respondent: Mr M Purchase (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 the complaint of unfair dismissal is not well-founded and does not succeed;

2 the disability discrimination claim does not succeed.

REASONS

1 This claim arises out of the Claimant's employment with the Respondent and resignation on 6 November 2014.

2 At a hearing on 10 June 2015 the issues between the parties were clarified by EJ M Warren as follows (we use the original numbering from the Preliminary Hearing (39-41) to avoid confusion):

Unfair Constructive Dismissal

6 Did the Respondent dismiss the Claimant? In particular:

6.1 Did the Respondent commit a repudiatory breach of the implied term of trust and confidence by:

6.1.1 Commencing disciplinary proceedings against the Claimant on 25.3.14, prematurely before making enquiries from the Claimant's line manager or the Claimant or before completion of a full internal investigation, any of which would have demonstrated that the Claimant had not received a management instruction to recall the offender and that all the allegations against her were unfounded;

6.1.2 By acting predominantly to 'protect the service' (and in particular the actions of senior managers) from disrepute by striving to demonstrate that any 'fault' at management level was that of the Claimant and not more senior management;

6.1.3 Continuing the disciplinary proceedings (a) after receipt of the Occupational Health report dated 14 April 2014 and/or (b) after the determination of the disciplinary proceedings against Jamie Sacre on 13 May 2014;

6.1.4 Failing to provide the Claimant with sufficient details of the allegations against her until the investigatory meeting;

6.1.5 Allowing her manager, David Messam, to provide deliberately misleading evidence concerning his involvement in the matter, on 22 April 2015;

6.1.6 Continuing with the allegations after senior management endorsement for all decisions was evidenced by the Claimant at the initial interview on 9 April;

6.1.7 Allowing the Chief Executive of Essex Probation, Mary Archer, to chair the Disciplinary Hearing on 27 May 2014, given that chairing by the Chief Executive is unusual save in the most serious matters, given that she had made the allegations personally, and that she had previously made allegations against the Claimant in 2011.

6.1.8 Finding or suggesting that the Claimant had been given a clear instruction to recall offender MS and that there were concerns about her management of the case and risk management abilities, on 29 May 2014, even though the disciplinary charges were not upheld.

6.1.9 Failing to alter the disciplinary route when all facts were known, the case against the offender was discontinued, and findings for allegations against the other staff member have been concluded, (which relies on the nature and specificity of the supposed instructions).

6.1.10 Failing to transfer the Claimant to a different manager.

6.1.11 Failing to investigate the grievance by failing to respond to 3 written requests to institute its grievance procedure in particular the letter sent from the Claimant's then solicitor in October 2014.

6.1.12 Failing to contact the Claimant at all after receipt of an OH report dated 30 September 2014, which stated that the Claimant was unlikely to be able to return to work in the foreseeable future. The Claimant was uncertain whether this was the 'last straw' or whether it was the latest correspondence received from the Respondent regarding her grievance.

6.2 If so, did Claimant waive any such breach and/or affirm the contract?

6.3 If not, did the Claimant resign (on 3.11.14) in response to such breach?

7 If the Claimant was dismissed what was the reason or principal reason for the dismissal. The Respondent relies on conduct and/or some other substantial reason, namely, the need to investigate and maintain appropriate standards in the Probation Service.

8 Was the dismissal fair or unfair in the circumstances?

Disability Discrimination

9 Did the Claimant have a disability within the meaning of the Equality Act 2010 ('EqA)? She relies on anxiety and depression. Since the formulation of the issues, the Respondent has conceded that the Claimant is disabled, and concedes that it knew this from receipt of an Occupational Health report dated 14 April 2014.

10 (We add this preface to the disability discrimination issues to comply with our legal jurisdiction.) If so, did the Respondent discriminate against the Claimant contrary to section 39 of the EqA in relation to her dismissal and/or by subjecting her to any other detriment. The discrimination contended for is a failure to comply with a duty to make reasonable adjustments. This breaks down into the following issues:

11 Were either or both of the following provisions, criteria or practices ('PCPs') applied by or on behalf of the Respondent which placed the Claimant at a substantial disadvantage compared with persons who were not disabled:

11.1 The PCP of the Respondent's disciplinary process.

11.2 The disadvantage contended for is that a person suffering from mental ill health is less likely to be able to cope with the process in comparison with non-disabled persons.

11.3 The adjustment contended for is that after the Respondent knew of the Claimant's illness via its OH report of 14 April 2014 it should have halted the disciplinary process and should have recognised no case to answer.

11.4 The PCP of the Respondent's policies for managing return to work and in particular, the requirement to discuss one's return to work with one's manager.

11.5 The disadvantage contended for is that a person suffering from mental ill health, in particular where that is perceived to be as a consequence of interaction with a particular manager, means that being required to interact with that manager is likely to exacerbate the individual's illness and render her less likely to be able to return to work.

11.6 The adjustment contended for is either

11.6.1 a return to work to a different post; or

11.6.2 to the same post under a different manager and by not requiring the Claimant to liaise with her existing manager.

12 Did the Respondent know and/or could the Respondent reasonably by expected to know that (i) the Claimant had a disability and (ii) that the Claimant was likely to be placed at *the* substantial disadvantage.

13 If so did the Respondent take such steps as it was reasonable to take to avoid the disadvantage?

14 If so, and insofar as the relevant failure occurred or is treated as having occurred prior to 12 November 2014 (taking into account 8 days ACAS conciliation):

14.1 Did it form conduct extending over a period which concluded on or after 11 November 2014,

14.2 or is it just and equitable to consider the claim?

15 It was agreed that the hearing would deal with liability only.

16 An issue arose during the hearing about the admissibility of the letter dated 23 July 2014 (312-314), marked '*Without Prejudice*', from the Claimant's solicitor to the Respondent. The Claimant referred to this letter in her witness statement and it was subsequently produced by the Respondent. The parties agreed that the Tribunal could read this letter into the evidence except for the final page, the heading 'proposals for settlement' (313) and any other reference to such settlement proposals within it. We have had no regard to those passages in reaching our decision. (This approach seems to us to be consistent with section 111A of the Employment Rights Act as interpreted by the EAT recently in Faithorn Farrell Timms LLP v Mrs S Bailey UKEAT/0025/16/RN.)

17 The Tribunal asked the Claimant how the hearing might be adjusted to accommodate her disability. We took longer mid-morning and afternoon breaks and told her to inform us if at any stage she needed further time to collect her thoughts. The Claimant was given moral support by her friend, who attended all of the hearing.

Findings of Fact

18 Having heard the evidence of the Claimant, Mr Jamie Sacre, Mr Bob Culliton, Mr David Messam, Ms Katherine Brown, Mrs Sonia Crozier and Ms Mary Archer, and

having read the documents referred to us during the evidence, we making the following findings of fact.

19 The Claimant started her employment with Essex Probation Service on 1 October 1990 as a Probation Officer. By 2014 she was a Manager of Offender Managers (formerly known as a Senior Probation Officer), which meant that she managed about 12 Offender Managers (formerly known as Probation Officers).

20 In 2011 AL, a member of staff the Claimant managed was dismissed by Mr Messam, the Claimant's manager, on her recommendation, for failing to meet performance competencies at end of a 1 year probationary period. AL appealed to Ms Archer, the Chief Executive. She reinstated him because AL was initially told he had three months to improve but this period had been reduced (214m). After hearing the appeal outcome, AL said to Ms Archer '*I can't remember I think it's Penny that told me. She said the reason to appeal is because you either get reinstated or you get, constructive dismissal*.' (214n) Ms Archer remarked at the time, '*If Penny told you that, David can have another word because actually that's totally inappropriate'*. AL also told Ms Archer that he had been told by HR that the time period for meeting his competencies had been reduced because of employment law (214f).

21 Neither Mr Messam nor Ms Archer followed-up the alleged remark with the Claimant informally. Instead, Ms Archer decided to institute disciplinary allegations (214A): 'i) *that your actions bring or were likely to bring discredit on Essex Probation in that advised AL on the Non-Confirmation in Post appeal process in a manner which discredits the organisation by suggesting a potential outcome of the process could be a successful claim for constructive dismissal.*' and '*ii) that you failed to appropriately carry out your role as a manager … in that you gave the advice detailed above in i) and that you also advised AL that the reason for his non-confirmation in post was employment law.'* Ms Archer has been unable to identify where AL alleged that the Claimant gave him this second piece of advice.

22 These allegations were investigated by a company that the Respondent used at the time for such investigations. The investigation report, dated 'November 2011', concluded that the Claimant denied giving AL such advice, explaining that she did not know what constructive dismissal was. The investigator emphasised that AL's only '**thought**' that the Claimant had said it in '**meetings'** whereas the Claimant was clear in her denials, and the records showed, that there was only one meeting. The investigator stated that this '**tended to contradict**' what AL had said. The investigator's summary of AL's statement was that the Claimant had advised him his probation had been extended only by 6 weeks because that was to do with employment law (218).

23 Ms Archer signed a letter prepared by HR, dated 14 November 2011, stating there was a case to answer and inviting her to a disciplinary hearing on 5 December 2011, the outcome of which could be a final written warning (222).

24 Mr Culliton, the Claimant's TU representative, challenged that Ms Archer should chair the hearing, given that she had instituted the disciplinary proceedings.

25 On 30 November 2011, 5 days before the hearing, Ms Archer sent the Claimant a letter stating '*having considered the investigation report submitted*' she had decided not to pursue the hearing in this case (224). She informed the Claimant that all information relating to the investigation would be removed from her personal file.

26 Ms Archer states now that the first letter (222) was an error. She did not inform the Claimant of this at the time or apologise for it. We find it unlikely that it was an error because page 222 is a bespoke letter, someone had addressed their mind to its contents, and it was signed by Mrs Archer. We think it more likely, given the wording of the second letter (224) that Ms Archer addressed the investigation report only after the trade union prompt and only then decided there was too weak a case to take forward to the hearing.

27 The Claimant was aggrieved by the decision to treat the issue formally, and the initial decision (222) that there was a case to answer given the weak evidence against her. We agree that it was heavy handed to institute formal disciplinary allegations and, in our view, an informal inquiry would have been a better management approach; however, we do not find that instituting a disciplinary investigation was unreasonable or improper given that, if true, it would have been inappropriate of a manager to advise another employee to consider a constructive dismissal case.

28 We do not find, as the Claimant alleges, that she was faced in 2011 with an allegation of gross misconduct. It was not defined as such in the allegation letters and the potential sanction in the invitation to a hearing (222) was limited to a final written warning.

29 We consider that there was no reasonable and proper cause to send the first letter, given the investigation report plainly preferred the Claimant's account, and we can understand the Claimant felt poorly treated in the 16 day period before she was exonerated by the second letter. Unfortunately the Claimant does not appear to have taken any comfort in the allegations having been withdrawn. At root, this was a short period of additional stress.

30 There were no other problems at work. The Claimant's 2013/14 appraisal report was positive, containing supportive remarks by her manager, Mr Messam, Assistant Director, and Ms Archer dated in March 2014 (242). We do not find that these remarks were added into the report later but were genuine. We accept that the Claimant's relationship with her managers was good. In this context, therefore, we find the events in 2011 were not as serious nor suggestive of a pattern of antipathy towards her as the Claimant suggests.

31 The Claimant has had an underlying depressive illness for many years, which has fluctuated in severity. She also experiences anxiety on occasion, which interferes in a more than minor way with her day-to-day activities. She has usually been able to control these problems with medication.

32 The disciplinary allegations in 2011 triggered an exacerbation of anxiety and depression such that she sought help from specialist psychiatric services and her medication dose was increased. She told Mr Messam at the time she had felt stressed by it. She did not tell him or the Respondent about her depression or anxiety. It is agreed by all that the Respondent did not know about the Claimant's depressive illness until 14 April 2014 when an OH report was obtained (see later).

33 A recall requires an offender out of prison on licence to be returned to prison. It is a decision that can only be made by a Director. The Director usually makes the decision on the recommendation of the Offender Manager and Manager of Offender Managers, who have the detailed information about the offender and relevant risk factors. A question to recall can arise when an offender breaks the conditions of his licence.

34 Mr Sacre was an Offender Manager managed by the Claimant. MS was an offender he managed, who had been imprisoned for robbery and then released from prison on licence. A condition of his licence was to meet a 9.00pm curfew at his accommodation, an 'Approved Premises'. (For simplicity, we will describe this accommodation as the 'hostel'.) As Mr Sacre explained, the hostel was managed by staff and operated according a regime designed to reduce the risk of its residents reoffending. Unusually for this hostel, MS was categorised as 'medium risk'. Most of the residents were 'high risk' offenders.

35 On the evening of 6 March 2014, MS did not return to the hostel by the curfew deadline of 9.00pm. In accordance with usual procedure, the hostel officer on duty overnight, Mr Hargreaves, called the Out of Hours Director, Mr Mangan. He decided to wait until 9.40pm. When MS had not returned by then Mr Mangan considered recall. Mr Mangan (perhaps mistakenly) decided that because MS was medium risk he could not himself progress an out of hours recall. We do not have evidence from Mr Mangan or Mr Hargreaves directly, but we do know that Mr Hargreaves wrote an email at 10.30pm that night, which all agree sets out Mr Mangan's view of what should happen. '*Unfortunately OOH recall cannot be progressed as MS is categorised as 'medium risk'. I checked OaSys to verify. Recall will have to be instigated tomorrow during office hours'*. That email (which we shall call the Hargreaves' email) was sent to Mr Sacre who saw it the following morning. The Claimant accepts that it is likely she saw this email on the contact log the next morning (51).

36 The offender, MS, returned to the hostel at 1.00am on 7 March. Later that morning MS explained to Mr Sacre that he had gone to see his mother and had walked back from Brentford, which is why he was late. The context was that the hostel was regarded as inappropriate for MS because of his background and those of the other residents but he could not stay with his family. The Claimant, knowing the offender and this context, thought his explanation reasonable.

37 Mr Sacre and the Claimant discussed the case and decided to recommend a Director's Warning. This is a final warning to the offender that if anything else happens they will be recalled to prison. They came to this recommendation weighing the new information and knowing that MS was now back in the hostel where risk could be managed. The Claimant sent an email to Mr Messam to this effect (274). We find that the contemporary documents support Mr Messam's account that it was the Claimant's suggestion that a Director's warning be given.

38 That morning the Claimant also telephoned Mr Messam to discuss MS. After discussion Mr Messam decided to give a Director's warning. The paperwork was prepared thereafter. Mr Messam set out the factors for why his decision was a warning at his email (67). It is clear from this that he thought carefully about his decision to warn, initially being more inclined to recall. Mr Messam has taken full responsibility for the decision.

39 Both Mr Sacre and the Claimant did not think that the Hargreaves' email amounted to an instruction to recall but rather a statement of process i.e. that recall could not be done out of hours and had to be considered in the morning. In any event, they both thought there had been a change of circumstances because MS had, by then, returned to the hostel and given an explanation for his absence, which they had accepted, and the risk he posed was now properly managed. In other words, matters had moved on from when Mr Mangan took his view and these new facts had to be taken into account before the recall decision was made.

40 We find it likely that the Claimant did not tell Mr Messam about Mr Mangan's view as expressed in the Hargreaves' email. Mr Messam did not see the email and the Claimant's contemporaneous email (274) does not refer to Mr Mangan's involvement.

41 Mr Messam stated in his written evidence that he would have recalled MS if he had known about the statement in the Hargreaves' email; however, he was more equivocal in his oral evidence to us. What was clear by the end of his evidence was that if he had been aware of Mr Mangan's view and had gone on to decide upon a Director's warning, then he would have called Mr Mangan to inform him of the reasons for the change in approach. Mr Messam was aggrieved that he had not been told Mr Mangan's view.

42 On 19 March the Respondent found out that the police were investigating a rape allegation against MS. At this point Mr Mangan became aware that MS had not been recalled earlier and he told Ms Archer that he had instructed his recall on the 6th. Ms Archer asked Mr Messam, who said he didn't know about such an instruction. The Hargreaves' email was found and Ms Archer decided that disciplinary allegations should be investigated against Mr Sacre and the Claimant that they had failed to comply with a director's instruction to recall.

43 On 25 March MS was charged with rape. Mr Sacre and the Claimant could not have anticipated this rape allegation, MS having no history of offending of that nature. The charges against MS were dropped on or before 27 May 2014.

44 On 25 March, Ms Archer sent a letter, drafted by HR on her instructions, to the Claimant stating the following allegations:

- *'that you have failed to comply with a management instruction, in that Pete Mangan instructed that an individual must be recalled and this did not happen;*
- *that this brings or is likely to bring discredit on Essex Probation;*
- *that you failed to oversee a case in a way which met the responsibility to protect the public.'*

45 Mr Messam called the Claimant to tell her that a disciplinary investigation was to take place and it was about the MS decision. They have different recollections of this conversation, which we do not need to decide between because we find it likely that before the investigation the Claimant knew that the allegations were about her involvement in the MS Director's Warning decision (this was now high profile) and whether she had ignored an instruction to recall him. She knew this in general terms before the investigation interview and in more detail at the interview. She was well able to give full account to the investigator, see page 62. Her experienced trade union representative, Mr Culliton, did not ask for an adjournment of the interview as he said he was wont to do if he felt wrong-footed or if his member needed more time to prepare.

46 The Claimant was absent from work with stress from 27 March 2014 onwards. She felt made a scapegoat because she felt that Mr Messam should have told Ms Archer the decision not to recall MS was his.

47 Ms Brown, Quality Manager, investigated. She thought the allegations were

potentially gross misconduct. However, Mr Culliton, did not think they were gross misconduct because otherwise he would have involved a National Officer.

48 Ms Brown started with Mr Mangan, then interviewed Mr Sacre and the Claimant, then finally Mr Messam. She had obtained the Hargreaves' email and looked at the contact log.

49 Ms Brown started the investigation on the assumption that Mr Mangan had given a management instruction. Mr Mangan was clear that he had done so. As the investigation progressed it became apparent that this was not how the Claimant and Mr Sacre had interpreted it.

50 It appeared to the Claimant that Ms Brown did not know that a subsequent decision had been taken by Mr Messam not to recall MS the next day. Ms Brown interviewed Mr Messam after hearing the Claimant's account.

51 Mr Messam's statement (70) was, as recorded by Ms Brown: '*I was unaware of any decision to recall… I was presented with an independent decision regarding management for MS. … I received the recall paperwork for MS, which recommends a warning letter be sent. I replied [by email] which endorses the recommendation made by [Mr Sacre]…*' He explained to us that what he meant by 'independent decision' was that it was a decision without reference to Mr Mangan's view. He did not refer to the telephone conversation the Claimant recalls they had to discuss the decision on 7 March because he did not remember it. We are surprised that did not remember this conversation after so little time but find that he did not deliberately provide incorrect information (as Claimant alleges): everything in his statement is accurate. While in his statement he did not mention as fully as he might have done that this was a team decision for which he was responsible, he is clear that he endorsed the recommendation. At the disciplinary hearing Mr Messam was happy to accept that the conversation with the Claimant took place. The fact remains that he did not know about Mr Mangan's view. We do not find that his statement is evidence of an attempt to make the Claimant a 'scapegoat' as she has alleged.

52 The Claimant was clear in the investigation that because MS had returned to the hostel then the recall had to be reconsidered because there was a change of circumstances.

53 Ms Brown did not interview Mr Hargreaves because she did not think his view of whether or not it was an instruction would add anything to Mr Mangan's. It would have been a more comprehensive investigation if she had done so.

54 Ms Brown's report concludes that it is for the 'Executive' to decide whether there is a case to answer (53). We now know that Ms Archer herself decided there was a case to answer.

55 On 1 May 2014, Ms Archer wrote to the Claimant stating that the investigation confirmed there was a case to answer (106). The disciplinary hearing set for 13 May 2014. The letter stated that the outcome could be a 'final written warning'. This accords with Mr Culliton's understanding that these were not gross misconduct charges.

56 Ms Archer was to chair the disciplinary hearing. She says she did this because it could not be anyone at director level because directors were involved as witnesses. We

understand that. We are concerned that she heard it because of her involvement: initially by informally interviewing both directors, by formulating the allegations and then deciding that there was a case to answer. This involvement risked her objectivity; however, the trade union did not object at time nor did Claimant. Mr Culliton was an experienced representative who appeared to us to be sensible, assertive and more than able to make such an objection. We do not accept that it was a valid concern that because Ms Archer was involved in 2011 that somehow made her less objective because she had withdrawn the allegations, it was 2 and half years before and she had not shown any antipathy to the Claimant in the meantime.

57 The Respondent obtained an OH report, dated 14 April 2014. This observed '*clinical evidence of marked anxiety and depression. … suffers from panic attacks, has cancelled all social engagements and does not go out except to walk her dog. She currently does not feel well enough to drive, her sleep remains disturbed and she feels exhausted after the minimum of activity. Her appetite remains poor.*' (104) The Claimant was described as '*currently unfit for work'*. It was the opinion of the OH adviser that the Claimant met the definition of a disabled person. A review was suggested for approximately a month. The report refers to the trigger as '*perceived stress at work and stressors in personal life*'.

58 The Claimant herself did not think a phased return or part time work was possible because of the stressful nature of the job. She did not tell OH that her recovery would be aided by new manager or change of job.

59 As a result of OH report the disciplinary hearing was postponed to 25 June 2014. The Respondent also offered a hearing in the absence of the Claimant but with her trade union representative.

60 A case conference was held on 14 May. The aim of meeting was to '*review absence and to discuss any support or adjustments that may be needed*' (108). The Claimant's statement (110) was read out that her stress reaction was because of '1) *the background of a change and additional workload. 2) previous history of allegations 2011 (dropped just prior to the hearing) 3) the power differential in terms of those making the allegations (this time a director and last time the chief executive). 4) The position of my line director in these matters'*. She described her anxiety symptoms in details. She stated '*I have spoken to David [Messam] a couple of times but am finding communication with him difficult in the circumstances*.' She talked about what she was doing at home to aid her recovery.

61 At the meeting Mr Culliton said that the Claimant had not found Mr Messam supportive in his statement over the disciplinary allegations and she felt 'scapegoated' (111), that she felt the relationship was damaged and it was going to be difficult for her to return. Mr Messam was surprised at this. Mr Culliton suggested a 3-way meeting (between him, the Claimant and Mr Messam) to try to resolve the problem. Mr Messam was happy to do this. Mr Culliton said he would put this suggestion to the Claimant. HR suggested things might be clearer after the disciplinary.

62 When Mr Culliton put the idea of the 3-way meeting to the Claimant she declined (115). She told us she didn't want it because she thought Mr Messam would be defensive. She also told us in cross-examination that she would have found it difficult to go back to work without 'clearing her name'. At this stage, we find, from the OH report and the Claimant's evidence that she wished to clear her name before her return that she was too

ill to return to work with any manager or in any role.

63 Mr Messam has given evidence that immediately after the 14 May meeting, he suggested to Mr Culliton that he could explore a change of manager. On balance we find this unlikely because:

63.1 Mr Messam states Mr Culliton responded by saying the Claimant would probably not agree, which does not make sense to us as it was not for the trade union to decide and Mr Culliton had already suggested a 3-way meeting, which indicates that he was looking for a practical solution to the relationship problem and is therefore unlikely to have rejected out of hand Mr Messam's suggestion, if it had been made.

63.2 Mr Messam said it would have been easy to change managers because there was another equivalent director in the county. But we find this evidence to be wishful thinking and prefer Ms Archer's evidence that a change of manager would have been very difficult because the two directors, one in the north and the other in the south of the county, were geographically removed.

63.3 Mr Messam's alleged suggestion was not confirmed in a letter or followed up in his email of 18 July to Mr Culliton, which we would have expected it to be if it had been made (181).

63.4 We therefore prefer Mr Culliton's evidence that Mr Messam did not make this suggestion. While this might be Mr Messam's genuine recollection, we find it to be born in hindsight of wishful thinking.

64 Mr Sacre had his disciplinary hearing on 13 May. Ms Archer did not uphold the allegations stating '*I did understand that the email from Kyle was not explicit. You stated it was not your intention to ignore any instructions and you felt that you did what you should have which was endorsed by your line manager and a director. … I will ensure that going forwards the recall process is more explicit and cannot be misinterpreted. Taking all of the information into account my decision is that the allegations are: NOT UPHELD.*' Ms Archer went on, '*My interpretation of the instructions in the email are clear that the offender should be recalled. However I am prepared to give you the benefit of the doubt that you did not interpret the email contents in the same way and did not intentionally disregard an instruction to recall.'* (114).

65 Ms Archer to continued with the disciplinary hearing against the Claimant because in her view the outcome could have been different because the Claimant was a more senior manager with a different level of responsibility; and it was possible to find she had interpreted the Hargreaves' email as an instruction but ignored it even if Mr Sacre hadn't.

66 The Claimant's Disciplinary Hearing was postponed to 27 May by which time she was well enough attend with representation. At this hearing, we do not find that Ms Archer was hostile at the hearing but we do think it likely that there was a high degree of formality: the hearing was 70 minutes long and necessarily inquisitorial. We can understand that the Claimant will have felt pressured. Mr Messam accepted he had the conversation with the Claimant on 7 March if that was her recollection. We do not find any evidence that senior managers said anything to make the Claimant a scapegoat in this hearing.

67 Ms Archer informed the Claimant of the outcome in a letter of 29 May 2014 (157). She did not uphold the allegations. She went on to state: '*I remain concerned that you did not understand that a decision to recall had clearly been made. In my view the email from [Mr Hargreaves] makes that clear and that is the action, which should have been taken. I would not expect such an email to state 'instruction' in it. However, taking into account that you did not interpret the email that way, I am prepared to give you the benefit of the doubt on this occasion.*' Allegations 2 and 3 were not upheld for the same reasons.

68 Ms Archer went on to state: '*Having stated the outcome and my reasons I remain concerned about certain aspects of how this case was managed and the management oversight it was given. I will therefore be writing to your line manager so that you can look at your interpretation of events and communication to ensure any lessons to be learned are given appropriate attention, particularly with regard to the management of risk.*' We will call this the disciplinary letter 'rider'. The Claimant was very concerned about this rider as she thought she had referred the relevant information about the offender to the Director before the decision on risk was made and felt that it undermined the decision not to uphold the allegations and that, via the threatened letter, critical remarks would remain on her file. Ms Archer has explained to us that the lessons were about communication between directors – the Claimant knew director 1's view and should have relayed it to director 2; and about the Director's Warning which she felt personally she would not have given, although she also acknowledged it was within a range of acceptable decisions. She spoke to Mr Messam in supervision about her concerns. Ultimately, the letter referred to in this rider was never written or sent (see later).

69 The Claimant remained off work ill.

70 On 1 June 2014 a major national reorganisation of probation took place. Prior to this the Claimant had been employed by the regional Probation Trust, the Essex Probation Service. On 1 June this ceased to exist and its activities split between two legal entities: the National Probation Service ('NPS') and the Essex Community Rehabilitation Company ('CRC'). The Claimant's employment transferred to NPS along with Mr Messam who was now to be managed by Mrs Crozier, the NPS Deputy Director. Ms Archer went to the CRC. From 1 June 2014, therefore, Ms Archer no longer had any management responsibility for the Claimant.

71 On 3 June 2014 the Claimant wrote to Ms Archer in order to consider appealing, requesting the details of the aspects of the case Ms Archer was concerned about, the letter referred to in the rider and the outcome letter in Mr Sacre's case. She referred back to the events of 2011 and said both events '*lead me to conclude that there has been a breach in trust and confidence and I reserve my rights in this respect.'* (158)

72 On 9 June 2014, in Ms Archer's absence, Sam Mott of HR, CRC replied. He refused to send the letter and asked that the appeal be sent by the end of the week (160).

73 On 13 June 2014 (165) the Claimant sent an **appeal** to the CRC. The only way in which it was different from the grievance she send to NPS the following day (see below), was that the 2011 events were not referred to.

74 On 14 June 2014 the Claimant sent a **grievance** to Mr Allars, Director of Probation, NPS (161). In summary:

74.1 she complained that Ms Archer had acted inappropriately and unreasonably in that:

74.1.1 the 2011 matter should not have proceeded beyond the conclusion of the investigation.

74.1.2 the 2014 disciplinary hearing was a similar incident and, as the material facts did not alter after the investigation a hearing should not have been necessary.

74.1.3 she was refused the letter Ms Archer was sending to her line manager;

74.1.4 Mr Sacre's outcome was different and inconsistent to hers.

74.2 her senior managers, including her line director, were not supportive and in 2014 he '*deliberately provided incorrect information about the extent of [his] involvement to leave me as a scapegoat'*.

75 On 19 June 2014, Mr Allars informed her the **grievance** needed to be submitted to Essex Probation Trust Board, which still existed to deal with legacy grievances (163). The Claimant did this on 25 June (169).

76 On 19 June 2014 Mr Hubbard, Chair of the board of CRC, wrote to acknowledge receipt of **appeal**, setting 1 July 2014 for the hearing.

77 In the meantime the Claimant chased for the letter referred to in the rider (167). On 25 June HR replied that the letter had not yet been sent as Ms Archer had been away.

78 The **appeal** took place on 1 July 2014 before Mr Hubbard.

79 The Claimant and Mr Culliton say, and we accept, that they never formally agreed that the appeal hearing was also the grievance hearing. Mr Culliton explained that this was all new territory because the disciplinary allegations had not been upheld. (Employees don't usually appeal successful outcomes.) The hearing was therefore used as a chance for the Claimant to state her concerns and he viewed it as a '*grievance with a small g not a large G*'. We find therefore that Mr Hubbard's hearing heard the substance of the Claimant's grievance (including 2011 – as to which see below) but it was not formally agreed to be a grievance hearing. This is consistent with how Mr Hubbard puts it in his outcome letter '*it was agreed your appeal was more in the nature of a grievance*' (179).

80 The appeal was not upheld (174-5). In summary the panel's findings were that:

80.1 Mr Sacre's outcome letter was refused on the basis it was confidential to him. The panel found her case had been treated on its merits. We find that while the Claimant should have been given Mr Sacre's letter as his line manager, the panel was right that her case was treated on its merits.

80.2 It was not unreasonable for the matter to go to a hearing. (The Claimant did not challenge that Ms Archer chaired the hearing so this was not addressed.)

80.3 The Claimant was not made a scapegoat, because Ms Archer accepted

the Claimant's account and had not upheld the allegations.

80.4 The disciplinary hearing was appropriate and a Serious Further Offence ('SFO') investigation would have created an unhelpful delay. (An SFO investigation happens where an offender being managed by the probation service commits a further offence and the Claimant had argued that this should have occurred prior to her disciplinary hearing.)

80.5 No letter of concern, as per the rider, had yet been sent. The Claimant was informed that she would get a copy when it was. The panel found that the concerns were referred to by Ms Archer in the outcome letter so that lessons could be learned. The panel thought this reasonable. The concerns were described as '*the communication process within the whole management structure and operational handling of the case of which you were one though an important part*.' We note here that management of risk is no longer mentioned and the Claimant's involvement in the case is put in the context of the team.

80.6 It was right for Ms Archer to hear the case as she had not been involved in the recall decision and her earlier involvement in 2011 was not a concern given that she had not upheld those allegations. It is therefore clear to us that the 2011 matter was considered in the 'appeal' hearing even though it was only part of the grievance.

81 The appeal outcome letter informed the Claimant that the decision was final.

82 On 7 July the Claimant chased her **grievance** with Essex Probation.

83 On 16 July Ms Archer informed the Claimant she would not be writing to Mr Messam given that the matter had been discussed at the appeal, she no longer saw the need to put her views in writing (177). By this point, therefore, the Claimant had no further reason to fear that such a letter would appear on her personal file. She also knew from the appeal outcome what the criticisms had related to, her management of risk was no longer referred to.

84 On 18 July Mr Messam referred back to the case conference. He asked Mr Culliton for an answer about the proposed 3-way meeting to resolve the relationship problem (181). Mr Culliton replied on 21 July that he would 'see if there is any movement'. It does not appear that Mr Messam was ever provided with an answer.

85 On 21 July Mr Hubbard wrote to the Claimant about her **grievance** noting that it raises the issues which she raised at the appeal and because *'it was accepted by all parties that your appeal … was more of a grievance'* then her representations had been heard, but if she still wished to proceed with a grievance it needed to be raised through NPS procedures and sent to Mrs Crozier (179). While we will set out the correspondence below in full, the Claimant did so and, after a long delay caused by the reorganisation, Mrs Crozier offered the Claimant a chance to appeal Mr Hubbard's hearing outcome on 1 October.

86 On 22 July Mr Messam informed the Claimant he was making another OH referral as advised by HR.

87 On 23 July 2014 (312) the Claimant's solicitor wrote to Mrs Crozier, setting out all the matters about which she complained and stating that there has been a breach of the implied term of trust and confidence and that the Claimant was seriously considering her continued employment '*which she considers to be untenable'*. They sent a chasing letter on 5 August.

88 By 23 July the Claimant was aware of her rights under the Equality Act and aware of her rights to claim constructive dismissal.

89 On 10 September the Claimant's solicitor wrote to Mrs Crozier. They repeated some of the concerns and referred to the recent OH appointment and asked that all options be considered including ill health retirement (186-7).

90 The Claimant was equivocal in her evidence about the likely effectiveness of being appointed a new line manager. She thought it would have helped if it had been offered in June but by September 2014 her evidence was that a new line manager is not likely to have helped because she did not feel safe to go back and felt that she needed to 'clear her name' through the grievance process. We find a change of manager is not likely to have assisted her return to work by September because of her evidence and because the OH reports in September advised that the Claimant was too ill to return.

91 On 15 September an OH report interim unfit for work in any capacity. No adjustments to aid a return to work were suggested.

92 On 30 September an OH report was prepared after the Claimant was seen at an assessment: the Claimant was still suffering depression and stress factors for which were the handling of the disciplinary case and that she felt '*unsupported by management*'. OH reported she was unfit to return to work and the prognosis was not good and it was unlikely she would be able to render regular and effective service. It was not suggested that there was any possibility of a return to a different role. Nor does it suggest that the main stumbling block to a return was Mr Messam.

93 After a lengthy delay, caused by the large amount of work that the national reorganisation had created, Mrs Crozier addressed herself to the 23 July letter and replied on 1 October 2014. While we understand the reasons for the delay, this was too long a period for the Claimant's letter to have been left.

94 Having read Mr Hubbard's findings, Mrs Crozier took the view that the substance of the grievance had already been dealt with by his panel. She decided therefore that the best approach was to treat the Claimant's further correspondence as an appeal. She wrote to the Claimant on 1 October 2014 suggesting this and asking for the Claimant's grounds of appeal.

95 On 9 October (192), the Claimant's solicitors replied rejecting this approach on the basis that in their view there had not yet been a grievance hearing. They complained this was a further breach of the implied duty of trust and confidence. They also complained of the delay. They again expressed the hope that the recent OH report '*be progressed and that consideration given to all options including the possibility of ill health retirement'* and stated the Claimant '*reserves her position'*. By September, ill-health retirement was plainly the Claimant's preference.

96 Mr Messam did not receive a copy of the OH report until 10 October (195) when he obtained one from the Claimant. Save for sending the Claimant a copy back later in the month, he had no further contact with her until she resigned on 3 November.

97 Mr Messam was trying to obtain HR advice through a new system called 'shared services' a civil service procedure for obtaining an HR caseworker.

97.1 Before 16 October he had called OH assist to ask for HR help on what to do after the OH report. He had not heard from them by this date.

97.2 On 23 October he chased HR to find out what to do in the light of the medical report.

97.3 On 24 October he was allocated Liz Spurgeon, HR Case Manager. It looks as if they spoke about the case. They agreed to submit an OH appointment with a physician (197f) (i.e. a more expert medical assessment) who was to advise on whether the Claimant met the criteria for ill-health retirement. In his evidence, Mr Messam accepted that he should have contacted the Claimant to advise her of this progress.

98 On 3 November the Claimant resigned giving notice to 30 November, in an email to Mrs Crozier and Mr Messam (198). Her stated reasons were a breakdown of trust. She stated:

98.1 The 2014 case was 'a clear case of scapegoating by senior managers'.

98.2 The disciplinary outcome letter continued to raise concerns (i.e. the rider) but she had not been able to counter them because they were not evidenced.

98.3 Ms Archer brought the allegations and chaired the hearings: a breach of natural justice.

98.4 There was a background of mistrust because of the events in 2011.

98.5 Neither matter should have gone to a disciplinary hearing.

98.6 Her contact point had been the manager [Mr Messam] who 'failed to support me' in March and previously in 2011.

98.7 Her grievance was passed between NPS and CRC and the recent response failed to grasp that it had not been investigated;

98.8 The recent OH report had been ignored and she had had no contact from her manager or NPS to discuss it.

98.9 Her recovery from ill health would only be possible after resignation.

99 The Claimant says in her witness statement that she wrote the resignation letter '*as I had not received any contact from my employers for over a month since receipt of the OH report*' and her trust in her employers was completely destroyed. She also refers to the approach suggested by Mrs Crozier for the grievance as other part of the 'last straw' leading her to resign.

Law

Constructive unfair dismissal

100 Section 95(1)(c) of the Employment Rights Act 1996 ('the ERA') provides that there is a dismissal where the employee terminates the contract in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct. This is known as a 'constructive dismissal'.

101 An employee is entitled to terminate the contract where an employer is guilty of a 'repudiatory' (really serious or fundamental) breach of contract, Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.

102 Here the Claimant relies on the implied term existing in all employment contracts (as formulated by Browne-Wilkinson P in Woods v WM Car Services (Peterborough) Ltd [1982] IRLR 413): '*the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*'. A breach of this implied term is always 'repudiatory'. The test of whether there is a breach of it is objective, and not dependent on the employee's subjective view.

103 The Claimant also relies on the principle that a course of conduct can amount, as a whole, to a breach of this implied term. This is where individual actions may not, in themselves, be sufficiently serious but, taken together, may have the cumulative effect of a fundamental breach. The last act in such a course of conduct, sometimes referred to as the 'last straw', which causes the Claimant to leave, does not need to be serious (a breach in and of itself), Lewis v Motorworld Garages Ltd [1986] ICR 157 CA. But it must be more than trivial and must contribute to the breach of the implied term, though what it adds may be relatively insignificant, Omilaju v Waltham Forest LBC [2005] ICR 481 CA. This is also an objective test: even if the Claimant finds it hurtful, if the last act is entirely innocuous it is insufficient.

104 It seems to us, and Counsel for the Respondent agreed, that in a 'last straw' case, when considering each act or omissions complained of as contributing to the overall breach, the Tribunal should consider whether the Respondent had 'reasonable and proper cause' for each act or omission. Those for which there was no reasonable and proper cause could then be added together and looked at overall to see whether they amounted to conduct calculated to or likely to damage the relationship of trust and confidence.

105 The employee must show that she resigned in response to the breach i.e. that she left, at least in part, in response to the breach: Nottinghamshire County Council v Meikle [2004] IRLR 703 CA.

106 Finally, the Claimant must show that she has not 'affirmed' the contract. After a fundamental breach, the 'innocent' party has two choices: either to accept the breach and treat the contract as terminated (i.e. an employee resigning and treating herself as dismissed) or to 'affirm' the contract and insist on its further performance. Therefore the Claimant must show that she has not, after the breach, affirmed the contract. Mr Purchase reminded us that in a 'last straw' case, the Claimant can refer back to earlier cumulative events and it is only the period after the 'last straw' that we must consider to determine whether there has been affirmation.

107 If the Claimant establishes a constructive dismissal it will be unfair under the ERA unless the Respondent can show that it had a potentially fair reason for the dismissal and has followed a fair procedure.

Disability Discrimination

108 It is conceded that the Claimant is disabled within the meaning of the EqA and that it knew about disability from receipt of the 14 April OH report.

109 The claim under EqA is that the Respondent failed to comply with a duty to make reasonable adjustments. The statutory basis of this claim is unavoidably complex and we set it out here doing our best to make it intelligible.

110 The discrimination alleged is the failure to comply with the s39(5) duty to make reasonable adjustments. A duty to make reasonable adjustments arises, under section 20 and Sch 8 in this way:

110.1 the R applies a policy, condition or practice (a PCP)

110.2 that places an 'interested disabled person' at a substantial disadvantage in relation to a relevant matter

110.3 in comparison to non-disabled persons.

111 The failure to comply with the s39(5) duty to make reasonable adjustments must relate to dismissal or being subject to a detriment at work, see s39 EqA.

112 The duty does not arise if the employer:

112.1 did not know the Claimant was disabled; and

112.2 did not know or could not be reasonably expected to know that the Claimant was likely to be placed at that disadvantage compared to non-disabled people.

113 The nature of the duty is to: take such steps, as are reasonable to have to take to avoid the disadvantage. In other words the contended for step must not just be a reasonable step but an effective one. In Newham Sixth Form College v Sanders [2014] EWCA Civ 734 the Court of Appeal held that the test is an '*objective one'* and on '*the practical result of the measures which can be taken*' rather than whether any adjustments were actually considered or not. Thus if there are no adjustments to be made it doesn't matter that an employer did not consider them. Likewise if there is an adjustment to be made, it does not matter that the employer had a good excuse for not considering it.

114 The Claimant referred us to the principle, well established in the case law, that the Claimant is not required to suggest adjustments to the employer. Mr Purchase contended, and we agree, that this could however be relevant to the question of the employer's knowledge of the disadvantage.

115 Section 123 of the EqA provides that all claims of work related discrimination must be brought before the end of the period of 3 months starting with the date of the act complained of or such other period as the Tribunal thinks '*just and equitable'*.

116 Here any act or omission prior to 12 November 2014 is out of time.

117 The effective date of termination, i.e. the date of the constructive dismissal if we find one, is 30 November 2014. Therefore if the failure to make reasonable adjustments is connected to the dismissal it will be in time. But if we find there to have been no dismissal, and the Claimant relies on being subject to a detriment by the failure to make a reasonable adjustment, the question arises whether that claim is in time.

118 According to the Court of Appeal in Hull City Council v Matuszowicz [2009] ICR 1170, in a claim based on a failure to make reasonable adjustments, it is the employer's failure to do something that is at issue and this is a continuing omission **not** an act extending over a period.

119 Often in reasonable adjustment cases failure to make reasonable adjustments is not a deliberate omission but an inadvertent one. In Matuszowicz the court held that for time to start running in such a case a somewhat artificial date had to be found. It held that the employer is treated as having decided on omitting to make reasonable adjustments at the time when it might reasonably have been expected to make them. (And we note, that the duty only arises once the Tribunal finds the employer knew or ought reasonably to have known about the disadvantage.)

120 If 3 months has expired, the Tribunal can extend time according to what it thinks is just and equitable. Robertson v Bexley Community Centre (t/A Leisure Link) [2003] EWCA Civ 576 reminds us that time limits are exercised strictly in employment cases. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of discretion is therefore the exception rather than the rule. The Tribunal has a wide discretion but must only take into account relevant factors.

Submissions

121 For the Respondent, Mr Purchase conducted the case economically and courteously. This not only assisted us but also ensured that the inevitable stress of the hearing for the Claimant was not increased and we thank him for this approach. We also thank the Claimant for the calm, comprehensive and logical conduct of her own case, which again greatly assisted us. We will not do justice to either of their submissions in this short summary.

122 Mr Purchase reminded the Tribunal to stand back and remind itself that both disciplinary allegations had not been upheld against the Claimant.

123 In relation to the constructive dismissal claim, he argued that:

123.1 It was reasonable for the Respondent to conduct both disciplinary investigations and the 2014 disciplinary hearing. That in 2014 there was specific evidence that something had gone wrong in that Mr Messam did not know about Mr Mangan's view which it was reasonable to read as an instruction. The disciplinary issue was about this not the ultimate decision to warn MS.

123.2 The OH report of 14 April does not suggest that the Claimant was unfit to attend or participate in the disciplinary proceedings, nor did she or her representative ask that they be stopped. In fact she participated fully.

123.3 It was reasonable to continue after the decision in Mr Sacre's case because it was a question of interpretation and, as the more senior employee, the Claimant may well have had a different interpretation of the Hargreaves' email.

123.4 It was not unusual not to provide all details of the allegation prior to the investigation interview, the ACAS Code did not require this and in fact the Claimant understood the allegations against her.

123.5 Mr Messam had not provided deliberately misleading evidence, there not being anything factually incorrect in his statement (70). We should accept what he had meant by 'independent' in this statement. All sides accept that the Claimant did not tell him about Mr Mangan's instruction and we should accept from the contemporaneous evidence (274) that she had not mentioned Mr Mangan to him at all.

123.6 It was reasonable for Ms Archer to chair the hearing: there was no objection to her; it was right for the Chief Executive to deal with it given two directors were witnesses; she was not a witness to events, nor the investigator. There was no evidence of bad feeling since 2011.

123.7 In relation to the outcome letter, that Ms Archer said 'not explicit' in Mr Sacre's letter meant it did not say 'this is an instruction', rather than meaning it was not clear. Learning points were appropriate to put in the letter. The 'rider' was outside the disciplinary charges. In any event, by 16 July the Claimant knew the threatened letter was never going to be sent.

123.8 The Claimant had never asked for a transfer to a different manager; nor did any of her representatives; nor is it a proposal made in any of the OH reports. She did not come back to the Respondent with a response to the 3-way meeting. While the 30 September report refers to feeling unsupported by management, it does not say that Mr Messam is the stumbling block to return and would be likely to have done so if that had been the case.

123.9 The grievance had been heard at the appeal. There was nothing wrong in sweeping up this in the appeal, especially given that the Claimant did not have a right of appeal as she had been successful in the disciplinary hearing. After some toing and froing during the reorganisation Mrs Crozier had offered an appeal of the grievance.

123.10 Finally, there was some contact between the Claimant and Mr Messam over the OH report, it ought to have been clear to the Claimant, given the serious nature of the report that it would take some time to process. She didn't press. Mr Purchase submitted that the minimal contact in October was not substantial enough to have contributed to an overall breach.

123.11 If we do not find that it is a last straw then the clock had started ticking far earlier and the Claimant should be found to have affirmed any breach.

124 In relation to the disability claim he argued that we must follow the step by step approach in Newham College. We must find what the substantial disadvantage was, and

the extent of it before looking at any adjustment.

124.1 In relation to the first alleged adjustment: the disadvantage must be very limited because the Claimant was able to fully to engage with the disciplinary process. With this in mind it was not reasonable to abandon the process.

124.2 In relation to the second alleged adjustment of a change of manager. The PCP must be having a line manager and having to discuss work issues with them. The disadvantage might be the difficulty of having to engage with this manager being made more problematic by disability, but Mr Purchase contended that on the evidence the obstacle to her return was not Mr Messam but the general state of affairs. Crucially, the Respondent did not have knowledge of the disadvantage: they couldn't be expected to know that her disability was likely to create a substantial disadvantage about Mr Messam in the way in which it is contended for now. While the Claimant did not have to ask for the adjustment, that neither she nor her representatives asked goes to whether the Respondent could have had knowledge of the disadvantage. Plus the step was difficult to take and therefore not reasonable.

124.3 Finally the claims were out of time and it was not just and equitable to extend time: the Claimant had professional advice, she knew her rights from July 2014, there is real difficulty in looking back to May or June to consider whether changing her line manager was feasible then.

125 The Claimant also made helpful submissions, by reference to the issues.

126 In relation to the constructive dismissal claim she argued:

126.1 she had faced 2 sets of disciplinary allegations, which she had thought were gross misconduct, in 2 and a half years. The 2014 disciplinary process had started off assuming there to have been an instruction. Mr Hargreaves should have been interviewed as he would have known if it had been an instruction.

126.2 The directors were responsible for the decision but they did not take responsibility and Ms Archer had orchestrated this. The threat of poor publicity meant that she had been used as a scapegoat. Mr Messam gave limited information to protect himself; he would have known a director had been called out. He gave confusing evidence about whether he would have followed Mr Mangan's decision if he had known about it.

126.3 Ms Archer should not have conducted the hearing but was wont to involve herself too much in discipline and use it heavy-handedly. She had formulated the allegations and it was not fair and transparent to then conduct the hearing.

126.4 It would have been perverse in her case to find differently to Mr Sacre and therefore the proceedings should have been stopped. Her disability made this especially so, they knew about it and it could have been done in her case even if it was not the normal approach.

126.5 Prior to the investigation she did not have sufficient details. The Hargreaves email was withheld until the interview.

126.6 The outcome letter 'rider' undermined the outcome and was unclear. It meant she didn't feel her name was cleared.

126.7 In relation to the transfer of Mr Messam, she referred the Tribunal to Turner v DHL Services 2015 in which an employment tribunal found that mismanagement of sick leave was disability discrimination. It was clear that she mistrusted Mr Messam and that she needed a supportive person and the Respondent ought to have made this adjustment. The law did not require her to ask. The law required the employer to be proactive. She was experiencing very significant depression.

126.8 The grievance was not dealt with at the appeal hearing. It included the 2011 events. It ought to have been investigated. She was pushed back and forth between the two organisations. Mrs Crozier's very late response was inadequate because she knew what the Claimant's grievance was.

126.9 That Mr Messam failed to contact her about the OH report made her feel abandoned. She was not contacted about the ill-health retirement options.

126.10 The Claimant did not want to resign after 25 years but was exhausted after trying all the internal routes. She might have been persuaded to return if concessions or acknowledgments had been made. Her health had deteriorated because of all of the events and the only way to recover was to leave.

Application facts and law to issues

127 We shall apply the facts and law to the agreed issues in this case by reference to the numbering of the issues in the Preliminary Hearing (39-41).

Issue 6.1.1

128 In our judgment the instituting of a disciplinary investigation and continuation to a disciplinary hearing is a serious matter and stressful for any employee. An employer must have reasonable and proper cause to do so.

129 We consider that the wording of the Hargreaves' email could be reasonably interpreted as containing a Director's instruction because one interpretation of '*will have to be*' is of a requirement. We accept, as Ms Archer did at the disciplinary hearing that the Claimant did not read it like this, but that does not prevent an alternative interpretation being reasonable.

130 We accept that Ms Archer asked Mr Messam about his involvement prior to the formal investigation. As he was unaware of Mr Mangan's view, it was reasonable to investigate the Claimant and Mr Sacre who had dealt with the matter.

131 We also accept the Respondent's evidence that an SFO would have delayed matters and where an issue arises about a potential failure to follow instruction it was reasonable for the Respondent to want to deal with it quickly bearing in mind the public

importance of the appropriate management of offenders. Even though some managers might have had an initial informal discussion with the Claimant to find out her response, it was reasonable not to do so but to investigate matters formally, bearing in mind the relatively serious nature of the concern. We also accept that Ms Archer thought an informal conversation might prejudice any later investigation.

132 Overall, therefore, in our judgment the Respondent had reasonable and proper cause to commence disciplinary proceedings in 2014 and this was not premature.

Issue 6.1.2

133 In our judgment the disciplinary proceedings were instituted because the Respondent wanted to find out what had happened not because senior management had wanted to find a more junior 'scapegoat'. Ms Archer had one director stating he had given an instruction to recall and a second director (who made the decision to give a warning) unaware of the first director's view. Plainly something had gone wrong. We do not think the facts we have found indicate any evidence that senior managers wanted to make the Claimant 'a scapegoat'. She was investigated because it appeared that she knew the first director's view and had not relayed it to the second director. We do not therefore find that this issue is made out on the facts.

Issue 6.1.3

134 (a) In our judgment the Respondent had reasonable and proper cause to continue disciplinary proceedings after the OH report. The OH report did not suggest that the Claimant was too ill to participate in the disciplinary proceedings. Here there was still a disciplinary issue to be determined; the Claimant had the benefit of TU representation; the Respondent offered to hear the matter in her absence but with that representative and gave a postponement to allow her recovery time. These were all sensible ways forward in the circumstances and balanced the Claimant's illness against the employer's reasonable wish to have the disciplinary matter decided.

135 (b) We consider that the Respondent had reasonable and proper cause to continue the proceedings after the outcome in Mr Sacre's case because there could have been a different outcome: a more senior manager, responsible for communication with the Director, could have interpreted the Hargreaves' email differently. That Ms Archer had described the email as not being 'explicit' in Mr Sacre's outcome letter, was saying no more than it was open to two interpretations. It was reasonable to continue and judge what interpretation the Claimant had put on it.

Issue 6.1.4

136 We have found that the Claimant knew enough about the disciplinary allegations to give a good and detailed account of her actions at the investigatory interview. Her trade union representative did not ask for a pause as he would have done if there had been any doubts or need for further preparation. This issue is not made out on the facts.

Issue 6.1.5

137 We have found that Mr Messam did not give deliberately misleading evidence during the disciplinary process. While he could have been more supportive of the team

this does not come close to being deliberately misleading. This issue is not made out on the facts.

Issue 6.1.6

138 In our judgment the disciplinary issue was not whether Mr Messam had endorsed the decision about the offender or not. The disciplinary question was whether there had been an earlier instruction to recall (which Mr Messam did not know about), which should have been followed. The investigation established that Mr Mangan was clear he had given an instruction and the Claimant contended she had not read it that way. (Even though the Tribunal has found that Mr Messam probably wouldn't have changed is mind if he had known Mr Mangan's view, we do accept he would have wanted to know about it and discuss it with him and this finding is not necessarily the finding that the Respondent would have made at the time on the same evidence.) It is therefore our view that it was reasonable to continue the disciplinary hearing to determine whether an instruction had been given.

Issue 6.1.7

139 In our judgment the events in 2011 did not mean that Ms Archer ought to have recused herself from involvement in the 2014 disciplinary matter. While we have expressed concerns about the first letter (222), the fact that she exonerated the Claimant and there were no further problems between them means there is no evidence of antipathy or apparent bias against the Claimant.

140 We have reservations about Ms Archer chairing the disciplinary hearing in 2014 given her involvement in hearing the allegation from Mr Mangan, formulating the disciplinary allegations, and deciding there was a case to answer. But she had not witnessed the facts of the allegations herself and in those circumstances in our judgment it was not unreasonable for her to chair the hearing. Ultimately of course she did not uphold the allegations.

141 Overall therefore the Respondent had reasonable and proper cause for this issue.

Issue 6.1.8

142 The Tribunal has concerns about the extent of the rider. We accept that 'learning points' can arise out of disciplinary hearings and it was reasonable for the employer to set those out; however, we consider the rider went too far. Here the learning issue was about communication at management level and because the Claimant was the link between the two directors, it makes sense that the failure in communication here was a learning point for her in particular. But Ms Archer went on to suggest that there were concerns about the Claimant's management of risk. Those comments undermine the decision not to uphold allegation 3, which was about that issue. Given that Mr Messam had endorsed the Claimant's recommendation, knowing all the information about the offender, and that Ms Archer acknowledged this was a decision within a range of acceptable decisions, we find this part of the rider went too far.

143 By the time of the Claimant's resignation, however, she had known for over 2 months that the letter threatened in the rider was not any longer going to be written. The appeal hearing outcome had also explained and softened the outstanding concerns to

what was reasonable, in particular by removing any mention of concern about her management of risk. In our judgment, therefore the Claimant's appeal was effectively successful in relation to the rider and the threatened letter and had been resolved in her favour so far as it was reasonable to do.

Issue 6.1.9

144 The only new issue raised here is whether the disciplinary matter should have continued once charges had been dropped against the offender, MS. The disciplinary charge was not dependent upon whether he had committed another crime or not but was about whether or not a management instruction had not been followed, which was a necessary requirement of the Claimant's job regardless of what the offender did or did not do. We therefore consider the Respondent had reasonable and proper cause to continue even once it was known the charge had been dropped against MS.

Issue 6.1.10

145 We find the Respondent had reasonable and proper cause not change the Claimant's line manager because: it would have been very difficult given the geography and before an attempt at three-way mediation after the outcome of the disciplinary hearing, as the Trade Union had suggested; and, because the Claimant made no specific request either herself, through her Trade Union, in her solicitor's letters or through OH, it is unsurprising that this was not considered. Furthermore, the wish for a new manager is based on the Claimant's lack of trust in Mr Messam because in her view he deliberately deceived the Respondent during the disciplinary process. We have found Mr Messam plainly did not do this. We have considered this question here without reference to whether there was a duty to make an adjustment under the EqA. We will review the matter if, later in our decision, we find there was a failure of such duty.

Issue 6.1.11

146 In our judgment the Claimant's grievance in substance was heard by Mr Hubbard at the appeal, including the complaint about events in 2011. This is consistent with Mr Culliton's view (that the hearing was a small g grievance hearing rather than a large G) and with the outcome letter. The Claimant may not have agreed with Mr Hubbard's conclusions but it is clear he heard and made findings about the concerns she raised in her grievance and appeal letter. After much delay, the Claimant was offered an appeal against Mr Hubbard's decision by Mrs Crozier on 1 October 2014. We have criticised the delay as being too long. Before the Claimant resigned she knew that she had been offered an opportunity to appeal Mr Hubbard's view of the concerns set out in her grievance.

147 In our judgment the substance of the Claimant's grievance had been heard and in that sense issue 6.1.11 is not made out: the grievance had been investigated. However, the Respondent was guilty of too long delay before informing the Claimant of her opportunity to appeal the grievance. It had no reasonable and proper cause for this delay.

Issue 6.1.12

148 Mr Messam acknowledged before us that he should have kept the Claimant informed about the steps he was taking to obtain a more expert OH report to advise on whether she met the conditions of ill health retirement. In our judgment, objectively any

employee would want to hear within a month of an occupational health assessment what the Respondent's proposals were, this is even more so where the illness in question includes anxiety. This failure to keep her informed, did not have any reasonable or proper cause.

Issue 6.1

149 We now stand back and whether the conduct we find did not have reasonable and proper cause, added together amounts objectively to the Respondent conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust.

149.1 We find below that that the failure to offer the Claimant a change in manager was not in breach of the Equality Act, we therefore do not need to review our decision in relation to issue 6.1.10.

149.2 (Issue 6.1.8) The rider in the disciplinary letter threatening that a letter would be written to her manager went too far in referring to concerns about the Claimant's management of risk; however, by the time the Claimant resigned the Respondent had confirmed that it would not be writing or sending any such letter; and the appeal hearing had clarified and softened the statement concerns to those about communication and removed all reference to concerns about management of risk.

149.3 There was an inappropriate delay in the grievance process, during this delay the Claimant had been reserving her position and seeking, through solicitors letters, a resolution of the grievance. By time she resigned the Respondent had provided a reasonable and proper path to resolving the grievance by way of an appeal.

149.4 Thus in appealing and reserving her position, the Claimant had given the Respondent an opportunity to resolve her concerns and in our view, where there were concerns of behaviour without reasonable and proper cause (the rider and the grievance delay), by the time of the resignation the Respondent had changed its conduct and resolved the concerns in the Claimant's favour.

149.5 The failure to contact the Claimant in October 2014 would have amounted to a last straw because it is objectively more than innocuous. We have asked whether this delay, on its own, amounts to a fundamental breach and have decided that it does not. It would have shown greater consideration to the Claimant to contact her and keep her updated but the Claimant was asking for ill-health retirement as an option, and she would have known that this often a complex question, a delay in reverting to her was not therefore fundamental to the relationship rather it was poor communication and a lack of courtesy.

150 Overall, therefore, we find that the conduct for which the Respondent had no reasonable or proper cause were not, by the time of resignation, sufficient taken together to amount to a breach of trust and confidence.

151 We therefore find that the Claimant was not constructively dismissed and do not need to decide issues 6.2, 6.3, 7 and 8. Her complaint of unfair dismissal is not well-founded and does not succeed.

152 Issue 9 is conceded, as set out above.

Issue 10.1

153 All agree that the Claimant was subject to the Respondent's disciplinary process and this was a provision, criterion or practice ('PCP') that was applied generally.

154 We do not consider, in fact in this case, that the Claimant was subject to a substantial disadvantage by that disciplinary process in comparison to a non-disabled person. She was able to attend the investigation interview with her representative and give a good and detailed account, just as a non-disabled person might have done. Likewise she attended the disciplinary hearing, again with representation, and was able to put forward an effective case, which resulted in the allegations against her not being upheld.

155 If we are wrong and the additional anxiety caused to the Claimant amounted to a disadvantage, we agree with the Respondent that the facts show it was limited given her full involvement. Bearing this limited extent in mind, the adjustments the Respondent made to the disciplinary process to take into account the Claimant's illness: a postponement; an offer to continue with the Claimant's trade union representative alone, were sufficient and reasonable.

156 Further, and in any event, in our view, the adjustment of stopping the disciplinary process completely, contended for by the Claimant, would not have been a reasonable one for the employer to have to make in this case. Disciplinary allegations existed that it was reasonable to have determined, as we have decided here these were. Here the Claimant was able to attend the hearing and give an account. In those circumstances it would not have been reasonable to stop the disciplinary.

Issue 10.2

157 The Claimant was required to work with a line manager and it was her line manager who was to communicate with her while off sick and once back to work. We find that this amounts to a PCP applied generally and to the Claimant. (This expands the PCP formulated at the PH, but better fits the case put by the Claimant and met by the Respondent.)

158 The substantial disadvantage in comparison to non disabled persons that the Claimant contends she was subject to was that because of her anxiety and depression she has not been able to get over her feelings that Mr Messam her manager didn't support her during the disciplinary process in the same way as a non-disabled person would have been able to do. She argues therefore that the requirement for him to be her line manager and to communicate with him during her absence exacerbates her illness and renders her less likely to return. The medical evidence in this case does not go into this level of detail about the effects of her disability, but we are prepared to accept the Claimant's evidence at this Tribunal that this is how her anxiety and depression affected her thinking about Mr Messam. We find, therefore, that the Claimant was placed at a substantial disadvantage by having Mr Messam as her manager in comparison with non-disabled persons.

159 The next question is therefore, did the Respondent know or could it be reasonable expected to know that she was likely to be placed at that disadvantage in comparison to non-disabled persons?

159.1 After the receipt of the OH report of 14 April 2014, once the Respondent had knowledge of the disability, in our judgment it still did not know of the contended-for disadvantage. There is nothing in the OH report to put the Respondent on notice of this difficulty.

159.2 As at the 14 May 2014 case conference the Respondent knew that the Claimant was saying communication with Mr Messam was 'difficult' in the context of the disciplinary. But the Claimant's trade union had suggested a 3-way meeting to resolve this. Furthermore, at this stage the disciplinary hearing had not yet concluded.

159.2.1 At this stage in our judgment the Respondent did not know that the Claimant was subject to the disadvantage, which extends beyond 'difficult' communication in the context of a not-yet resolved disciplinary to not being able to get over her feelings and trust Mr Messam enough to return to work. To the contrary the problem of communication looked redeemable.

159.2.2 Nor do we consider at this stage that the Respondent had constructive knowledge of the disadvantage (i.e. ought reasonably to have known the Claimant was likely to be subject to it). On the contrary, it was reasonable to think, as it did, that a favourable outcome in the disciplinary might resolve the communication difficulties because it would have been reasonable to think a successful outcome would reduce anxiety and there was nothing to suggest the Claimant could not put this behind her as she had done in 2011. Furthermore, at this stage the Respondent did not have knowledge or constructive knowledge of the disadvantage 'in comparison with non-disabled employees': on the evidence a non-disabled employee facing disciplinary allegations may have felt communication with her manager was difficult.

159.3 The disciplinary outcome was in the Claimant's favour and the Respondent did not hear anything in the appeal or grievance letters or the appeal hearing to inform it that the Claimant could not work with Mr Messam. The Claimant's solicitors letter of 23 July 2015 at 312-3 doesn't provide any more information to the Respondent about the Claimant being subject to this disadvantage. In our judgment, in July and August the Respondent was provided with nothing further to give it actual knowledge of the disadvantage: it hadn't been told Mr Messam was a particular obstacle to return. Nor had the situation changed so as to give it constructive knowledge. Mr Messam had followed up the idea of the 3-way meeting but had not heard anything back. As far as the Respondent knew the Claimant was still too unwell to work.

159.4 By the 15 September and 30 September all that the OH reports say is that the Claimant felt 'unsupported by management'. This is too general a statement in our view to put the Respondent on notice actually that the

Claimant could not return to work with Mr Messam or communicate with him because it does not identify the line manager in particular; it does not link the feeling that the Claimant felt unsupported with her inability to communicate or be managed by him. It seems to us equally too general a statement to call for reasonable further enquiry. And we know at this point that the Claimant did not feel a change in manager would have assisted.

159.5 We agree that the Claimant does not have to identify the adjustments she thinks should have been made, but before the duty arises the Respondent does needs enough information to know about the disadvantage she is suffering from in comparison to non-disabled persons. Here we find the Respondent simply did not know and could not be reasonably expected to know on the information it had that the Claimant's disability had affected her thinking about Mr Messam that despite the successful outcome of the disciplinary she could not return under his management.

160 If we are wrong about knowledge, in September, we would have found that the contended for adjustment would not have been effective to avoid the disadvantage, simply because the Claimant could not herself say that a change of manager in September was likely to have enabled her return to work.

161 It follows that the disability discrimination claim fails.

162 In any event, we consider the question whether the disability discrimination claim was brought out of time and whether it would be just and equitable to extend time.

163 We find that the reasonable adjustment claim would have been out of time because there was no dismissal to which the claim attached and therefore the claim is that the Claimant was subject to a detriment:

163.1 in relation to the issue 10.1, the detriment of the disciplinary process, the date that time started to run from, following the principles of Matuszowicz, would be, on the Claimant's case, at some point after receipt of the OH report of 14 April and prior to the disciplinary hearing of 25 May 2014 by which point she argues the disciplinary proceedings against her should have been stopped. This claim is approximately 5 and a half months out of time.

163.2 in relation to the issue 10.2, the date that time starts to run is more difficult but, if the Claimant had succeeded on knowledge and reasonableness of the step, it would have been at some point from 14 April to mid-September. This claim is therefore also out of time and, given that the Claimant thought a change of manager only likely to be effective at an early stage, then arguably equally as late.

164 We have considered therefore whether it is just and equitable to have extended time.

164.1 The factors against it being just and equitable to extend time are the fact that from July 2014 (i.e. within 3 months of the failures complained of) the Claimant was receiving professional advice, was able to give detailed instructions to her solicitor about her complaints, and was aware of her

potential rights under the EqA; that the delay is relatively long; that the failure to make reasonable adjustments was not notified to the Respondent in her grievance; and that she has still had the chance to air her grievances about her treatment through the constructive dismissal claim.

164.2 The factors in favour of extending time are that the Claimant was evidently ill during the relevant period and seeking to resolve her grievance internally.

165 If it had been necessary to decide this point, on balance we would not have extended time to allow the disability discrimination claim. In our judgment the factors against extending time outweigh the factors in its favour. The Claimant's illness is outweighed by the fact that she had professional advisers during the period to whom she gave detailed instruction. Her attempt to resolve her grievance internally is outweighed by the fact that she did not raise any concern about the reasonable adjustments she required in that grievance. We would not therefore have been persuaded that the usual strict time limits should be extended.

166 It is our decision that the claims do not succeed.

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Employment Judge Moor

15 August 2016