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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms K Walker	**AND**	**Way Ahead Support Services Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** **2, 3, 6, 7, 8, 9, 10, 13, 14 15 March and (In chambers) 16, 21 and 22 March 2017**

EMPLOYMENT JUDGE **Woffenden**
MEMBERS: **Mr T Liburd**
Mr H Parvin

Representation
For the Claimant: **Mr P Liggins lay representative and the claimant's partner**
For the Respondent: **Mr A Lorde, consultant**

RESERVED JUDGMENT

1 The claimant's claim of constructive unfair dismissal fails and is dismissed.

2 The complaint of disability discrimination (failure to make reasonable adjustments) fails and is dismissed.

3 The complaint of disability discrimination (indirect discrimination) fails and is dismissed.

4 The claimant's claim of breach of contract/unauthorised deduction from wages (occupational sick pay) fails and is dismissed.

REASONS

1 The claimant was employed by the respondent from 2 May 2008 .She resigned on 14 July 2015.

2 On 12 October 2015 the claimant presented a claim to the Employment Tribunal in which she made complaints of constructive unfair dismissal disability discrimination holiday pay and arrears of pay. She was at that time legally represented.

3 On 2 March 2017 immediately prior to the commencement of the final hearing there was a preliminary hearing at the end of which the respondent applied for an order that the claimant's claims be struck out in their entirety under rule 37 (1) (b) and/or (e) of the Employment Tribunal Rules of Procedure 2013.That application was heard on 7 March 2017 and refused for the reasons given at the time which are not now recorded.

4 The claimant was asked what reasonable adjustments she required during the final hearing and it was agreed that she be afforded regular breaks and given time before responding to questions and the hearing would begin at 10.00 am each day and finish as close to 4 pm as was convenient.

5 A timetable was discussed and having regard to the number of witnesses and volume of documentation it was decided that the time available would be sufficient to deal with liability only although the parties were informed that cross examination was permitted on issues 10.2 and 10.3 below. The parties were encouraged to agree as many points as possible in the claimant's schedule of loss.

6 There was a bundle of documents (1039 pages in three folders) prepared by the respondent which was agreed by the claimant by 7 March 2017 subject to the inclusion of some additional documents at pages 1040 to 1072 .During the course of the hearing further document were added at pages 1073 to 1080 and 1082 to 1086. The tribunal had regard only to those documents to which it was referred by the parties in their witness statements or in cross examination.

7 For the claimant the tribunal had witness statements and heard evidence from the claimant Mr P Liggins (her partner and representative) Mr Gordon Spencer Liggins (her representative's father) Mr Kevin Hately (who was until July 2013 the manager of the Netherfield Association) Ms Lorraine Hampson Ms Lisa Mc Hendry and Mrs Ellen Hutt .Witness statements of Mr Pete Dooley the claimant's daughter (Alexandra Walker) Mr Michael Porter and the claimant's mother (Mrs McBain) were put in as evidence but they either did not attend or were not called as witnesses. On 10 March 2017 Mr Liggins applied for a witness

order for Tammy Croft Perkins but that application was refused for the reasons given at the time.

8 For the respondent the tribunal had witness statements and heard evidence from Lorraine Plant Mr Geoffrey Ralph Mr Ian Crowther Mr Gary Ratcliffe and Andrea Gwilliam. A witness statement of Derek Harvey (the respondent's chairman) was put in as evidence but he was not called to give evidence. The parties' failure to provide comprehensive or adequately detailed witness statements addressing events occurring over a number of years, in particular in relation to the contemporaneous documentation and voluminous correspondence between the parties, has made the tribunal's fact finding particularly onerous and protracted.

9 At an open preliminary hearing on 22 and 23 June 2016 Employment Judge Dimbylow found the claimant to be a disabled person (by reason of the mental impairment of depression and anxiety) within section 6 and Schedule 1 of EqA at the material time (14 April 2014 until 14 July 2015). At an earlier preliminary hearing (case management) on 7 December 2015 Employment Judge Findlay identified the issues to be determined at the final hearing. The claimant withdrew her claims of holiday pay at another preliminary hearing before Employment Judge Broughton on February 2017.

10 The remaining issues to be determined are set out below:

Constructive Unfair Dismissal

10.1. Was the claimant treated in such a way that she was entitled to treat herself as constructively dismissed? Namely

10.1.1 Was the respondent in repudiatory breach of the implied term of trust and confidence, i.e. did the respondent (without reasonable or proper cause), conduct itself in a manner calculated (or likely to) destroy or seriously damage the relationship of trust and confidence between the parties? (The specific conduct relied upon by the claimant is set out in an agreed schedule of incidents which the claimant amended during the course of the hearing). NB The burden of proof in relation to constructive dismissal falls on the claimant.

10.1.2 Was the conduct relied upon sufficiently serious to entitle her to leave at once? Did she in fact leave in response to that conduct? Did she lose her right to do so by delay or otherwise electing to affirm the contract?

10.1.3 If so, what was the reason for the dismissal? Was it a potentially fair reason?

10.1.4 If so, was the dismissal fair or unfair having regard to the reason shown by the employer and taking account of section 98(4) of the Employment Rights Act 1996?

10.1.5 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

10.1.6 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Section 19: Indirect discrimination in relation to disability.

10.2 Did the respondent apply the following provisions, criteria and/or practices ('the PCPs') generally, namely

10.2.1 requiring the claimant to attend an investigatory meeting without informing her of the allegations against her

10.2.2 requiring the claimant to attend investigatory and disciplinary meetings which were not chaired by an independent person;

10.2.3 requiring that the claimant should only be accompanied to investigatory and/or disciplinary meetings by a work colleague or trade union representative;

10.2.4 requiring the claimant to attend investigatory or disciplinary meetings at her workplace rather than a neutral venue.

10.3 Does the application of any or all of these provisions put other persons who share the claimant's disability at a particular disadvantage when compared with persons who do not have this protected characteristic?

10.4 Did the application of any or all of the provisions put the claimant at that disadvantage in that

10.3.1 the claimant's mental health condition was exacerbated by having to comply with them?

10.5 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim upon which it relies is the need to address the claimant's allegations to prevent further damage to the claimant's health arising from the long drawn out investigation/disciplinary process.

Reasonable adjustments: section 20 and section 21

10.6 Did the respondent apply any or all of the provisions criteria and/or practices ('the PCPs") (as set out above in relation to indirect discrimination) generally?

10.6.1 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter (i.e. her employment with the respondent) in comparison with persons who are not disabled, in that her condition was exacerbated by having to comply with them?

10.7 Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

10.7.1disclosure of the allegations against her at an earlier stage;

10.7.2 ensuring that there was an independent chairperson at the investigatory and disciplinary hearings;

10.7.3 allowing the claimant to be accompanied by her partner at such hearings;

10.7.4 holding the investigatory and disciplinary hearings at a neutral venue

10.8 Did the respondent know, or could it reasonably be expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above? NB The burden of proof in relation to knowledge falls on the respondent.

Unauthorised Deduction/Breach of Contract

10.9 The claimant claims that she suffered an unlawful deduction of wages/breach of contract in respect of payment of contractual sick pay from April 2014 to November 2014.

10.10 If the claim(s) succeed how much pay is outstanding to be paid to the claimant?

11 From the evidence it saw and heard the tribunal makes the following findings of fact:

11.1 The respondent is a small charity supporting individuals who have a range of learning disabilities, mental health issues and are vulnerable. It operated a day centre called Netherfield House in Lillington in Leamington Spa.

11.2 The claimant was originally employed by the Netherfield Association ("Netherfield") from 2 May 2008 as an Assistant Organiser working 32 hours a week based at Netherfield House. Mr Liggins (manager of Plato Trust) has been

her partner for the last six years or so. He was a frequent visitor to Netherfield House because a number of individuals who attended it also used the accommodation he managed.

11.3 In November 2008 the claimant was hospitalised .Her then manager at Netherfield wrote to her on 27 November 2008 to tell her that its sick pay rules meant she qualified for 2 weeks' sick pay less statutory sick pay. However as a '*one off gesture'* the trustees had agreed to pay her in full for the month of November and a '*generous settlement for December*.' It was explained that as a result she would receive £205 less in pay than she would normally have received for those two months but as she would normally receive a clothing allowance of £200 at that time of year that would also be paid to her.

11.4 The claimant worked with a number of individuals who used the services provided by Netherfield (the service users) which included AP MW and RP. She was hardworking and caring and we have no doubt that on occasion she went above and beyond what was expected or required of her. However her unwillingness to change her ways of working with service users became a source of conflict between her and the respondent.

11.5 We do not doubt the claimant's passionate belief in her own veracity but we did not find her a credible witness. She was understandably nervous and became fatigued during cross examination which no doubt affected her concentration but we found her combative at times (repeatedly answering questions with questions) defensive (not answering questions which were put to her but reiterating stock responses) vague and inconsistent. By way of example in her impact statement in relation to the issue of disability she described as 'the straw that broke the camel's back' the events immediately after she had received a telephone call from a service user's sister on 10 April 2014 .However under cross –examination the claimant said that she had lost all confidence in the respondent in 2013 and in 2014 and volunteered in reply to a question put by a tribunal member about the Policy (see paragraph 11.28 below) that all trust and confidence had broken down between her and the respondent on 4 April 2014. She disagreed with and sought to distance herself from parts of her own contemporaneous letters describing them as mistakes. In the event of a conflict between the claimant's evidence and that of the respondent's witnesses (which was corroborated by contemporaneous documents) we have preferred the latter.

11.6 From 2012 Netherfield's finances were adversely affected by changes to local authority funding arrangements. Its direct grant was cut by 50%. Service users were given money direct to fund their care packages. The trustees of Netherfield perceived the need to review its management arrangements and the services offered to make it more competitive.

11.7 To that end Netherfield utilised the services of the Ingleby Foundation, a charitable trust which worked with local charities for example in relation to income generation. No-one was very clear about it but it appears it was set up by or in conjunction with Ingleby Care a private business of which Jean Miller and her son were directors. Kevin Hateley was a self-employed consultant paid by Ingleby Care which invoiced Netherfield for his services. He also became a trustee of Netherfield. Nathan Williams was also involved in the Ingleby Foundation. He too became a trustee of Netherfield and among other matters helped Netherfield get grants for which he was rewarded by way of a percentage of those grants. He and Mr Hateley had an office at Netherfield and Mr Hateley became in effect the manager of Netherfield and Mr Williams was his line manager. The claimant got on well with Mr Hately but it was clear under cross-examination that she has a longstanding dislike of Nathan Williams and that she believes that Netherfield and the respondent were in some way (which she was unable to articulate and for which there was no cogent evidence) subject to the malign control of Ingleby Foundation/Ingleby Care.

11.8 It was decided by the Netherfield trustees that new contracts of employment and job descriptions would be put in place and all employment policies would be reviewed by 1 February 2013.

11.9 On 8 February 2013 Kevin Hateley (by then a trustee of Netherfield) issued the claimant with a new contract of employment. Her job title was senior support worker on a basic salary of £13,104 a year working 32 hours a week. Clause 14 of that contract referred to an occupational sick pay scheme details of which were available from the claimant's manager. Occupational sick pay included any statutory sick pay. Any extension of the sick pay scheme was given as a discretionary payment and did not imply any contractual obligation. Clause 12 of the contract said that sickness would be monitored using the Bradford Factor scoring system.

11.10 The job description for a senior support worker described the purpose of the role as : "*to provide high-quality support for adults with a range of either Learning Disabilities and/or Mental Health conditions which enable people who attend Netherfield to live with maximum choice, a variety of options in a friendly supportive environment. To support Clients with agreed and acceptable community-based activities and to attend agreed medical appointments."*

11.11 The respondent has a policy on managing sickness absence ("the Sickness Absence Policy") which was issued in December 2007. It requires staff to be made aware in advance when occupational sick pay is to be reduced. Return to work interviews should be conducted by a manager when an employee returns to work irrespective of the duration of their absence.

11.12 As at January 2012 Netherfield had a policy on sickness leave. As far as sick pay was concerned employees who had been employed for three years and above were entitled to sick pay of 4 weeks full pay (inclusive of statutory sick pay) during any rolling period of 12 months.

11.13 Netherfield had a disciplinary procedure. It contained (non- exhaustive) examples of conduct which might lead to summary dismissal. These include "*Breaches of policies etc-Serious offences which are in breach of any of Netherfield's agreed policies/procedures or recognise national legislation*" and "*Serious insubordination-Failure to obey reasonable verbal or written instructions from your manager, or other supervisory member of the management team."* The procedure states disciplinary outcomes will be provided in writing within 5 working days of any disciplinary hearing.

11.14 Netherfield had a code of conduct for its employees. It said (among other matters) that social care workers must recognise and use responsibly the power that comes from their work with service users and carers. In particular they must not form inappropriate personal relationships with service users.

11.15 Netherfield had a grievance procedure. If a grievance was not satisfactorily resolved informally and referred to the next level of manager the grievance would be heard by the manager and "*A full investigation, which may involve a formal hearing, will be undertaken and a written response will be given within 10 calendar days*." Paragraph 4 states that:

> "*In the interests of a speedy solution, timescales have been set at all stages of the procedure. It is accepted that on occasions, timescales may need to be waived by mutual agreement*. "

11.16 In July 2013 a complaint by a Netherfield employee was made against Kevin Hately which was investigated by Kate Farmer (an independent consultant). During her investigation other allegations of misconduct were raised by the same employee in relation to events at a holiday for service users in Ilfracombe in June 2013 attended by Mr Hateley and the claimant and Mr Hately resigned on 6/7 July 2013.The claimant went off sick and Ms Farmer interviewed her in the presence of Mr Crowther following the claimant's return. In her report dated 17 July 2013 (the the existence of which the claimant was not aware until after she resigned) Ms Farmer recommended that:

> *"Karen is heavily supervised while under your employment, encouraged to work within the boundaries of her job description and given strong professional boundaries for her work with vulnerable adults within Netherfield's sphere of activity*."

11.17 Michael Porter (the then chairman of the Netherfield trustees) wrote to Netherfield employees (including the claimant) on 23 July 2013 to update them about interim management and other arrangements while a replacement was sought for Mr Hately. He explained that the Ingleby Foundation would be helping out. Jean Miller (described as the head of Ingleby) would be regarded as line manager until a new appointment was made. Nathan Williams and Kate Farmer would also assist.

11.18 Mr Ratcliffe was taken on by Netherfield in the capacity of manager on a self-employed basis from 21 August 2013.He had previously worked for Ingleby Foundation for 7 years before doing some NVQ work. He was to assist Nathan Williams taking over some of the duties he had assumed following Mr Hateley's resignation .Roger Heydon was employed as deputy manager.

11.19 The claimant has disclosed some pages from her diary for 2013.These include the dates of 27 August 2013 and 29 October 2013 on each of which the claimant has drawn a triangle .It is her evidence in chief that the use of this symbol denoted occasions on which Mr Ratcliffe commented about her chest [size].Such comments are denied by him. It is also her evidence that on several occasions she tried to get a community psychiatric nurse reallocated to AP and that she asked Mr Ratcliffe about this but nothing was done and that dates were put in the diary as urgent reminders to call a mental health manager on 27 August 23 October and 11 December 2013.The claimant later confirmed her concern about the lack of professional support for AP in a letter at the request of a locum psychiatric consultant. Further she did not get any assistance when trying to get '*proper support* 'for MW and '*independently*' created a diary to assist MW's sister. Mr Ratcliffe's evidence was that the claimant expected the provision by the respondent of higher levels of support for service users than was '*allowed*'; this had become the 'norm' and gone unchallenged and created dependency among service users.

11.20 The claimant has alleged in chief in her evidence that on 27 September 11 October and 14 November 2013 free training courses took place on diabetes autism schizophrenia and medication which was relevant to her role but her attendance at which was denied by Mr Ratcliffe and they were 'given' to another member of staff (which she identified under cross-examination as Roger Heydon). It was Mr Ratcliffe's evidence in chief that the medication training (which Netherfield staff were invited to attend) was cancelled by the provider so no staff attended. He was unaware of the other training which the claimant alleged he had denied her. The claimant relies on the witness statement of Mr P Dooley (an employee of Advance Support Services who also worked at Netherfield House and a transcript of a recording of a telephone conversation the claimant had with Mr Dooley in which they discussed training and who had received it.

11.21 Netherfield's financial difficulties were such that on 19 November 2013 the claimant and the other employees were notified in writing of a potential merger between Netherfield and the respondent. As chairman of trustees for Netherfield Michael Porter informed them that the Transfer of Undertakings (Protection of Employment) Regulations 2016 ('TUPE') would apply and the employees' terms and conditions would remain unaltered save for a change in the name of the employer to that of the respondent (another charity). All employees trustees and volunteers were invited to attend the Netherfield annual general meeting ("AGM") on 12 December 2013 at which there would be a resolution to merge Netherfield with the respondent and to dissolve Netherfield.

11.22 On 25 November 2013 the claimant signed a new contract of employment which was signed by Mr Ratcliffe. Her job title was changed to that of support worker. Her hours of work increased to 40 hours to reflect some additional work she was doing for Mencap on behalf of the respondent and her entitlement to the provision of appropriate clothing was removed. Her salary was increased to £17208 backdated to October 2013 .Other terms and conditions remained the same. She noted in manuscript on it (though when she did so is unclear) that she had signed it without noticing the removal of 'senior' or that the clothing allowance had been discontinued. She did not mention in that note that she had been forced to sign it by Mr Ratcliffe,as she now alleges is the case.

11.23 The AGM took place on 12 December 2013 (attended by the claimant and her fellow employees) at which there was a slide show presentation about the proposed TUPE transfer to the respondent and the resolutions to merge with the respondent and to dissolve Netherfield were passed.

11.24 On 17 December 2013 Mr Ralph wrote (as vice-chairman of Netherfield trustees) to the claimant to inform her that the transfer of her employment to the respondent under TUPE would take place on 1 February 2014. The letter also told her the information Netherfield had about her which under TUPE had to be given to the respondent. She was told Netherfield had a signed statement of her main terms and conditions of employment which she was welcome to view and if she wished to do so raise it with Mr Ratcliffe. It was confirmed that no disciplinary action had been taken against her and she had raised no grievance in the preceding two years. She was asked to let Mr Ratcliffe or Mr Ralph know if the above information was not accurate by 31 December 2014 and if she had any concerns she could raise it with Mr Ratcliffe or another trustee. Unless he heard from her by that date it would be assumed the information was correct and it would be passed to the respondent in January 2015.The claimant did nothing. The requisite information was given to the respondent in a letter dated 6 January 2014. This included reference to a pay review and increase in the claimant's salary in November 2013 because of the change in her duties and responsibilities.

11.25 Sometime in December 2013 Mr Ratcliffe admits that he told the claimant to fuck off during an argument and that this was not professional. She had been complaining that a diarised meeting had been missed during her absence from work and he became frustrated .The incident was raised with Mr Crowther by Mr Dooley .Mr Ralph and Mr Crowther went to speak to Mr Ratcliffe about it later .He was told that was not the best way to talk to staff . Disciplinary proceedings were not taken because Mr Ratcliffe was not a Netherfield employee. The claimant was not on site at the time but Mr Ralph later went to speak to her about it and she told him she did not want to raise a grievance .There was no repetition by Mr Ratcliffe.

11.26 The claimant had overheard a conversation with Mr Ratcliffe and Mr Crowther (on a date which she did not identify) that Ms Gandy would start on £ 10.80 an hour at a time when she was paid £8.00 per hour. The claimant did not know the nature of the contractual relationship between Netherfield and Ms Gandy. Ms Gandy was not employed by Netherfield until 1 January 2014; prior to that date she was an agency worker at Netherfield which paid the rates charged for her by her agency. While she was an agency worker she also worked for Advance Support and it was in that capacity she carried out what the claimant regarded as outreach work. When Ms Gandy was taken on as an employee she was paid the same rate of pay as the claimant. Like the claimant Ms Gandy could drive. The claimant had told Mr Ratcliffe that she was under pressure so when Ms Gandy arrived Mr Ratcliffe thought it made sense to share the load and give some of that sort of work to Ms Gandy and as she had become more experienced by October /November 2013 Ms Gandy was given additional responsibilities like those which over time the claimant had assumed for service users such as taking them to a doctor's appointment.

11.27 Ellen Hutt (and other Netherfield trustees) resigned as trustees on 31 January 2014. She attended no more trustee meetings after that date. Mr Crowther Mr Ralph and Mr Porter became trustees of the respondent.P45s were issued to all employees with effect from 1 January 2014.The claimant had originally alleged as an incident which related to the repudiatory breach of the implied duty of trust and confidence that she had been informed by Mrs Hutt that she had been told in a board meeting that the claimant had left her employment. During the course of the hearing the allegation changed to being told by Mrs Hutt in May 2014 that she had been told by Nathan Williams when she had attended Netherfield House that the claimant had left. Mrs Hutt was very unclear in her evidence about what she had been informed or what she informed the claimant.

11.28 On 1 February 2014 the TUPE transfer from Netherfield to the respondent took place by virtue of which the claimant's employment transferred to the respondent.

11.29 There was a weekly plan of activities in which service users could participate some of which were run at Netherfield House by external organisations /groups or individuals. The number of days which service users attended was monitored and recorded.

11.30 One of the Netherfield policies (in existence since 2012) was called "*Professional and Personal Boundaries (Including sexuality and personal relationships*)" ("the Policy").

11.31 It was said to be the responsibility of the manager to ensure that staff had a full understanding of the Policy and that it was adhered to at all times. The introduction provided that

> "*For the establishment of accessible services it is necessary that all Netherfield staff are approachable in their dealings with Service Users and Carers. However, it is important that working relationships are not mis read or confused with friendship or other personal relationships. It is essential that all interactions between staff, Service Users and Carers must be seen in terms of a professional relationship. For a culture of safety to exist in Netherfield all staff are required to work within the framework of policy and procedure".*

11.32 The Policy contained a number of definitions.

> "*Boundary*" means "*Defines the limits of behaviour, which allow staff to have professional relationships with Service Users receiving care and/or treatment from them. These boundaries are based upon trust, respect and the appropriate use of power*."
>
> "*Service User"* means "*A current client/patient for whom the worker is directly involved in providing care. A client/service user who has previously had care from the staff member. A current client/service user who has had no direct contact from a staff member that is receiving a service from Netherfield".*
>
> *"Staff member"* means "*anyone who is employed directly or indirectly (e.g. contractor or Local Authority) by Netherfield*."

11.33 It is said to be the responsibility of staff members to be aware of the potential for power imbalance and to maintain professional boundaries to protect themselves and their patients and that failure to meet its responsibility might lead to formal disciplinary action.

11.34 Clause 11.4 of the Policy states that

> "*On occasions a member of staff may develop an attachment towards a particular service user. In this instance the staff member should ensure that this does not lead to a breach of professional boundaries. Staff should be encouraged to discuss these kinds of difficulties with their manager or colleagues as part of practice supervision."*

11.35 Clause 11.5 of the Policy requires a staff member to bring it to the attention of the manager immediately he/she thinks that there is a risk of potential breakdown of his/her professional boundaries.

11.36 Limits are imposed on disclosures between staff and service users. The former are told they must never share personal details about other staff with service users or any personal information about themselves or other staff members or discuss service users with other service users. If such disclosures occurred the incident must be brought to the attention of the manager as soon as possible. Staff should never give out their personal contact details to service users or give personal details of others to service users or allow service users to visit their homes or encourage service users to develop relationships with the staff member's relatives or friends. Physical touching between staff and service users is to be discouraged and avoided except in cases of clinical need. Consent should always be sought for a physical examination and where it was deemed necessary to carry out a physical or intimate examination the privacy and dignity of service users must be respected at all times.

11.37 If staff feel a colleague is at risk of potential breakdown of professional boundaries they had a duty to protect both service user and staff members and are required to bring the matter to the manager.

11.38 Clause 21 deals with "*Sexual Boundaries*". It is said that:

> *"21.1 In order to maintain professional boundaries, and the trust of Service Users and Carers, staff member should not display sexualised behaviour or pursue a sexual or emotional relationship with a Service User or Carer.*
>
> Examples are given of behaviour which reaches sexual boundaries. These include sexually motivated actions such as sexual humour and/or inappropriate comments and telling patients about their own sexual problems, preferences or fantasies or disclosing other intimate personal details.

11.39 Mrs Gwilliam is the respondent's Activity Services Manager a position she has held for eight years. .She was responsible for Netherfield House and another

centre and (post-merger) spent her time equally between the two. After the merger she became concerned that the Policy was not being followed and that Netherfield staff were exceeding its remit as a day centre attended by service users and were carrying out outreach work.

11.40 0n 27 February 2014 Ms Gwilliam had a discussion with Ms Gandy following incidents when she had raised her voice at a service user. Ms Gwilliam told her she would be given the opportunity to go through an induction process with the respondent and went through the Policy with her. Ms Gandy's reaction was positive and said it helped her to understand what behaviour was appropriate.

11.41 On 5 March 2014 there was a staff meeting which was minuted.The claimant did not attend. Ms Gwilliam stated that in her opinion Netherfield was being run as more of an outreach service than a day service and that over the coming months they would be looking at what would be offered as part of the service and what would be a chargeable activity. It was agreed that Mr Ratcliffe would attend all meetings with social services from 5 March so that there was consistency in the services being offered and agreed and any misunderstanding with social workers as to the ambit of work undertaken corrected. He would also be the first level of contact on all issues as manager of the service.

11.42 On 10 March 2014 there was a meeting between the claimant and Ms Gwilliam at the claimant's request. The claimant volunteered the information that she was friends with AP. Under cross –examination she resiled from this depiction of their relationship but it is common ground AP had given the claimant a card describing the attributes of a friend with '*Lots of Love*' written on it which the claimant herself described as a '*gift- a token'* from AP to her .Mrs Gwilliam explained that she felt the claimant's relationship with AP breached the Policy. She asked her not to say anything to AP at the moment as it would upset AP and the matter would have to be dealt with very carefully. The claimant would be given the opportunity to complete the respondent's induction process. The claimant initially signed the notes of that meeting made by Ms Gwilliam but then came to see Ms Gwilliam to withdraw her signature because she was unhappy with the second paragraph of the notes which said "*During the meeting Karen said she was friends with AP (individual who is supported at Netherfields), I explained that we would need to look at this as it contravenes the Professional Boundaries Policy. I asked Karen not to say anything to AP at the moment as this would upset AP, I said we would need to deal with the issue very carefully."* She was given a copy of the notes from 10 March meeting to read and told there would a meeting on 18 March 2014 to get them signed.

11.43 On 18 March 2014 the claimant prepared and gave to Ms Gwilliam a manuscript document headed 'Response to 3 paragraphs' dated 16 March 2014 " in which she said "I will continue to be AP's friend, more importantly AP wants

to be a friend of mine." She concluded by saying "*thank you for giving me the time to respond. At least you and only you are clear of the facts and can summarise without fabrication of events*." Ms Gwilliam signed to confirm that she had read this document on that day, and the claimant and she signed the notes of the meetings on 10 and 13 March 2014.

11.44 On 26 March 2014 there was another staff meeting which was attended by the claimant at which the minutes of the meeting on 5 March 2014 were read out and approved. Future extra activities were discussed such as photography and a client holiday which the claimant was to look into.

11.45 On 4 April 2014 the claimant was undertaking an induction at the respondent's premises in Warwick and Mrs Gwilliam gave the claimant a copy of the Policy which she told the claimant to look at prior to a meeting the following week. She thought the induction process was a good opportunity to give the claimant the chance to read it for herself and reflect on its contents. The claimant declined to stop being friends with AP and was advised to read the Policy so she could see why the friendship was inappropriate. She repeated she would not stop being friends and Ms Gwilliam asked her again to read the Policy and if she was refusing to stop being friends they would need to look at other options. The claimant asked what options .Ms Gwilliam said that if the friendship did not cease she may need to stop working at Netherfield .The meeting was provisionally arranged for 9 April .The claimant asked if she could be represented at the meeting but Ms Gwilliam declined her request .She asked that the claimant read the Policy as a priority preferably that day as she was carrying out her induction. Ms Gwilliam became frustrated at the claimant's reaction to their discussion. Following it the claimant went home early because she was ill. Her evidence in reply to a question from the tribunal was that she did not think she had ever read the Policy.

11.46 On 7 April 2014 there was a discussion between the claimant and Mrs. Gwilliam concerning the Policy and AP (of which typed notes were made by Mr Gwilliam) in which the claimant confirmed she had both read and understood it. We conclude on the balance of probabilities that by this time the claimant had indeed read the Policy. AP already had the claimant's telephone number and it was agreed that telephone contact could continue until an alternative person could be provided for provide out of hours crisis support. However the claimant was told not to have contact with service users outside her normal duties and if she was unsure what to do she should speak to management. On that day she took it upon herself to write to the Community Rehab Team about a service user (RP) to tell them that despite their request that she do so she was unable to accompany RP to a meeting with them because her request to Mr Ratcliffe and Ms Gwilliam had been refused.

11.47 On 8 April 2014 the claimant attended a return to work interview with Mr. Ratcliffe following her absence on 4 April 2014.Mr Ratcliffe filled in a Back to Work form and recorded that her health problem was management upsetting her causing 'undue distress ,causing me to be unable to continue with my induction.' She identified the perpetrator as Ms Gwilliam. She told Mr Ratcliffe that she had been made to feel very small spoken to aggressively and told she would lose her job. The claimant was annoyed that when she was told her absence was being taken into account as part of her Bradford Factor score and she refused to complete or sign the form. She wanted to take it home .Mr Ratcliffe refused and said it had to be completed in the meeting .She asked again to take it home and again Mr Ratcliffe refused. When she asked again he told her the meeting was over.

11.48 On 10 April 2014 while the claimant was out shopping she received a telephone call from MW's sister asking her to attend his home because of a flood. She went to the premises and her presence there was observed by a fellow employee of the respondent who told Mr Radcliffe about it.

11.49 On 11 April 2014 the claimant was still undertaking her induction at the respondent's premises .She asked Mr Ratcliffe for a copy of her job description which she needed to complete a part of the process. The claimant's personnel records were not located at the respondent's premises and Mr Radcliffe could not put his hand on the claimant's job description so he gave her a copy of a generic Netherfield job description for a Support Worker which he had been able to find. It stated the purpose of the post was:

> It also said that it would be advantageous to be a car *"To provide, as a member of a staff team, high quality support and care to the clients within the service."*
>
> driver or have access to transport as the service delivered may be on an "*Outreach basis*" and said duties may include support with personal care.

11.50 As part of her induction the claimant completed two induction workbooks (Standard 1 "role of the health and social care worker" and Standard 2 "personal development ") on 11 April 2014.

11.51 In the Standard 1 workbook the claimant was told to be aware of ways in which her relationship with an individual must be different from other relationships. In particular she was reminded that she had a professional duty of care to the individuals she supported which was different to the relationship she had with her friends and family. She was told that some of the ways in which she could maintain professional boundaries were "Do not form inappropriate intimate or personal relationships with individuals." She was told that her employer might

have a Code of Conduct policy which would inform her of her professional boundaries and was advised to locate and read her employer's code of conduct policy. She was told she might wish to discuss professional boundaries with her supervisor/manager. In the workbook questions she was asked to explain how her relationship with the individuals she supported differed from her relationship with her friends. She replied "*we have a professional duty of care to the individuals we support which is different to the relationships we have with family and friends. Our role is to guide and support to help them live as independently as possible. We should listen carefully and never put pressure on them'*. She was also asked to explain why it was important to follow policies, procedures or agreed ways of working. She replied "*because they are agreed ways of working for best practice. They are to benefit and protect us and the individuals we support and our employer. They enable a provision of good quality of service within the legal framework and aim to keep us and service users safe from danger of harm and us to deliver professional service"*. She was asked what would happen if she did not follow agreed ways of working relevant to her role. She replied "*we could potentially cause harm to ourselves or others and could find ourselves subject to capability or disciplinary procedures which could lead to dismissal or even prosecution if the law is broken*." She went on to say that up-to-date policies procedures and details of agreed ways of working relevant to her role were available at her place of work. We conclude that by 11 April 2014 the claimant had not only read but understood the Policy.

11.52 That same day the claimant was asked but declined to attend what Mr Ratcliffe described to her as a 'little chat' with him because as he put it 'something else had cropped up'. The 'something else' to which he was referring was the MW incident the previous day which indicated that she had had contact with a service user outside normal working hours despite her conversation with Mrs Gwilliam on 7 April 2014. The claimant wanted to continue with her induction and declined to attend a meeting without prior notification and an agenda. Mr Radcliffe immediately took advice and later that day handed the claimant a letter inviting her to attend an investigation meeting with him on 15 April 2014 stating that the purpose of the meeting was to give her the opportunity to provide an explanation for attending a client's house outside normal duties. If she had any queries she was asked to contact Mr Ratcliffe. She later wrote to Mr Ratcliffe on 11 April 2014 and asked what representation she could have if it was not a disciplinary meeting and she would wait for the response before seeking legal advice.

11.53 On 15 April 2014 the claimant did not attend work because she was ill.

11.54 When the claimant did not attend work on 15 April 2014 Mr Ratcliffe sent her two texts and left a voicemail .He then received a text from the claimant's daughter telling him the claimant was ill and her fit note (which had been hand delivered and put in the respondent's post-box but had not been found there)

was located .He wrote to her that day to confirm she was not entitled to a representative at the investigation meeting and to tell her that he was sorry to hear that she was now off work with work related stress and since she had been unwell since the invite it might alleviate it if she attended the investigation meeting. He asked her to clarify by 25 April 2014 whether she was well enough to attend such a meeting.

11.55 Having taken advice from a solicitor on 17 April 2014, on 22 April 2014 the claimant wrote to the respondent agreeing to attend the investigation meeting when her GP advised she was well enough to do so .However she expressed the view Mr Ratcliffe was not the best person to carry out the investigation. She gave her reasons which were:

Since September 2013 no activity plans or structure were in place for staff members creating a culture of '*mediocrity*';

December 2013 he had sworn at her which she had not reported because she thought it was dealt with in workplace supervision which had never materialised;

February 2014 her senior support role was removed without explanation (she implied this had the effect of stopping the multi agency liaison in which hitherto she had participated) and he had relieved her of the role of and responsibility for attending meetings and outreach work;

8 and 10 April 2014 Mr Ratcliffe's conduct of her return to work interview;

11 April 2014 Mr Ratcliffe provided her with a job description which was not hers and then asked her to attend a meeting which she declined to do without prior notification or agenda .She had carried on with her induction but he had then given her a letter inviting her to attend an investigation meeting and sarcastically thanked her;

Mr Ratcliffe treated other members of staff differently; he goaded criticised and had no respect for her;

he had a personal vendetta towards her and his bullying had worsened after the takeover;

15 April 2014 when signed off sick she had received two texts and a voicemail then a letter targeting her about the investigation and requiring a response by 25 April.

She asked that a more senior member of staff conduct the investigation.

11.56 On 25 April 2014 Ms Hawkins (a manager at the respondent) wrote to the claimant to ask her to confirm by 2 May 2014 if she wanted to raise a formal grievance and enclosed a copy of the respondent's grievance procedure. The claimant replied that when her GP said she was fit to resume work she would engage in correspondence about the investigation and formal grievance subject to clarification of who she was dealing with and the policies which applied.

11.57 On 30 April 2014 Ms Plant sent the claimant a letter enclosing the Netherfield occupational sick pay scheme.

11.58 On 8 May 2014 Ms Hawkins sent the claimant a letter about the investigation meeting and the grievance meeting and the claimant's absence from work. She said the concerns raised would be dealt with in the first instance through the grievance procedure and she would chair the grievance meeting.

11.59 On 12 May 2014 the claimant wrote to the respondent to repeat she would engage in both the investigation and grievance once her GP said she was fit to return to work. She said her grievance would be dealt with after the investigation and asked who she would be dealing with as far as the investigation was concerned.

11.60 On 19 May 2014 there was a meeting with AP at her request in which she expressed concerns about the claimant and Mr Liggins and texts she had been receiving telling her not to trust anyone and not to say anything. AP had received a text from the claimant and while she was with Mrs Gwilliam AP rang her. AP became distressed and the call was terminated by Ms Gwilliam. The claimant rang AP back. Mrs Gwilliam answered it and the claimant put the phone down without speaking. That same day the respondent received an email from AP's daughter who was worried about her mother and contact she had been receiving from the claimant during her absence from work. Mrs Gwilliam was not expecting that there would be contact of any form between the claimant and service users while she was unwell and absent from work

11.61 On 20 May 2014 AP showed Ms Gwilliam a text she had received from the claimant the previous evening which said '*Don't worry its ok, we haven't seen each other so don't worry its ok,hope u r ok now x*'.

11.62 On 20 May 2014 the claimant took an overdose and was admitted to intensive care. She was in hospital until 27 May 2014 and was signed off work with work related stress until 3 October 2014. Mr Liggins rang the respondent's CEO (Mr Harvey) 11 times immediately after the claimant's admission to hospital but was unable to speak to him. Eventually he was able to make contact with Mr

Crowther. We accept Ms Gwilliam's evidence that Mr Harvey rang her on 24 May 2014 about the messages he had received about the claimant while his phone had been off .Mr Porter and Mr Crowther sent the claimant a get well card. The claimant was vehement in her evidence under cross-examination that she had resolved never to return to work after her hospital admission.

11.63 In May 2014 the respondent notified Warwickshire Safeguarding Team which informed the police of the allegations made by AP.

11.64 On 23 May 2014 Ms Plant sent a memo to the claimant with her pay slip to say she was not entitled to company sick pay from 14 May 2014 so £812.50 had been removed from her pay and that she would be paid statutory sick pay only. She did not respond to that letter in correspondence with the respondent on 11 June 2014 or thereafter until the presentation of her claim to the tribunal. Her evidence about having received it and other correspondence from the respondent was very vague and she conceded she could not (entirely understandably given her health) remember that period of time.

11.65 On 23 May 2014 Heart of England Mencap (which also employed the claimant) suspended her.

11.66 On 2 June 2014 the claimant received a telephone call from the police (CID) to inform her no action would be taken by them. The claimant had not been aware of any such investigation and was very upset by the call.Mrs Gwilliam had asked the police not to tell the claimant the outcome of their investigations because of her concern for AP who she believed to be quite frightened of the claimant at this time.

11.67 On 10 June 2014 Heart of England Mencap informed the claimant her suspension was lifted.

11.68 On 13 June 2014 the respondent invited the claimant to attend an informal welfare meeting.

11.69 On 18 June 2014 AP alleged to a support worker the claimant had shaved her on an intimate part of her body and she had gone for meals with the claimant.

11.70 On 11 July 2014 AP alleged to Mr Ratcliffe and Ms Gwillliam she had given the claimant money while they were out and bought her presents about the claimant.

11.72 On 11 July 2014 the claimant's local MP wrote to the respondent on behalf of the claimant.

11.72 As a result of that contact on 15 July 2014 the respondent wrote to the claimant asking if she was ready to engage with them. On 24 July 2014 the claimant's local MP wrote to the respondent to say the claimant would not attend an investigation meeting until she was advised of the allegations which had been made against her.

11.73 On 25 July 2014 AP alleged to Ms Gwilliam that the claimant had told her personal information about other service users and that she suspected she had told Mr Liggins things about her.

11.74 On 31 July 2014 the claimant was invited to an investigation meeting to be conducted by '*an impartial Employment law Consultant for the Peninsula Business Services HRF2F service'*. The purpose of the meeting was said to give her the opportunity to provide an explanation for the following matters of concern;

> '*Serious insubordination*
>
> *Serious breach of professional conduct*
>
> *Serious breach of the Professional Boundaries Policy*'.
>
> Possible outcomes were said to include the pursuit of a formal disciplinary procedure or that there were no grounds for it.
>
> The respondent retained HR Face2Face (a division of Peninsula) on terms and conditions which included the following: '*To ensure that any recommendation was fair and reasonable, the Consultant will conduct the process on an impartial basis .This means any recommendation will be based on an objective assessment of the evidence and the circumstances, irrespective of any existing commercial relationship between the Customer and the Provider*.' Further it was expressly stated that no warranty was given to the respondent that it would get any particular recommendation from HRFace2Face.

11.75 On 5 August 2014 the claimant responded to the invitation saying querying how the use of Peninsula was to be funded by the respondent and the impact this would have on the impartiality of any outcome. She also insisted '*on these [allegations] being clarified in the clearest detail by listing events, names ,dates ,times, locations etc to enable us to prepare a robust and vigorous defence of my character and work record*'. She said she had '*every intention'* of attending the meeting once she had the details in full and had time to prepare the defence.

11.76 On 19 August 2014 the claimant wrote to the respondent to confirm that she did not accept that HRFace2Face would be an impartial chair. She asked for details of the allegations against her.

11.77 On 26 August 2014 the claimant was invited to attend an investigation meeting. She wrote to the respondent again on 29 August 2014 and said she would attend a '*fully transparent, impartial and independent meeting once all the detail of the allegations had been provided* 'and had been given enough time to prepare a defence .She suggested the meeting be conducted by an organisation '*completely independent of either side*'.

11.78 On 3 September 2014 Ms Gwilliam wrote to the claimant to say the meeting was not a disciplinary but an investigation meeting to decide whether disciplinary proceedings should be instigated; the details would be discussed during the meeting and if there was such a meeting all the evidence would be provided well in advance and allowed time to prepare a defence and comment on any of that evidence. The investigation meeting due for 5 September 2014 was postponed since the claimant could not be compelled to attend it while on sick leave. The letter also explained that the investigation would be carried out by a dedicated team separate from the department that advised the respondent. It was an additional and separate service offered and she had been assured it would be carried out impartially. She told the claimant there was no obligation on the respondent for there to be an investigation by someone outside it but she felt it was better for an impartial consultant from Peninsula to do so rather than someone within it.

11.79 On 8 September 2014 the claimant wrote to Mrs Gwilliam to reiterate she would attend the investigation meeting when the details requested had been provided and expressed the view that '*both organisations are bound by association*' and could '*bring transparency to this dispute*' and that her viewpoint was supported by a letter which the claimant had sought from her GP dated 4 September 2014 written to the respondent referring to the claimant's request that to be accompanied in any work related meeting by Mr Liggins and that any further investigations be carried out by an independent and impartial external agency to prevent any more stress. The GP was '*happy*' to support that request and hoped they were able to accommodate it. The claimant also mentioned that she had received no further communication about her grievance. Under cross-examination she denied that she had raised the issue of her grievance 'out of the blue' and said it had just come into her head at this time. We did not find that evidence credible.

11.80 On 22 September 2014 the claimant commenced a phased return to work to Heart of England Mencap only.

11.81 On 24 October 2014 the claimant was invited to an investigation meeting on 14 November 2014 before Mrs Yardley-Bennett (described as an independent care advisor with no links to the respondent) with a note taker in attendance. The allegations to be investigated were:

> The claimant was upstairs in a male service user's home outside of her working hours;
>
> she contacted a service user while she was off work sick;
>
> she contravened a direct management instruction not to contact service users outside her working hours;
>
> she willingly breached the Policy in meeting and contacting service users outside of her working hours;
>
> she breached the Policy by fostering a client's belief that she and her partner (Mr Liggins) were their "friend" in addition to a carer;
>
> a service user was invited to an evening meal with her and her partner Mr Liggins outside of her working hours in breach of the Policy;
>
> she accepted gifts of ornaments and money from a service user;
>
> she did not declare that offers of guests and money had been made to her;
>
> she had an inappropriate conversation with a service user in which she indicated that the respondent was only interested in people with learning difficulties and would attempt to withdraw support for people with mental health issues;
>
> she sent inappropriate text messages to a service user in which she told them not to trust anyone at the respondent;
>
> both she and her partner Mr Liggins attempted to intimidate a service user into making them promise not to report to the respondent or anyone "about you all going out together"
>
> she had a conversation with a service user, advising her to stop taking antidepressant medication;

she had inappropriate conversations with a service user of a sexual nature, detailing sexual acts, in breach of the Policy;

she exercised undue pressure on a service user to allow her to shave their pubic hair in contravention of the Policy;

she did shave the pubic hair of a service user (not detailed in their care plan or an act which she was authorised to carry out);

she disclosed personal information regarding a service user to her partner Mr Liggins in contravention of the respondent's Confidential Policy;

she disclosed personal information regarding Netherfield's clients to a service user, in contravention of the respondent's Confidential Policy.

The respondent agreed to allow the claimant to be accompanied at the investigation meeting by a fellow employee or trade union representative although it was an investigation meeting but not Mr Liggins because he was named in the allegations .If she wished to be accompanied by anyone else they would consider this. They suggested holding the meeting at a neutral venue and asked to be informed of any other reasonable adjustments so this could be considered.

11.82 Mrs Yardley-Bennett was chosen because Mrs Gwilliam needed help in identifying a suitable chair and Mr Ratcliffe had called his sister who also worked in the care industry to see if she knew anyone .Mrs Gwilliam felt it had to be someone who did not know her and she had worked in the area for over 20 years. Mr Ratcliffe's sister suggested Mrs Yardley-Bennett. Mrs Gwilliam had never met her neither had Mr Ratcliffe; she had joined Ingleby Care after his relationship with the Ingleby Foundation ended.

11.83 On 3 November 2014 the claimant wrote to the respondent expressing her shock and disgust at the above allegations. She said it was her GP who had requested an independent chair and complained that Mrs Yardley –Bennett was linked to the respondent because she had previously had dealings with Ingleby Foundation for which current employees of the respondent had previously worked which showed a complete lack of impartiality and transparency. She did not want to be accompanied by anyone other than Mr Liggins. She complained of a clear personal agenda against her and Mr Liggins while hiding behind a safeguarding issue. She accepted under cross examination that her GP had supported the request she made rather than made the request himself and said her letter was wrong and she had made a mistake.

11.84 On 5 November 2014 Mrs Gwilliam clarified in a letter of that date to the claimant that Mrs Yardley –Bennett had worked for Ingleby Care which she said was a completely different organisation from Ingleby Foundation .She maintained the view Mr Liggins was not appropriate to attend but she was happy to extend the right to be accompanied to a family member or friend. The claimant was assured there was no prior agenda .The meeting would be held at a venue opposite Netherfield House on 14 November 2014.

11.85 On 7 November 2014 the claimant again complained that Mrs Yardley-Bennett was to chair the meeting because current employees of the respondent were by association connected to the '*former Ingleby group of companies*.' She would be accompanied by Mr Liggins .She said by naming him in the allegations he was '*absolutely insistent that he will attend all meetings that I am involved in*.' She concluded by saying that when the respondent had identified a suitably impartial and transparent chair '*we will attend at any time and location without the need for reasonable adjustments*.'

11.86 Mrs Gwilliam reiterated the points she had previously made in a letter to the claimant of 7 November 2014 and confirmed Mrs Yardley Bennett would chair the meeting on 14 November.

11.87 On 10 November 2014 the claimant wrote to the respondent to say Mr Liggins would be the only person accompanying her to any meeting. She could not be responsible for the respondent's ineptitude in failing to identify an impartial and transparent chair. Once there was a suitable chair she and Mr Liggins would attend any meeting at any time and location. She also reminded Ms Gwilliam of the outstanding grievance against Mr Ratcliffe. Under cross-examination she said that it must have been by mistake that she said in this letter (co-authored by Mr Liggins) they would attend any location and the grievance (which had last been mentioned on 8 September 2014) had once again just come into her head. We found that evidence disingenuous.

11.88 Mrs Gwilliam wrote back to the claimant on 11 November 2014. She reiterated her position as far as Mr Liggins was concerned and again reassured the claimant there was no prior agenda. The meeting would take place on 14 November at a venue opposite Netherfield House chaired by Mrs Yardley Bennett. If the claimant chose not to attend the investigation it would be continued in her absence and the respondent would write to her with the outcome. She preferred that the claimant attended the meeting at the input would be invaluable in reaching the outcome. She reminded the claimant that the claimant had said in her letter of 12 May that she wanted the investigation to take place before her grievance was addressed. She had now arranged for the grievance meeting to take place on 21 November at Netherfield House chaired by Helen Hawkins and informed the claimant of the right to be accompanied at that meeting by a fellow employee or trade union representative.

11.89 On 13 November 2014 the claimant wrote to Mrs Gwilliam describing the allegations "*horrendous and despicable*" and having "*no truth whatsoever*." She was unable to cope with any more stress and unable to face any meeting without Mr Liggins who would sit quietly by her side to support her. Her daughter would attend to take minutes for her during any meetings. She now said she could not face any meetings at Netherfield House or anywhere in its vicinity. She complained again that Mrs Yardley Bennett was not a suitable chair because Jean Miller (assisted by Nathan Williams) was her line manager for a period of time and they would be known to Mrs Yardley -Bennett alongside other current members of the respondent's staff. The claimant accepted under cross-examination she had never met Jean Miller. She also accepted that it was reasonable for the respondent to investigate allegations of the type AP had made and for a disciplinary hearing to follow if thereafter there was found to be a case to answer subject (in her opinion) to the provision of an independent and impartial chair.

11.90 On 18 November 2014 the respondent wrote to the claimant to request her consent to approach Health Assured (another division of Peninsula which provides occupational health assessments) to provide an occupational health report on her state of health so that her fitness for and likely return to work the effect of her.condition on normal day to day activities and any reasonable adjustments to help her return could be assessed. It also said that if the evidence indicated that the claimant was unlikely to return to work in a reasonably near future the respondent might have to consider terminating her employment. The claimant was unaware that Health Assured was in any way associated with Peninsula. A separate letter was written to her about her grievance. Ms Gwilliam asked her if she was now ready to proceed with a formal grievance meeting and if she would like to suggest a suitable venue. The claimant replied on 24 November 2014 saying she was waiting for legal advice (she had been taking advice from a firm of solicitors (Slater and Gordon) for some time). She was chased for a response on 1 December 2014 in which Mrs Gwilliam again explained that although she had the right to refuse the request such refusal meant the respondent might have to make decisions about her future employment without the benefit of appropriate medical evidence and advice. She was told that if she decided to refuse a meeting would have to be arranged to consider her continuing sickness absence at which the lack of information could be detrimental to her interests and obstructive to both parties. She was invited to contact Ms Gwilliam if she wanted to discuss the matter and either way let Ms Gwilliam know her decision by 12 December 2014. The claimant told Mrs Gwilliam in a letter of 4 December 2014 that she had not been able to get legal advice because of her representative’s extremely heavy caseload.

11.91 On 16 December 2014 Ms Gwilliam wrote to the claimant again to tell her that she could be accompanied at the Occupational health assessment by Mr Liggins which was entirely separate from the investigation meeting and to tell her

a medical capability meeting was arranged for 16 January 2015 .On 9 January 2015 the claimant agreed to the occupational health review. Notwithstanding she said under cross-examination that it had not been fair for the respondent to seek such a report on her ,the respondent just wanted to get her alone in a room and she did not trust and had no confidence in it at this point**.**

11.92 Eventually on 4 March 2015 the claimant (accompanied by her friend Ms McHendry) attended the occupational health review meeting with Dr Barhey (instructed by Health Assured) who prepared a medical report upon her in order (among other matters) to establish if she was fit to attend an investigation meeting and what provisions needed to be taken to ensure the claimant's welfare. Dr Barhey set out what he had been told by the claimant and Ms McHendry about the background to the referral. He said the claimant's problems began in February 2014 when the respondent took over Netherfield .He said she had been bullied by her manager. Dr Barhey recorded that the claimant had been informed by the police in June 2014 that no further action would be taken against her and that the allegations against her had been disproven. He said that in his opinion the claimant was being entirely reasonable about the provisos sought before attending a meeting with the respondent .These were:

> An independent chairperson (because the manager who had been verbally aggressive to her was going to chair the meeting previously);
>
> A neutral venue;
>
> To be accompanied by a support person -this could 'certainly include her partner.'
>
> The rationale for the latter was Dr Barhey's belief that the police had investigated the issue and found no case to answer so 'the safeguarding issue regarding her partner is irrelevant now.'
>
> The above were described as '*reasonable adjustments*' but it was said '*the employee is not covered under the disability provisions of the Equality Act 2010'.*The report concluded that the results of the meeting and '*a favourable outcome'* would say whether she could give reliable and effective service in the future and the claimant was fit to attend an investigation meeting subject to the above provisos. The diagnosis was work related stress; she had had no further investigations since her stay in hospital. She had had a short course of sleeping tablets but on no current medication and was receiving no counselling. He said her condition was completely related to work and her work environment. The claimant accepted under cross-examination that Dr Barhey had reached his

conclusions based on the information which came from her but denied having told him she would be able to work in the future subject to being cleared .She had not however checked the contents of the report to ensure its accuracy. We conclude that on the balance of probabilities Dr Barhey did reach his conclusions concerning her ability to work in the future as depending on her being given a favourable outcome on the basis what the claimant told him.

11.93 On 31 March 2015 the claimant was invited to attend a grievance meeting. By a separate letter of the same date she was invited to an investigation meeting on 10 April 2015 at the Gap Community Centre Warwick (a neutral venue) chaired by Mrs Yardley Bennett. The respondent explained it disagreed with Dr Barhey's view that the allegations against the claimant had been disproven. That the police had decided to take no further action did not mean that the respondent's internal investigation had no merit. However in the interests of concluding matters Mr Liggins was permitted to attend but he was not to answer on the claimant's behalf. The allegations to be investigated and for which she would be asked for an explanation were that:

11.94 On 6 April 2015 the claimant wrote to Mrs Gwilliam to accuse the respondent of prevarication as far as the investigation meeting was concerned. The neutral venue was accepted but Mrs Yardley Bennett was not. She was rejected as an impartial transparent and independent chair nor would the claimant accept any restrictions being placed on Mr Liggins' attendance. The claimant stated that she would attend the investigation meeting when the following conditions had been met:

a) an impartial transparent and independent chair ie one with no connection either directly or indirectly with the respondent; and

b) no restriction whatsoever on Mr Liggins' attendance or participation; and

c) confirmation of their own note taker facility.

She also wrote separately to repeat that the investigation meeting must precede the grievance meeting and until it was resolved she would be unable to attend but once 'due process' had been concluded she would be happy to do so.

11.95 On 8 April 2015 Mrs Gwilliam wrote to the claimant to confirm the grievance hearing was postponed until after the investigation had been concluded. The hearing planned for 10 April was cancelled. As far as the investigation meeting was concerned she repeated that Mrs Yardley Bennett was

an impartial chair. The restrictions which had been imposed on Mr Liggins were in accordance with the ACAS code. She was reminded her statutory right to be accompanied had been extended to include the investigation meeting. Her chosen companion's role was to support her during the meeting and take notes if she so wished. It was not reasonable to ask a third party to be present. A copy of the notes taken at the meeting would be provided. She said every attempt had been made to facilitate the meeting over several months and believed that reasonable adjustments had been made to allow the meeting to take place. It would proceed as planned and would be chaired by Mrs Yardley Bennett and if the claimant chose not to attend Mrs Yardley Bennett would take account of any written submissions provided by her.

11.96 On 9 April 2015 the claimant wrote to Mrs Gwilliam to restate once the conditions set out in paragraph 11.92 above were met she would attend the investigation meeting.

11.97 On 10 April 2015 the investigation meeting was conducted by Mrs Yardley-Bennett in the claimant's absence. No written submissions were provided by the claimant. A report was prepared and it was recommended that all allegations be taken forward to a disciplinary hearing. The claimant agreed under cross-examination that Mrs Yardley-Bennett's report was a pretty fair assessment which gave reasons for her findings based on what she had been told by the respondent which since the claimant had not provided any information to her had to be based on that provided by the respondent. The claimant alleges that a letter dated 20 April 2015 about holiday pay and other matters was sent to Ms Plant but the latter denied having received it. We found Mrs Plant a credible witness .The copy in the agreed bundle is not signed in contrast to the voluminous quantity of correspondence she addressed to the respondent in that bundle which was signed. Her explanation under cross-examination was she forgot to do so on this occasion but we conclude on the balance of probabilities that it was a draft and was never sent.

11.98 On 5 May 2015 the claimant instructed another solicitor Ms C Sketchley.

11.99 On 6 May 2015 the claimant was invited to attend a disciplinary meeting on 14 May 2015 at the Gap Community Centre to answer the allegations set out above. In addition however the service users were identified by their initials and there were two further allegations which were that:

> the claimant had inappropriate conversations with AP of a sexual nature with particulars given of the conversations; and
>
> a sexual act between the claimant and Mr Liggins had been described to AP by the claimant.

> The claimant was informed that an impartial 'HRFace2Face' consultant from Peninsula would be provided to chair the meeting and conduct any further investigations. A note taker would be in attendance. She was assured the consultant was impartial and had had no prior involvement in the matter and that it was therefore important that she brought with her any paperwork or other evidence she wanted the consultant to consider. She was warned that if the allegations were substantiated they would be considered gross misconduct and her employment might be terminated summarily. She was informed of her statutory right to be accompanied and told if she did not attend the hearing without good reason her non-attendance would be treated as a separate issue of misconduct. The respondent had been advised by Peninsula to add the two additional allegations.

11.100 On 7 May 2015 the claimant wrote a contentious and intemperate letter to Mrs Gwilliam. She said she had made it clear that the meeting must be chaired in a transparent impartial and independent way '*free from direct or indirect subterfuge'* .The '*disgusting and vile allegations'* were '*vehemently denied* '.The investigation meeting was a '*sham*' where decisions had been made on a *'guilty until proven innocent' basis*. She attributed the delay solely to the respondent and complained that only the neutral venue and Mr Liggins' attendance had been agreed and that their request for a note taker was denied; the reasonable adjustments had not therefore been met. They relished the prospect of facing their accusers but only on a '*level playing field'* something which the respondent did not believe in granting. When asked under cross-examination whether by this point the relationship between the respondent and herself had broken down the claimant retorted that that had been the case since 2013 and that there was no way she would have gone back to work after her admission to hospital.

11.102 The following day however the claimant wrote to say that she would be unable to attend the disciplinary hearing but this was said to be due to her daughter's medical appointment. She asked to be informed of the new date.

11.103 On 12 May 2015 the respondent replied to the claimant and agreed that the disciplinary hearing would be postponed until 22 May 2015, the venue was unchanged and Mr Liggins could accompany her .She was also reminded that if she failed to attend without giving advance notice or good reason her non-attendance would be treated as a separate issue of misconduct. The claimant accepted under cross-examination that she had 16 days to prepare for the hearing.

11.104 On 19 May 2015 Ms Sketchley wrote to the respondent on the claimant's behalf. She raised a number of matters .She said the claimant was currently signed off sick from work. She said the claimant was not receiving discretionary sick pay although she had received it previously on two occasions while

undergoing operations. She contended this had been incorporated into the claimant's contract "*by implication*." She referred to the claimant's grievance of 22 April 2014 which she said appeared to have a direct bearing on the way in which the allegations of misconduct had been treated. She said the allegations had not been made by a competent witness, the police had found no case to answer and the claimant's other employer had reinstated the claimant after a very short suspension of a week. Although she accepted that the respondent was entitled to make a safeguarding notification she accused it of having failed to investigate and reach a reasoned conclusion within a reasonable timeframe which the claimant thought was malicious. She suggested the grievance was investigated as a matter of urgency before the disciplinary hearing took place. She said the correct course of action would be the claimant to be signed back as fit for work and for her to be suspended pending a proper investigation into the allegations followed by the disciplinary hearing. She said that provided the person appointed to hear both matters was impartial the claimant would co-operate fully. She said she had asked the claimant (who she described as keen to clear her name as quickly as possible) to suggest three independent third parties to chair the hearing and in the meantime she suggested that the disciplinary hearing on 22 May was postponed.

11.105 Mrs Gwilliam replied on 20 May 2015.She told Ms Sketchley that the grievance had been postponed until after the disciplinary allegations were dealt with at the claimant's request. The disciplinary hearing would continue as planned and the claimant was expected to attend. If she chose not to do so the hearing would go ahead in her absence and if she wanted to provide any written submissions or evidence for consideration she should do so prior to the meeting. She said the respondent was bound to deal with the allegations following their disciplinary procedure and any delays had not been caused by the respondent but by the claimant. She reminded Ms Sketchley of the adjustments which had been made (even though the respondent did not agree with them) and asked her to put forward her proposal for the chairing of the grievance meeting which would be arranged as soon as possible after receipt.

11.106 On 21 May 2015 Ms Sketchley wrote to Ms Gwilliam. She said the claimant was not well enough to attend the disciplinary hearing. The independent third parties were not restricted to the hearing of the grievance. She did not agree that the grievance hearing had no bearing on the disciplinary, commenting that "*if the facts of the grievance did not exist then I doubt that the other allegations would have ever reached disciplinary stage, neither would Karen have made an attempt on her life.*" If the disciplinary hearing was to proceed in the absence of the claimant she would take instructions about any written submissions. She noted that some of the allegations named Mr Liggins and asked whether she could accompany the claimant instead of him.

11.107 On 22 May 2015 the respondent agreed the disciplinary hearing would be postponed. The claimant was informed that the grievance meeting would be held before Mr Chehal (of HRFace2Face) who was also going to hear the disciplinary. Both would take place on 5 June 2015. The grievance meeting would precede the disciplinary hearing. If the claimant did not wish to attend the meetings would progress in her absence and any written submissions must be provided before 11 AM on 5 June.

11.108 On 1 June 2015 Ms Sketchley wrote to Ms Gwilliam proposing as independent chairs the claimant's other employer (Heart of England Mencap) ACAS or the Citizens Advice Bureau. If none were acceptable the claimant would be prepared to lodge written submissions.

11.109 On 3 June 2015 Ms Gwilliam replied to Ms Sketchley. She told her that contact had been made with ACAS which could not assist. She had not been able to get a response from the Citizens Advice Bureau and did not consider Heart of England Mencap appropriate to chair an internal meeting regarding the respondent. Since the claimant had stated she would proceed with the meetings by way of written submissions she intended the disciplinary and grievance meetings should proceed as planned. The claimant was welcome to attend if she wished. Ms Sketchley confirmed she would provide the claimant's written submissions before 5 June and sought confirmation of the chair of the meeting and who would be attending.

11.110 On 4 June 2015 Ms Gwilliam confirmed that Mr Chehal (who she described as an independent consultant) would chair the meetings and a note taker (Lynne Hughes) would also attend. Ms Sketchley expressed her concern that the independent consultant was not independent but the respondent's employment adviser (Peninsula) which had been advising throughout. She commented that if the meetings were to proceed in the claimant's absence by way of written submissions only provided it was only agreed that a team leader attend as note taker if she played no part in the process. Mr Liggins had offered to attend to take notes on behalf of the claimant but would take no part in the process. She suggested both sets of notes could then be exchanged at the end of the meetings with a copy of each being given to Mr Chehal.

11.111 Ms Gwilliam replied by email that same day. She explained she had been assured Mr Chehal was not part of the advice team at Peninsula and that the two departments operated independently. His investigation and deliberations would be impartial. She reminded Ms Sketchley that the respondent had attempted to provide several chairs over recent months but they had not been accepted by the claimant. They had attempted to utilise the services provided by the two organisations the claimant suggested without success. The respondent felt it had no option other than to proceed on Friday with Mr Chehal. If the claimant was to attend with Mr Liggins then if it was possible to photocopy the notes taken by Ms

Hughes and Mr Liggins copies could be exchanged. If not both parties could sign their notes and forward them later. She made the point that if the claimant chose not to attend she did not see why Mr Liggins should attend solely to take notes. They had agreed to the claimant's right to be accompanied by him as the claimant felt she needed support and as recommended by Dr Barhey but if she chose not to attend Mr Liggins' attendance would be unnecessary. Notes would be provided to the claimant after the meeting.

11.112 Ms Sketchley e-mailed Ms Gwilliam in reply at 17.54 on 4 June 2015 to say she had previous knowledge of Mr Chehal when he had been directly involved in the "*advice side*" of Peninsula. She asked if he had no previous knowledge of the case and said that if so "*in the interests of compromise*" his nomination would be "*reluctantly*" accepted. She said the respondent had the option of adjourning and requesting an alternative and truly independent chair. The respondent had nothing to lose by waiting. She would tell the claimant that the minutes of the meeting would be provided and requested that handwritten notes be scanned and e-mailed to her next day with a typed copy to follow. She also said that if Mr Chehal had any additional questions for the claimant they should be e-mailed to her and she would "*facilitate a response*".

11.113 On 5 June 2015 the grievance and the disciplinary meetings (both chaired by Mr Chehal of HRFace2Face) began in the claimant's absence but were not concluded because at 9:30 AM on that day the claimant presented to the respondent her written submissions running to some 71 pages. These were described by Ms Sketchley in the letter which accompanied them as '*very much in draft form*' and if Mr Chehal needed any additional information to please let her know. Mr Liggins attended the respondent's premises but was not permitted to attend meetings in the absence of the claimant because the intended purpose of his attendance was to enable him to accompany her. The claimant accepted under cross-examination that it made sense that if she was not attending the meeting his attendance was not necessary; he could not go on her behalf.

11.114 On 11 June 2015 the claimant was informed that both meetings were postponed until 19 June 2015.The claimant was asked to confirm if she would be attending the meetings or if she wished to proceed with the claimant's written submissions. It was hoped the outcome would be provided within 10/15 working days from the date of the meetings and if she wanted to attend on 19 June with Mr Liggins she was welcome to do so.

11.115 On 19 June 2015 the meetings were resumed by Mr Chehal, again in the claimant's absence.

11.116 On 13 July 2015 Ms Sketchley drafted an e-mail to send to the respondent but we find on the balance of probabilities it was not received by the

respondent. In it she made a number of complaints but concluded by saying that her client '*will have written to you separately confirming her resignation*.'

11.117 On 14 July 2015 Ms Gwilliam wrote to Ms Sketchley to say the meetings and necessary investigations had taken place, the notes were being transcribed and an outcome produced but due to pre-planned holidays the outcome date could not be met and it was intended it would be sent by the week commencing 3 August .In her reply of the same date Ms Sketchley described this as '*ludicrous and completely unacceptable'* and complained about delay. She said she had a meeting with the claimant later that day and would get back to her then. Ms Gwilliam emailed her to reject the allegation of delay reminding her that the claimant had first been invited to an investigation meeting over twelve months before but said she would ensure the outcome was provided by 20 July 2015.

11.118 On 14 July 2015 the claimant (having taken legal advice) resigned with immediate effect by a letter to the respondent of the same date. She referred to having been given a copy of the respondent's e-mail to Ms Sketchley on 13 July and said "*the only conclusion that can be drawn is one of complete and utter incompetence*" by the respondent. She went on to say:

> "*Your organisation has, over the last 15 months, displayed utter and total contempt for my health and well-being. I have been constantly bullied, harassed and accused culminating in a safeguarding issue being raised against me whilst in the intensive care unit at Warwick Hospital which Way Ahead Support instructed Warwickshire Police not to tell me about.*
>
> *The Companies (sic) arrogance and viciousness is breathtaking. It is clear to see that the length of time it took to get meetings, headings and a full list of the scurrilous allegations against me and my partner which was only achieved following the intervention of my MP. All meetings have been chaired by representatives who in some way have a connection either to the current company or historical links to previous regimes prior to the February 2014 merger.*
>
> *I was never suspended pending any investigation/disciplinary or paid occupational sick pay after May 2014. In contrast Heart of England Mencap with whom I also have a contract of employment suspended, investigated and cleared me for a return to work within a week!!!*
>
> *Following legal advice, written submissions were lodged for the disciplinary meeting of the 5th June. This was adjourned until 19th June. The usual 5 day decision process suddenly became 10-15 days. When that expired I was informed that due to "holidays" a decision is intended to*

be given week commencing 3rd August. As no new evidence was supplied between the 5th and 19th June there can be no possible reason for a delay.

Way Ahead Support Services malicious and devious manipulation of its own policies and procedures has led to a serious deterioration in my health. The constant prevarication involving any decision-making process means that I will have to take this to a higher authority to be resolved and you therefore leave me with no choice but to resign with immediate effect.'

Under cross-examination she said her reference in that letter to the preceding 15 months was incorrect and the conduct of the respondent about which she complained had commenced in 2013. We did not find her evidence on that point credible.

11.119 On 15 July 2015 the claimant commenced Early Conciliation with ACAS and was subsequently issued with a certificate on 15 August 2015.The claimant's resignation letter was received by the respondent on 16 July 2015.

11.120 The respondent had referred the claimant to the DBS in accordance with its legal duty to do so. In the event she was not added to the barred list and the Warwickshire County Council safeguarding enquiry was closed although two allegations (going to see MW when off duty on 7 April 2014 and that after being made aware of the Policy she regularly telephoned AP and asked for information about the respondent and told AP not to trust anyone there) were found proven.

11.121 On 24 July 2015 the respondent sent to the claimant a letter which set out the outcome in relation to her grievance and on 30 July 2015 the claimant appealed that outcome. She attended a grievance appeal hearing conducted by Mr Harvey on 20 August 2015 and was accompanied by Mrs McHendry. The appeal was unsuccessful and the outcome letter was sent to her on 16 September 2015.

11.122 The claimant presented her claim to the employment tribunal on 10 October 2015.

The Law

12 Section 95(1)(c) ERA provides that an employee is dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

13 It was held in the leading case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, t**hat in order to claim constructive dismissal, the employee must establish (1) that there was a fundamental

breach of contract on the part of the employer (2) that the employer's breach caused the employee to resign (3) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

14 In the case of **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 EAT** it was held that: "It is clearly established that there is implied in a contract of employment that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

15 In the case of **London Borough of Waltham Forest v Omilaju [2005] IRLR 35 CA,** it was held that: "In order to result in a breach of an implied term of trust and confidence, a 'final straw', not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective".

16 It is irrelevant that the employer does not intend to damage his relationship provided the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it. It is the impact of the employer's behaviour on the employee that is significant - not the intention of the employer (**Malik**). The impact on the employee must be assessed objectively. In **Niblett v Nationwide Building Society UKEAT/0524/08** His Honour Judge Richardson said, in the context of an employer's conduct of a grievance procedure and whether the implied term of trust and confidence had thereby been broken, that "the implied term of trust and confidence is a reciprocal obligation owed by employer to employee and employee to employer. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It has never

been the law that an employer could summarily terminate the contract of an employee merely because the employee behaved unreasonably in some way. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. In the context of the implied term of trust and confidence, the employer's conduct must be without proper and reasonable cause and must be calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

17 The repudiatory breach does not need to be the sole, nor the principle cause but it must have been the "effective" cause; the tipping point for the resignation (**Jones v FR Sirl & Sons (Furnishers) 1997 EAT)**.

18 Section 39(5) Equality Act 2010 ('EqA') imposes a duty to make reasonable adjustments upon an employer. Where such a duty is imposed sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that duty comprises three requirements. Insofar as is relevant for us, the first of those requirements is that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

19 Section 21(1) EqA states that the failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments. Section 21(2) EqA provides that a failure to comply with a duty to make reasonable adjustments in relation to the disabled person constitutes discrimination by the employer.

20 In **Environment Agency v Rowan [2008] IRLR 20** a case concerning the provisions of the DDA the Employment Appeal Tribunal, His Honour Judge Serota QC, presiding stated as follows:-

> *'27 …..In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:*
>
> *(a) the provision, criterion or practice applied by or on behalf of an employer, or*
>
> *(b) the physical feature of premises occupied by the employer,*
>
> *(c) the identity of non-disabled comparators (where appropriate) and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the Claimant.*

> *It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.' "*

It was held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters at a) to d) above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person at a substantial disadvantage.

21 The Equality and Human Rights Commission has prepared a Code of Practice on Employment (2011) ('the Code').Tribunals and courts must take into account any part of the Code that appears relevant to any questions arising in proceedings. Paragraph 6.10 of the Code suggests that *'provision, criterion or practice'* should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions.

22 The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons.

23 The EqA states that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

24 Once the duty is engaged employers are required to take such adjustments as it is reasonable to have to take, in all the circumstances of the case. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

25 Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;

the extent of the employer's financial or other resources;
the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
the type and size of the employer.

26 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable. Paragraph 19.9 of the Code states that 'Where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability or their conduct, they must consider whether any reasonable adjustments need to be made to the performance management or dismissal process which would help improve the performance of the worker, or whether they could transfer the worker to a suitable alternative role.'

27 As far as knowledge for the purpose of the claimant's claim of a failure to comply with the duty to make reasonable adjustments is concerned in **Secretary of State for the Department of Work and Pensions v Alam [2010]IRLR 283** (EAT) (again a case that preceded EqA) it was held that two questions needed to be determined:
Did the employer know both that the employee was disabled and that his/her disability was liable to affect him/her in the manner set out in section 4A (1) DDA?
Only if that answer to that question is no then ought the employer to have known both that the employee was disabled and that his /her disability was liable to affect him/her in the manner set out in section 4 A(1)?
If the answer to both questions was also negative, then there was no duty to make reasonable adjustments (see also the comments of Underhill P at [37] in **Wilcox v Birmingham CAB Services Ltd [2011]EQLR 810 EAT).**

28 Schedule 8, para 20(1) EqA states that a respondent is not under a duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to .It would seem therefore that the analysis in **Alam** remains good law.

29 However the employer must do all they can reasonably to find out whether this is the case and what is reasonable will depend on the circumstances.

30 At paragraph 6.19 the Code gives the following example:

"A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer queries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the

worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

31 Section19 EqA provides that:

'(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

The relevant protected characteristics include disability.

32 Section 123 EqA provides that:

"(1) Subject to sections…140B, proceedings on a complaint within section 120 (*which relates to a contravention of Part 5 (Work) of EqA*)may not be brought after the end of –
(a) The period of three months starting with the date of the act to which the complaint relates ,or
(b) such other period as the employment tribunal thinks just and equitable .
…..
(3) For the purposes of this section –
(a) conduct extending over a period is to be treated as done at the end of the period:
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

33 Under Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 a claim for breach of contract must be presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim or whether tribunal is satisfied that it was not reasonably practicable for the complaint to be presented in time within such further period as the tribunal considers reasonable. The burden of proof is on the claimant as far as the term of the contract on which the claimant relies the breach of that term by the respondent and the damages that flow from that breach. Terms may be implied into employment contracts if they are regularly adopted by a particular employer. However the custom in question must be reasonable notorious and certain and a one off incident will not be sufficient to establish an implied term. Further a policy adopted unilaterally by an employer cannot be implied by custom and practice unless it is shown that it had been drawn to the attention of employees or has been followed without exception for a substantial period.

34 Under section 13 (1) Employment Rights Act 1996 a worker has the right not to suffer unauthorised "deductions". A deduction is defined as "Where the total amount of wages paid on any occasion by an employer to work employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated . As a deduction made by the employer from the worker's wages on that occasion (section 13 (3) ERA). The determination of what is "properly payable" on any given occasion requires a tribunal to resolve what the worker is contractually entitled to receive by way of wages. Under section 27 (1) ERA "wages" means any sums payable to the worker in connection with his employment, including any fee, bonus, commission, holiday pay or other emolument preferable to his employment, whether payable under his contract or otherwise. "Under section 23 (2) ERA an employment tribunal shall not consider a complaint that an employer has made an unauthorised deduction from wages unless it is presented before the end of the period of three months in the case of a complaint relating to deduction by the employer from the date of payment of the wages from which the deduction was made. Where the tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of three months, a tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable (section 23 (4) ERA).

35 We heard and considered the parties' oral submissions for which we were grateful.

Conclusions

Constructive Unfair Dismissal

36 In relation to this claim the claimant relied on the conduct of the respondent set out in an agreed schedule of 55 incidents ('the Schedule'). During the course of the hearing she amended items 4 24 and 33 and deleted items 28 and 37 of the Schedule. It is for the claimant to prove on the balance of probabilities that each of those alleged incidents occurred. It is only if she discharges that burden (in relation to some or all of the incidents) that we have considered whether the conduct we find took place was a breach of the implied duty of mutual trust and confidence as defined in paragraph 14 above.

37 We must therefore first turn to each of the remaining alleged incidents.

Ongoing lack of supervision /guidance, activity plans and structure -August 2013 to April 2014

38 The claimant has not provided us with any cogent evidence about what supervision /guidance, activity plans and structure were in place prior to August 2013 which ought to have been but were not in place thereafter .We have found that in fact there was a weekly plan of activities (paragraph 11.26); there were to be more activities (paragraph 11.41) and service users' activities and attendance were monitored .The reference to the provision of some activities by external providers indicate that structure and plans were in place. It is obvious that Netherfield post July 2013 was an organisation in a somewhat turbulent state as far as both management and finances were concerned but there is no evidence that from which we could conclude that Mr Radcliffe was not actively line managing the claimant; indeed it appears rather that the claimant was unwilling to be managed and guided by him or Ms Gwilliam. The claimant has failed to prove that the respondent conducted itself as she alleged.

Claimant lacked support from management in relation to 'care 'packages for MW and AP mental health service users-August 2013 to April 2014

39 The claimant relies on two particular instances as set out in paragraph 11.17 above. However there is no evidence that there were in place for the individuals concerned 'care packages' which the respondent was obliged to provide .We conclude that the claimant had over the years taken it upon herself to provide certain services to certain service users who attended the day centre and she was unwilling to accept any change to or diminution of those services which the respondent for its part felt it was inappropriate to provide for the reasons given by Mr Radcliffe. Management are unlikely to (nor is it reasonable to expect) support 'care packages' which do not exist. The claimant has failed to prove that the respondent conducted itself as she alleged.

Claimant's request for medication training denied - September/October 2013; Schizophrenia, autism and diabetes training denied to the claimant that other staff members were allowed to attend-15 November 2013

40 The claimant did not provide any details of when or the circumstances in which Mr Ratcliffe denied her training or what he said to her .There is no evidence before the tribunal from which the tribunal could conclude that the training took place or that Mr Heydon attended it .Mr Dooley did not attend the tribunal and only one of his four witness statements was signed. It does not corroborate the claimant's evidence that Mr Heydon attended the training. The transcript of the conversation which the claimant says she had with Mr Dooley was not signed or agreed by the respondent nor did the claimant disclose the recording of the conversation nor did we hear it in tribunal. The transcript itself reveals that the claimant was leading Mr Dooley to agree with the version of events she put to him. Very little weight can be given to either Mr Dooley's signed witness statement or the transcript in those circumstances. There is no contemporaneous documentary evidence to corroborate the claimant's allegations. In contrast we have heard evidence from Mr Ratcliffe and found his evidence clear concise and credible. We have no hesitation in preferring his evidence to that of the claimant. She has failed to prove that the respondent acted as she has alleged.

Julia Gandy was employed by Nathan Williams and allocated some of the claimant's work. She was paid a higher salary even though she was unqualified and Roger Hayden was then given training which was denied to the claimant-September/October 2013

41 Julia Gandy did not become an employee until 3 January 2014.Prior to this the respondent paid to the agency which supplied her rate which had been set by the agency. Thereafter she was paid the same salary as the claimant. We have concluded that she was not allocated some of the claimant's work; rather she and the claimant over time performed similar duties but there is no evidence that she did so to the exclusion of the claimant. We have already concluded that there is no evidence before the tribunal from which we could conclude Mr Heydon had attended training in September /October 2013 which the claimant had been denied. The claimant has failed to prove that the respondent conducted itself as she alleged.

Commentary made regularly to belittle and ridicule the claimant e.g. "it'll be your fault", "it'll be your age", "is not surprising your age"-September 2013 to April 2014
Comments made in relation to claimant's chest size and her age-August 2013 to April 2014

42 As far as the belittling and ridiculing commentary allegedly made in September 2013 to April 2014 is concerned neither this allegation nor the

claimant's evidence in chief provide any cogent details such as frequency or the date (or approximate date) on which they were made. Mr Ratcliffe's evidence that no such comments were made was not challenged in cross-examination. There was no contemporaneous corroborative documentation in the bundle of documents. It would be reasonable to expect that the claimant would have included such details in the grievance she raised on 22 April 2014 which raised a number of historic concerns she said she had about Mr Ratcliffe .If the commentary had been going on since September 2013 the claimant who was not in any way inhibited in making her views known in the workplace (see paragraph 11.17 11.22 and 11.43 above) would not in our judgment have delayed until 22 April 2014 to complain and would have provided chapter and verse. The allegation that comments were made about the claimant's chest size and age from August 2013 to April 2014 is also wholly lacking in detail and the (two) diary entries with a symbol (which is in any event self-serving evidence) do not provide any evidence that any such remarks were made by Mr Ratcliffe let alone what was said and in what circumstances. Again if there was a history of such 'extremely personal remarks ' (as alleged by the claimant in her evidence in chief) it would be reasonable to expect complaints would have been raised by her well before 22 April 2014 but even then no such complaint is made about them in the grievance of that date. The claimant has failed to prove that the respondent conducted itself as she alleged.

<u>claimant undervalued as, in her absence, notes were not kept in relation to her clients (AP) and meetings were missed. This caused a phenomenal amount of work to the claimant on her return-10 October 2013 onwards</u>

43 The claimant cited one example of this in her evidence in chief in which she alleged that on 10 October 2013 Mr Ratcliffe attended an appointment with AP on that day but failed to make any notes although medication changes were implemented by AP's consultant which caused her a 'phenomenal amount ' of work as a result. There was no evidence before that even if this was the case the situation continued thereafter or how any such failure occasioned the claimant any additional work let alone a 'phenomenal amount.' Mr Ratcliffe's evidence was that service users were self-medicating and the only assistance AP needed was numbing cream for blood tests which was not missed. Again the claimant has failed to prove that there was a meeting or that Mr Ratcliffe acted as she has alleged or that it had the consequences she alleged. Further there is no explanation provided how Mr Ratcliffe's alleged omission demonstrates her contention that she was undervalued.

<u>Claimant's title of 'senior" support worker removed. Claimant forced to sign new contracts of employment and told "that was the way it was"-November 2013</u>

44 Under cross-examination the claimant described her reference in her grievance dated 22 April 2014 to the removal of her role of senior support worker as having taken place in February 2014 as a 'mistake'. In our judgment in the

light of our findings at paragraph 11.18 above on the balance of probabilities the claimant was seeking at the time she presented that grievance to link removal of her role to the time of the TUPE transfer on 1 February 2014 and to distance herself from the pre TUPE transfer change in her job title in November 2013 to which she had raised no objection at the time. There is no evidence to support her contention that she was forced to sign her new contract or told by Mr Ratcliffe that 'that was the way it was'; certainly her manuscript note does not refer to either point and rather indicates oversight on her part rather than coercion or misrepresentation by Mr Ratcliffe. The claimant has failed to prove that the respondent conducted itself as she alleged. We conclude that her job title was changed in November 2013 and with her consent.

claimant pressurised to sign statement under TUPE Regs in readiness for the merger to confirm that she had no claims against the organisation. Document not explained to her and not given the benefit of legal advice-December 2013

45 The claimant alleges that it was Mr Ralph who acted as set out above. There is no evidence to support the claimant's allegation that she was pressurised by him to sign any statement in December 2013. She was asked to sign to a copy of the letter of 17 December 2013 if the information contained in it was correct. She did nothing so the information was duly passed to the respondent in the letter of 6 January 2015.The process to be followed had been explained to the claimant (together with her fellow employees) at the AGM on 12 December 2013 and the letter of 17 December 2013 was clear. There is no requirement on either transferee or transferor to provide legal advice to transferring employees and if the claimant had required legal advice about her position she could have made efforts to obtain this or sought more time to do so but she did nothing and the non-provision of such advice cannot in our judgment (on its own or taken into account with other matters) amount to a breach of the implied duty of mutual trust and confidence on the part of the respondent.

Claimant was told to "fuck off"-December 2013

46 It is common ground that this offensive remark was made by Mr Ratcliffe (a manager) to the claimant (his junior) in December 2013. 46 It is common ground that this offensive remark was made by Mr Ratcliffe (a manager) to the claimant (his junior) in December 2013. In our judgment the fact that Mr Ratcliffe was not an employee may explain why disciplinary action was not taken but does not explain why no action was taken to either terminate his contract for services or warn him that if there was any repetition that contract would be terminated .However the claimant did not want to raise a grievance about it at the time and only brought it up after Mr Ratcliffe had asked her to attend an investigation meeting into an allegation of potential misconduct. We conclude that a single offensive remark made by a manager to an employee when frustrated (though reprehensible) is not sufficient (without more) to amount to a breakdown in the implied duty of mutual trust and confidence. However if we are wrong in that

conclusion the claimant remained in employment working with Mr Ratcliffe thereafter and raised no complaint until 22 April 2014 as part of her stated reasons for wanting him removed as investigator. If the remark in question did amount to a breakdown of the implied duty of mutual trust and confidence in December 2013 we conclude that by remaining in employment until 14 July 2015 the claimant has delayed too long and affirmed the contract of employment.

Some of the claimant's responsibilities were removed ie outpatient appointments, meetings with consultants,CPNs SW Community MH Teams and given to Julia Gandy-November /December 2013

47 It would appear that over time the claimant had taken upon herself the provision of a variety of support services for service users the ambit of which was unclear to us. We have no doubt that service users were happy to accept those services .There is no evidence that her employer had asked her to do so but equally no evidence that she was asked to desist. Ms Gandy provided similar services. There is no evidence that the claimant objected to this work being done by Ms Gandy at the time; indeed when she raised the issue of aspects of her role being removed from her on 22 April 2014 she did not mention Ms Gandy at all. In any event as the claimant was aware from the minutes of the meeting of 5 March 2014 the respondent was seeking to confine the services it provided to those of a day centre not an outreach service. The claimant may not have welcomed this change but there is no evidence that Ms Gandy would not have been similarly affected. The claimant has alleged that it was Mr Ratcliffe who acted in the way alleged but has been unable to provide cogent evidence about what precisely her responsibilities entailed or when Mr Ratcliffe removed the above from her or the circumstances in which he did so or that those were the responsibilities which were thereafter given to Ms Gandy. The claimant has failed to prove that the respondent conducted itself as she alleged.

Claimant isolated from her peers and other professionals-November 2013 to April 2014

48 The claimant alleges that Mr Ratcliffe was the person who isolated her from her peers and other professionals at this time. It is apparent from her witness statement that she did not have a high opinion of Ms Gandy's competence and that she did not like Mr Heydon's friendship with Mr Ratcliffe but she has not provided any evidence about what it is Mr Ratcliffe is said to have done or not done which resulted in her isolation or when this occurred or identified the peers or professionals to which she refers. The claimant has failed to prove that the respondent conducted itself as she alleged.

Claimant's historic liaison with multiagency mental health professionals was stopped-December 2013 to April 2014

49 As we have concluded above the ambit of the support services provided by the claimant for service users was unclear to us and she has not proved on the balance of probabilities that her duties had by December 2013 come to include included liaison with multiagency health professionals nor as we also concluded in paragraph 47 above has she been able to provide cogent evidence when it was she alleges that Mr Ratcliffe removed the above from her or the circumstances in which he did so. Her witness statement relies on an occasion on 12 November 2013 when a multiagency professional asked in a diary that she attend such a meeting 'if possible'. The claimant has failed to prove that the respondent conducted itself as she alleged.

Claimant accused of overstepping personal boundaries in relation to AP -10 March 2014

50 On 10 March 2014 the claimant volunteered the information that she was friends with AP and Mrs Gwilliam explained that she felt the claimant's relationship with AP breached the Policy and this would have to be looked into. Given the Policy makes it clear that it is important that working relationships are not misread or confused with friendship or other personal relationships an admitted friendship between with a service user and a member of staff would prima facie indicate to Mrs Gwilliam that personal boundaries were not being maintained which would require further examination. The claimant has failed to prove that Ms Gwillian accused her as alleged; her witness statement simply stated that she had referred to the claimant's relationship with AP as over stepping professional boundaries. However in any event in the light of her admission and the Policy the respondent had reasonable and proper cause to make such an accusation. There was therefore no conduct on the part of the respondent which individually or collectively could amount to a repudiatory breach of the implied duty of mutual trust and confidence.

Claimant attended her first staff meeting with the respondent but was ignored throughout. She felt undermined and belittled -26 March 2014

51 There was no evidence in the claimant's witness statement to support the claimant's allegation that she was ignored throughout the meeting on 26 March 2014.Indeed the minutes of that meeting show it was she who was specifically tasked to look into a potential client holiday. The claimant has put forward no alternative version of what occurred at the meeting .She may have felt undermined and belittled but has provided no evidence to corroborate why she felt that way. The claimant has failed to prove that the respondent conducted itself as she alleged.

Attempt to change claimant's job description without any prior discussion notification April 2014

52 We conclude there was no such attempt by Mr Ratcliffe .He provided the claimant with a copy of a generic Netherfield job description for a Support Worker Ratcliffe which she needed to complete a part of her induction process because he could not find the claimant's own job description. There is no evidence that he told the claimant it was her job description. The claimant has failed to prove that Mr Ratcliffe treated her as she alleged.

Claimant abused when training on respondent's induction course-paperwork in relation to professional boundaries thrown at her in a threatening manner-4 April 2014

53 We have found that while the claimant was carrying out the respondent's induction course and following the events of 10 and 17 March 2014 which concerned the claimant's friendship with AP Mrs Gwilliam gave the claimant a copy of the Policy to look at it prior to a meeting the following week. The claimant did not raise a grievance about paperwork being thrown at her thereafter nor did she complain about this particular matter to Mr Ratcliffe at the return to work meeting on 8 April 2014 only 4 days later or on 22 April 2014 after she had taken legal advice. We conclude that on the balance of probabilities although she became frustrated with the recalcitrance of the claimant Mrs Gwilliam did not throw documentation at the claimant and the claimant has embellished her evidence in this regard.

Claimant went home sick after abusive conduct referred to above and was made to take absence as sickness leave. By comparison other members of staff did not have similar absences noted on their sick records-8 April 2014

54 We have already found the claimant was not subjected to abusive conduct by Mr Ratcliffe. She has accepted that she went home because she was unwell. It follows that the respondent had reasonable and proper cause to treat her absence as sickness leave. There was no cogent evidence before us from which we could conclude that others had sick leave absences which were not noted on their sick records.

Claimant forced to agree to stop seeing A P outside of working hours-7 April 2014

55 We have found that the claimant was told by Ms Gwilliam not to have contact with any service users outside her normal duties not just AP. This was in the light of her having volunteered the information that she was friends with AP and stated her intention of continuing to be her friend which was contrary to the emphasis in the introduction to the Policy that it was important that working relationships were not misread or confused with friendship or other personal relationships. Further telephone contact with AP could continue .Ms Gwilliam had reasonable and proper cause in those circumstances to impose such a restriction on the claimant who in common with all other employees was required to adhere

to the Policy which was in place in order to protect her and all service users of which AP was one.

Claimant was penalised for her absence on 4 April 2014- 8 April 2014

56 We have already made reference to the claimant's acceptance that she was unwell on 4 April 2014 and went home (paragraph 54 above).A return to work meeting is required whatever the duration of sickness and incidents of sickness have to be recorded whatever its cause under the Bradford system. Mr Ratcliffe did not penalise the claimant as alleged; he had reasonable and proper cause to act as he did in relation to her absence.

Claimant intimidated by invite to investigation meeting when not given any details-11 April 2014

57 There is no evidence to support the claimant's contention that she was in any way intimidated. She was able to make it very clear to Mr Ratcliffe that she was not going to attend any such meeting and wanted to carry on with her induction .She was then (very quickly) given an invite letter which both gave her the notice she required and gave brief details of the issue to be investigated. The claimant has failed to prove that she was affected as alleged when she was not initially given the details and the omission of which she complains was quickly remedied. In any event the short period of time when details were not provided to the claimant cannot (on its own or taken into account with other matters) amount to a breach of the implied duty of mutual trust and confidence on the part of the respondent.

Claimant received a letter from the respondent inferring that her sickness was dubious. Later two texts and a voicemail received in similar terms-15 April 2014.

58 Mr Ratcliffe was expecting the claimant to attend work on 15 April 2014 and his texts and voicemail preceded his becoming aware that the claimant was unwell. It cannot be inferred from his subsequent letter nor did that letter imply that her sickness was dubious. The claimant has failed to prove that Mr Ratcliffe treated her as she alleged

Claimant's grievance against Gary Ratcliffe 22 April 2014 was not investigated for 18 months

59 In May 2014 the claimant was invited to attend a grievance meeting but it was her decision that it be dealt with after the disciplinary investigation. It was not until September 2014 that she mentioned it again and then she simply mentioned its existence but did not request it now be progressed .In November 2014 when the claimant brought it up the respondent reminded her of her previous stance and invited her to a grievance meeting. Thereafter it was the claimant with whom matters were left until 31 March 2015 when it was the respondent which

progressed the grievance by inviting the claimant to a grievance hearing. The claimant's response was to revert to her previous stance that it be dealt with after the disciplinary investigation. When Ms Sketchley got involved she said the grievance should be investigated as a matter of urgency before the disciplinary hearing took place and the respondent then arranged a grievance meeting to precede the disciplinary. There was no evidence before us on which we could conclude that any delay was attributable to the respondent or that as alleged it should be laid at the door of Derek Harvey in particular.

Claimant's partner (Mr Liggins) called CEO of the respondent 11 times while the claimant was in intensive care but he refused to take the calls or return them-20 to 27 May 2014

60 We accept that Mr Liggins called Mr Harvey 11 times but have concluded on the balance of probabilities that these calls took place in the period 20 to 24 May 2014. Further we have concluded that although Mr Harvey did not take the calls or return them there is no evidence to support the claimant's allegation that he refused to do so.

Respondent notified police of allegations against the claimant and made safeguarding notification but then failed to carry out reasonable investigation and reach a conclusion in relation to those allegations in a timely manner-May 2014 to August 2015

61 The respondent did not notify the police as alleged; but did notify the Warwickshire safeguarding team as it was obliged to do. We conclude that there was no failure on the part of the respondent to carry out a reasonable investigation and the fact that no conclusion was reached until August 2015 could not have played a part in the claimant's decision to resign which predated the conclusion. The delays which had occurred up to the resignation were not occasioned by any unreasonable failure of the respondent.

Respondent failed to suspend the claimant on receipt of allegations and as a result the claimant received limited sick pay rather than full pay -23 May 2014

62 The respondent was under no obligation nor was there any necessity to suspend the claimant who was absent from work due to ill health and therefore entitled to occupational sick pay. If she had returned to work the respondent might have taken a different view. However she did not and the failure to suspend in these circumstances cannot (on its own or taken into account with other matters) amount to a breach of the implied duty of mutual trust and confidence on the part of the respondent.

Claimant was told that £812.50 would be removed from her salary and that she would receive statutory sick pay only- 23 May 2014

63 We conclude on the balance of probabilities that the claimant did not receive the memo in question and , even if she did, it formed no part of her rationale for resigning from the respondent's employment.

Claimant was informed by Ellen Hutt that she had been informed by Nathan Williams in 2014 while attending Netherfield that the claimant had left the respondent-May 2014

64 Ellen Hutt was very unclear about what she had been informed or what she informed the claimant .She was no longer a trustee after January 2014 and Mr Williams' status in relation to the respondent is entirely unclear. The claimant did not seek clarification from the respondent at the time about whatever she was told by Ellen Hutt. The claimant has failed to prove that the respondent was guilty of any blameworthy conduct.

Respondent failed to advise the claimant of the general nature of the allegations against her which had a catastrophic effect on her health and well-being and completely undermined the relationship of trust and confidence-May to July 2014 (2 months)

65 The claimant made it very clear to the respondent on 12 May 2014 that she would engage in both the investigation and grievance once her GP said she was fit to return to work. In accordance with her clearly expressed stance the respondent did not communicate further with her until 15 July 2014 when **(**having heard from the claimant's local MP on behalf of the claimant on 11 July 2014) the respondent wrote to the claimant asking if she was now ready to engage with them. There is no evidence before us upon which we could conclude that this particular alleged failure had a catastrophic effect on the claimant's health and well-being or that it completely undermined the relationship of trust and confidence .On the claimant's own evidence all trust and confidence had already broken down between her and the respondent by 4 April 2014.

Respondent failed to advise the claimant of the specific nature of the allegations against her-July to 31 October 2014

66 As we set out in our conclusions above it was not until July 2014 that the claimant's MP contacted the respondent. Hitherto she had declined to participate in an investigation until she was fit to do so. This contact understandably prompted an enquiry from the respondent about whether she was now ready to engage. She did not confirm that she was but declined to attend an investigation meeting until she was advised of the allegations which had been made against her. On 31 July 2014 she was informed of three areas of concern but no details were provided even though the stated purpose of the investigation meeting was to give her the opportunity to provide an explanation. Understandably and reasonably the claimant required details but they were not provided until 24

October 2014. In our judgment had such a delay continued it could have amounted to conduct likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. However the details were provided and the claimant continued in employment for another nine months. The respondent had prevented the breach of the implied term of mutual trust and confidence from occurring and we are not satisfied that the failure played any part in the claimant's decision to resign in any event since she had already decided that trust and confidence had broken down by April 2014.

Respondent failed to follow GP's advice to hold disciplinary / grievance meeting in a neutral location, chaired by an independent person and with her partner to accompany her-22 August 2014

67 The claimant gave no evidence in her witness statement in support of this allegation .We have however set out our findings at paragraph 11.79 above. The GP's letter of 4 September was very far from giving advice as alleged .It is silent as far as a neutral location is concerned and in any event the claimant accepted under cross –examination that the GP was reciting her requests. It is not that the GP gave medical advice to the claimant who then as a result made the request ; it was the claimant who was making the request to her employer and the GP was doing no more than supporting a request made by one of his patients (in reliance on information which had been provided to him by the claimant) which he hoped (but did not require or insist) could be accommodated .He was not advising the respondent that ,due to the claimant's health, matters should only proceed in that way. The claimant has failed to prove that any such advice was given as she alleged.

Respondent extended the allegations and matters of concern to 17 individual points and insisted on using a chairperson who was linked to their company-24 October 2014

68 The respondent did give the claimant details of 17 individual allegations which it wanted to investigate .This was in response to the claimant's request for details. Had the details of these serious matters not been provided the claimant would have had cause for complaint. She had already indicated in her letter of 5 August 2014 to the respondent her willingness to attend a meeting once those details were provided. We cannot see how their provision amounted to a breach of the implied term of trust and confidence. We set out at paragraph 72 below our conclusion in relation to the independence of Mrs Yardley –Bennett. There was no evidence before us of any link between her and the respondent such we could have concluded that she was actually or apparently biased and therefore should not have been used as a chairperson by the respondent.

Respondent was asked to deal with the claimant's grievance raised on 22 April 2014. This was ignored- 7 and 10 November 2014

69 On 7 November 2014 the claimant complained about Mrs Yardley – Bennett chairing the investigation meeting into the disciplinary allegations against her. She do not on that day as alleged ask the respondent to deal with her grievance raised on 22 April 2014.Further on 10 November 2014 she did not as alleged ask the respondent to deal with that grievance; she reminded the respondent it was outstanding and on11 November 2014 the respondent (with commendable alacrity) told the claimant it had been arranged for the week after her disciplinary investigation meeting with Mrs Yardley-Bennett. The claimant has failed to prove that the respondent conducted itself as she alleged.

Claimant was invited to a meeting at Netherfield House on 3 days' notice. This was not a neutral venue, she was not allowed to have her partner present and no independent chair-11 November 2014

70 It was the respondent which first suggested an impartial venue in its letter of 24 October 2014.The claimant expressed no view on the matter and indeed when the respondent identified a venue opposite Netherfield house informed the respondent (subject to a suitable chair) she and Mr Liggins would attend at any time and location (see paragraphs11.85 and 11.87 above).The respondent went ahead and organised Netherfield House for the grievance hearing and a venue opposite it for the disciplinary investigation to take place a week apart. There was no reason not to choose these venues in the light of what the claimant had said. This provoked a rapid negative response on the part of the claimant in relation to venue, something which no more than three days before she was entirely relaxed about. Of course by this time she had had the details of the allegations since 24 October 2014 and she did not complain in her letter of 13 November 2014 about the lack of notice or inability to prepare an explanation. There is no statutory right for employees to be accompanied at an investigation meeting and the respondent did not have to extend the right to a fellow employee or trade union representative but agreed to do so. It did however have good reason not to extend this further to Mr Liggins as at 11 November 2014. Indeed on the evidence he was not the only person who she could have proposed to accompany her; Ms McHendry for example attended and evidently spoke at the Occupational Health review meeting with Dr Barhey. We have set out our conclusions about the independence of Mrs Yardley-Bennett's independence in paragraph 72 below.

Respondent insisted on holding the investigatory meeting at the workplace (not a neutral venue)-14 November 2014

71 The respondent did not insist on holding the investigation meeting at the workplace ;the investigation meeting (on 14 November 2014) was to be held at a venue other than the workplace and it was the grievance meeting which was to take place on 21 (not 14) November 2014) at Netherfield House. The claimant has failed to prove that the respondent conducted itself as she alleged. Further the claimant had indicated in her letter of 10 November 2014 that subject to the

provision of an independent chair she and Mr Liggins would attend any meeting at any time and location. The location of the meeting was of no concern to her and could not amount or contribute to a breach of the implied duty of mutual trust and confidence.

Investigation Meeting was held by the respondent using a chair who was not independent transparent or impartial.
Claimant was not informed until one month later that the matter was to be escalated to a disciplinary one 14 November 2014
Investigatory meeting held in the claimant's absence and chaired by Mrs Yardley-Bennett who was not independent of the respondent organisation. It went ahead and was turned into a disciplinary-10 April 2015

72 There was no evidence on which we could conclude that the investigation meeting was held using a chairperson who was not independent transparent or impartial. The ACAS Code of Practice Disciplinary and Grievance Procedures 2015 requires only that different people should carry out the investigation hearing and the disciplinary hearing .The claimant sought to explain that her concern was that Jean Miller (assisted by Nathan Williams) was her line manager for a period of time and they would be known to Mrs Yardley -Bennett alongside other current members of the respondent's staff but neither of them were (on the evidence we have seen) relevant to the allegations which were being investigated . The respondent had reasonable and proper cause to use Mrs Yardley-Bennett; the claimant's concerns were insufficient to raise any real doubt on its part that she was not independent. Mrs Yardley Bennett was not and had not been an employee of the respondent and the report she prepared betrays no lack of independence or impartiality on her part. Indeed the claimant agreed under cross- examination that Mrs Yardley-Bennett's report was a pretty fair assessment. The respondent had reasonable and proper cause to proceed with the long delayed investigation meeting into AP's serious allegations (which the claimant accepts that it was reasonable to investigate) in her absence in view of the claimant's unreasonable refusal to attend. She knew what the detailed allegations were and had been afforded the opportunity to make written submissions which she did not take up. The hearing did not turn into a disciplinary hearing; Mrs Yardley Bennett recommended that a disciplinary hearing should follow and the claimant accepted that it was reasonable for the respondent to investigate allegations of the type AP had made and for a disciplinary hearing to follow if thereafter there was found to be a case to answer subject (in her opinion) to the provision of an independent and impartial chair. There was no evidence that following the investigation meeting the claimant chased the outcome or complained about any delay and we conclude that a month between the investigation meeting and the letter on 6 May 2015 was not conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between the respondent and the claimant.

Respondent wrote to claimant threatening her that her employment may be terminated on the grounds of ill-health-1 December 2014

73 By 1 December 2014 the claimant had been absent from work since 15 April 2014.We conclude the respondent had reasonable and proper cause to write to her on 18 November 2014 and 1 December 2014 to seek her consent to an Occupational health assessment for the purposes set out in the correspondence and to explain clearly for her the consequences of her refusal to consent, which in the case of the letter of 1 December 2014, would be a meeting to consider her continuing absence and ,potentially ,make decisions about her future employment without the benefit of such medical evidence and advice. That letter was measured in tone clear in meaning and contained no threat that the claimant's employment may be terminated on ill health grounds. It was not conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between the respondent and the claimant.

Respondent did not agree with and ignored advice given by Dr Barhey as an independent chairperson, a neutral venue, her partner being able to attend the meeting.-31 March 2015

74 We conclude the respondent had reasonable and proper cause to disagree and ignore Dr Barhey's opinion about the reasonableness of the provisos sought by the claimant because the conclusions on which his opinion was was based derived from information provided by the claimant which the respondent knew was inaccurate ,not least the identity of the person who was going to chair the meeting and that the outcome of the police investigation was that the allegations against the claimant had been disproven as a result of which he had concluded the safeguarding issue regarding Mr Liggins was irrelevant .In any event his opinion was not ignored to the extent the respondent permitted Mr Liggins to attend an investigation meeting with the claimant in line with the restrictions imposed by the ACAS Code. Hitherto the claimant had of course wanted Mr Liggins to attend but simply to sit quietly by her side to support her at such a meeting.

Claimant sent letters to Lorraine Plant at the respondent requesting her holiday pay for 2014 and confirmation of outstanding holiday monies and national insurance employer contributions but never received a response 20 April 2015

75 We have found at paragraph 11.97 above that no such letter was sent by the claimant as alleged on 20 April 2015.

Respondent threatened claimant whilst off sick that if she failed to attend the rescheduled disciplinary hearing without giving advance notification or good reason they would treat such non-attendance as a separate issue of misconduct-6 May 2015

76 We conclude the respondent had reasonable and proper cause to write to the claimant to let the claimant know that non-attendance without advance notice or good reason would be treated as a separate issue of misconduct given the previous lengthy delay in progressing the disciplinary procedure. The claimant has not explained why she formed the opinion that if she was unable to attend due to sickness the respondent would not have considered that a good reason for her non-attendance.

Claimant called to formal disciplinary hearing to discuss what were now 19 matters of concern. Two additional matters have been added which had not been disclosed before-6 May 2015

77 It is common ground that the invitation to the disciplinary hearing did include two additional matters .The respondent has not explained why they were not included in its letter of 24 October 2014 or when it decided in the light of advice given by Peninsula to include them in this letter which was sent after the investigation carried out by Mrs Yardley Bennett on 10 April 2015. However the claimant's witness statement does not mention this letter at all nor does it feature in her resignation letter .The disciplinary hearing at which the allegations were considered did not take place until 5 and 19 June 2015 and though she did not attend the claimant did make lengthy and detailed submissions in writing. We conclude that this was not conduct which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between the respondent and the claimant. If we are wrong about that we conclude this was not a matter which either individually or collectively played any part whatsoever in the claimant's decision to resign.

Claimant's suggestion of three independent Chair Persons were rejected by respondent-3 June 2015

78 It is common ground that having said on 22 May 2015 she would provide some suggestions it was not until 1 June 2015 that the claimant's solicitor wrote to Ms Gwilliam suggesting as independent chairs the claimant's other employer (Heart of England Mencap) ACAS or the Citizens Advice Bureau and that on 3 June 2015 the respondent explained why in each case for cogent reasons given the shortness of time before the hearings the suggestion was rejected. The claimant's solicitor did not apply for a postponement but accepted Mr Chehal as chair if he had no previous knowledge of the case. There was no evidence before us that Mr Chehal had any such previous knowledge. The claimant's witness statement does not mention the letter of 3 June 2015 at all nor does it feature in her resignation letter **.**We conclude that the respondent had reasonable and proper cause to reject the suggestions made and (for the avoidance of doubt) proceed with Mr Chehal.

Respondent failed to request further information from the claimant during the grievance and disciplinary process, contrary to what had been specifically agreed

when the claimant accepted that the Hearing would be based on her written submissions-5 June 2015

79 The claimant's witness statement does not mention this failure at all nor does it feature in her resignation letter. It is common ground that Mr Chehal did not request further information from the claimant during the grievance and disciplinary process, but that such a request would be made had not been specifically agreed as alleged between Ms Sketchley and the respondent though this may have been the claimant's understanding. Ms Sketchley confirmed in correspondence that she would provide the claimant's written submissions before the hearing on 5 June 2015 but did not tell the respondent that the claimant had only accepted that the hearing would be based on those submissions on the basis that further information would be requested from her. The offer to provide further information by the claimant was subject to Mr Chehal asking for it and as we already observed above he made no such request. There was no reason why had she wanted to provide him with any additional information she could not have done so voluntarily. The claimant has failed to prove that the respondent conducted itself as she alleged.

Respondent's own procedures were breached by delaying the Grievance and Disciplinary hearings from June until19 June-5 to 19 June 2015

80 It is common ground that the Netherfield grievance procedure states that a written response will be given within 10 calendar days (and that timescales may need to be waived by mutual agreement) and the Netherfield disciplinary procedure states disciplinary outcomes with be provided in writing within 5 working days of any disciplinary hearing. However Mr Chehal was unable to conclude the grievance or the disciplinary hearings on 5 June 2015 and postponed them both to 19 June 2015.We conclude that there was no breach of either procedure in his adopting that course of action.

Grievance and disciplinary meetings chaired by Peninsula -not independent as advised by Dr Barhey-5 and19 June 2015

81 Dr Barhey's advice that there be an independent chairperson related only to the investigation meeting and was based on his erroneous understanding that a manager who had been verbally aggressive to the claimant was going to chair the meeting previously).The claimant's initial objection to Peninsula's conducting the investigatory meeting was that the respondent paying for the service would have an impact on the impartiality of any outcome but in the event it was conducted by Mrs Yardley-Bennett. When on 6 May 2015 the claimant was informed that an impartial 'HRFace2Face' consultant from Peninsula would conduct the disciplinary hearing she replied that she wanted the meeting to be chaired in a transparent impartial and independent way '*free from direct or indirect subterfuge'.* The respondent then engaged in correspondence with the claimant's solicitor and explained to her the basis on which HRFace2Face

operated and identified Mr Chehal as the chair. Mrs Sketchley accepted his nomination if he had no previous knowledge of the case "*in the interests of compromise*". The suggestions made by the claimant for independent chairs were not independent or able to assist. There was no evidence on which we could conclude that Mr Chehal had any previous knowledge whatsoever of the case regarding the claimant. The claimant has not pointed to any findings made by him which indicate any appearance of or actual bias or partiality in his conduct of the hearings or the outcome. The respondent is a small organisation which used a discrete part of the company it used to provide it with HR advice to chair the hearings in question having done so on contractual terms which make it clear the process would be conducted on an impartial basis with no warranty of any particular recommendation. We conclude that in the circumstances we have set out above the respondent had reasonable and proper cause to have the meetings chaired by Mr Chehal as a consultant of HRFace2face, a division of Peninsula.

Further unnecessary delay to outcome/s. Claimant was told that the delayed date of 19 June was again to be exceeded by the respondent due to holidays. The claimant was told the decision would be given week commencing 3 August which was nearly 2 months after the scheduled hearing-19 June 2015
No outcome issued despite a delay of six weeks from original scheduled grievance and disciplinary hearing date. Claimant still on sick leave and not being paid. Breach of all company policies-5 June to 14 July 2015

82 The 19 June 2015 was the date on which the postponed disciplinary and grievance hearings took place .We have set out under paragraph 80 above the timescales for response. The hearings on 5 June 2015 could not be concluded on that day because the claimant had presented to the respondent her written submissions running to some 71 pages. The respondent had told the claimant on 11 June 2015 that it was hoped the outcome would be provided within 10/15 working days from the date of the meetings .She raised no objection .That period ended on 10 July 2015 .On 14 July 2015 (one working day later) Ms Gwilliam wrote to Ms Sketchley to say due to pre-planned holidays the outcome date could not be met and it was intended it would be sent by the week commencing 3 August (a further three week delay).Employers are subject to an implied duty reasonably and promptly to afford a reasonable opportunity to employees to obtains redress of any grievance. We can well understand how unreasonable delay in informing an employee who absent from work and not being paid of the outcome of serious disciplinary charges such as those against the claimant could amount to a breach of the implied duty of mutual trust and confidence. However the claimant made it clear in her resignation letter that her concern was about the delay in the outcome of the disciplinary meeting not the grievance meeting. The postponement of that hearing to 19 June 2015 was not unreasonable in the light of the claimant's detailed written submissions. She was aware from the respondent's letter of 11 June 2015 of a further delay of 10/15 working days but did not object to it. The further 3 week delay (of which she was informed very shortly after 15 working days had elapsed) was occasioned by holidays. The

allegations were both numerous and serious .In those circumstances we conclude that although there was a delay in the issuing of the outcome the delay was neither unnecessary nor unreasonable and did not amount or contribute to a breach of the implied term of trust and confidence.

Minutes of the Disciplinary and Grievance meetings were not supplied to the claimant. A copy of the written notes had been promised by e-mail on the day of the meeting with a typed up copy to follow within a reasonable timeframe-June to August 2015

83 The absence of the notes and /or that there was such a promise did not find their way into in the claimant's resignation letter .Mrs Sketchley was not called to give any evidence about any telephone calls between her and the respondent concerning any such promise about the provision of notes .The claimant has not proved on the balance of probabilities that any such promise was made by Mrs Gwilliam as alleged.

84 Looking at the respondent's conduct as a whole therefore we conclude that its cumulative effect, judged reasonably and sensibly, was not such that the claimant could not be expected to put up with it and was entitled to resign.

85 If we are wrong in that conclusion although the claimant formed the view that trust and confidence had broken down as early as 4 April 2014 she remained in employment until her resignation of 14 July 2015 thereby affirming the contract of employment and we conclude that she cannot rely any conduct by the respondent which occurred before 4 April 2014. Further we conclude that any conduct of the respondent which occurred after that date could not have played any part in her decision to resign on 14 July 2015; by 4 April 2014 she had lost trust and confidence in the respondent and by May 2014 had resolved that she was never going to go back to work. The claimant's claim of constructive unfair dismissal therefore fails and is dismissed.

Indirect discrimination in relation to disability

86 As far as the claimant's claim of indirect discrimination in relation to disability is concerned we conclude that:

86.1 the claimant was not required to attend an investigatory meeting without informing her of the allegations against her; the claimant was informed of the allegations against her on 24 October 2014 and the investigatory meeting took place on 10 April 2015;

86.2 the claimant was not required to attend investigatory and disciplinary meetings which were not chaired by an independent person; there was no evidence on which we could conclude that Mrs Yardley-Bennett and/or Mr Chehal were not independent persons;

86.3 the claimant was not required to be accompanied to investigatory and/or disciplinary meetings by a work colleague or trade union representative; the respondent made concessions and permitted Mr Liggins to accompany her to meetings and on the same restrictions that would be imposed on a work colleague or trade union representative;

86.4 the claimant was not required to attend investigatory or disciplinary meetings at her workplace rather than a neutral venue; the investigation meeting and the disciplinary hearings took place at the Gap community centre .

87 In any event the claimant has failed to provide any evidence whatsoever that all or any of the above requirements put other persons who share her disability at any particular disadvantage when compared with persons who do not have that disability or that those requirements put her at that disadvantage in that her mental health condition was exacerbated by having to comply with them. Her evidence in chief was that in relation to the investigation meeting only she knew she would simply become too distressed to cope without an independent chair and the attendance of Mr Liggins without restrictions but the nature and extent of any alleged exacerbation in her mental health condition was entirely unclear. We find ourselves unable to judge if any proposed adjustment was reasonable .The claim of indirect discrimination in relation to disability fails and is dismissed.

Reasonable adjustments: section 20 and section 21

88 We have set out our conclusions about the application of the PCPs alleged. However even if they were applied to the claimant as alleged as **Rowan** made clear it is necessary for the tribunal to make findings of the nature and extent of the substantial disadvantage to which the claimant (as a disabled person) was put by the application of the PCPs in comparison to a person who is not disabled in order to consider what steps it would have been reasonable for the respondent to take to prevent or mitigate that disadvantage. We have set out above the claimant's limited evidence in chief in relation to the investigation meeting. In our judgment a non-disabled person would also suffer stress if the PCPs alleged were applied due to the inherently stressful nature of investigation and disciplinary hearings. However the nature or extent of the alleged substantial disadvantage (the exacerbation in the claimant's mental health condition) to which the claimant was put by having to comply with them was entirely unclear and the evidence the claimant gave under cross-examination about the necessity for all three reasonable adjustments to be provided does not sit happily with the contents of her letter of 7 November 2014.

89 As far as knowledge is concerned the respondent was aware that the claimant had attempted suicide on 20 May 2014 and was signed off work with work related stress from 14 April to 3 October 2014 which is a substantial period of absence such that it is reasonable to conclude that the claimant's ability to carry

out normal day to day activities were substantially adversely affected during it. It was also known however by 22 September 2014 she had been able to return to work at Mencap on a phased return and the claimant had told the respondent in November 2014 no reasonable adjustments were required other than the requirement for an independent chair. The respondent made strenuous efforts to obtain information about the claimant's medical condition (which her fit notes describe as work related stress throughout and not depression and anxiety) from November 2014 onwards but it was not until March 2015 that it was able to obtain an occupational health assessment when Dr Barhey's opinion was that the claimant was not disabled. The respondent would have no reason to think any of the reasonable adjustments suggested by him were therefore necessary to prevent any substantial disadvantage to the claimant. The claimant gave no information to the respondent in correspondence about an alleged disability or any substantial disadvantage to which it put her in relation to attendance at meetings. In our judgement for the purposes of the claimant's claim of a failure to make reasonable adjustments Ms Gwilliam did not know and could not reasonably have been expected to know that the claimant satisfied each of the requisite elements of the definition of disability and that her disability was likely to put her at a substantial disadvantage. The respondent was therefore under no duty to make reasonable adjustments for the claimant.

90 The claim of a failure to make reasonable adjustments fails and is dismissed.

Unauthorised Deduction/Breach of Contract

91 The claimant claims that she suffered an unlawful deduction of wages/breach of contract in respect of payment of contractual sick pay from April 2014 to November 2014.She has submitted that it is an implied term of her contract by custom and practice that full salary is paid during sick leave and relies on two periods of sick leave (in November 2008 and 2011) during which she was paid full pay. It is clear from our findings in paragraph 11.3 above that the sick pay paid to the claimant in November 2008 was a one off gesture and was not full pay in any event but a composite payment put together to assist the claimant during her sick leave .If she were paid full pay in 2011 this would not be in any way sufficient to establish by custom and practice the contractual right to full pay during sick leave .In any event on 8 February 2013 the claimant entered into a new contract of employment which referred to a different sick pay regime from that which applied in November 2008 limiting occupational sick pay to four weeks in a rolling 12 month period. The claimant has failed to prove that it had become an implied term of her contract of employment by custom and practice that full salary is paid during sick leave and her claims of unauthorised deduction from wages/breach of contract which are predicated on the existence of such a term fail and are dismissed.

Employment Judge Woffenden
Date: 25 August 2017

Judgment sent to Parties:
Date: 1 September 2017

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