EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106119/2015

Held in Glasgow on 9, 10, 11, 12, 13 & 16 May 2016 and 25, 26, 27, 28 and 31 October 2016

Employment Judge: Shona MacLean
Members: Mr SF Evans
Mr WA Stewart

Miss Elizabeth Richards	Claimant In Person
Vodafone Limited	First Respondent Represented by: Mr Grant Hutchison Advocate
Sophia Ghafoor	Second Respondent Represented by: Mr Grant Hutchison Advocate
Chris Wilkie	Third Respondent Represented by: Mr Grant Hutchison Advocate
Ross Fullerton	Fourth Respondent Represented by: Mr Grant Hutchison Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The claims of discrimination on the grounds of the protected characteristics of sex, age and disability are dismissed.
2. The claim that the first respondent was in breach of the sex equality Clause is dismissed.
3. The claim of constructive unfair dismissal is dismissed.

4. The respondent is ordered to pay to the claimant the sum of £610 as compensation for accrued but untaken annual paid leave (holiday pay).

REASONS

Introduction

1. Following early conciliation notification on 6 February 2015 and ACAS issuing a certificate dated 6 March 2015 the claimant presented a claim form to the Employment Tribunal's office on 20 March 2015 in which she set out several complaints, some of which were withdrawn at a case management Preliminary Hearing before Employment Judge Gall on 10 August 2015. The claimant also withdrew the claim of victimisation.

2. At the Preliminary Hearing on 29 January 2016 Employment Judge Meiklejohn determined that the claimant was a disabled person for the purposes of the Equality Act 2010 (EqA) but only in respect of her condition of depression and that from 27 October 2014.

3. Following a case management Preliminary Hearing on 24 March 2016 Employment Judge Walker set out in her Note that the following complaints remained outstanding:

   a. Unfair constructive dismissal (Section 94 of the Employment Rights Act 1996 (ERA)).
   b. Direct discrimination because of sex and age (Section 13 of the EqA).
   c. Direct discrimination because of disability (Section 13 of the EqA) in respect of acts or omissions that occurred on or after 27 October 2014.
   d. Harassment related to sex and age (Section 26 of EqA).
   e. Harassment related to disability (Section 26 of the EqA) in respect of acts or omissions that occurred on or after 27 October 2014.
   f. Breach of the sex equality clause (Section 66 of EqA).
   g. Claim for payment of accrued holiday pay and in respect of a repayment relating to the pension scheme."

4. In respect of the claim for constructive dismissal the claimant relied on the breach of the implied term of trust and confidence based on an alleged failure to deal with her grievance properly (including the appointment of a person who was not independent); an attempt to obtain medical records without her knowledge; and failure to pay the full amount of wages due in January 2015.

5. The acts relied upon in both the sex discrimination and harassment claims were the way in which the claimant was treated by her co-workers and manager which the claimant had set out in a document (which formed productions R37 to R48).

6. The issues to be determined by the Tribunal were as follows:

   a. Was the claimant treated less favourably because of sex or age?
   b. Was the claimant treated less favourably because of disability (specifically the disability of depression) on or after 27 October 2014.
   c. In relation to harassment (i) Was the claimant subjected to unwanted conduct related to age or sex which had the purpose of effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? (ii) If the conduct had that effect but it was not its purpose, was it reasonable for the conduct to have that effect? (iii) Was the claimant subjected to unwanted conduct related to disability (specifically depression) on or after 27 October 2014 which had the purpose or effect of violating her dignity or creating a hostile, degrading, humiliating or offensive environment for her? (iv) If the conduct had that effect but it was not its purpose, was it reasonable for the conduct to have that effect?
   d. In relation to dismissal (i) Was the respondent in breach of the implied term of trust and confidence by failing to deal with her grievance properly; including the appointment of a person who was not independent; attempting to obtain medical records without the claimant`s knowledge; and failing to pay the full amount of wages due in January 2015? (ii) If so does the respondent have a potentially fair reason for the conduct that

was in breach of contract? (iii) If so did it act reasonably in conducting itself that way.

e. As it had been conceded that the claimant was engaged in like work with the comparator in which she was paid less than him for a period of time, has the respondent succeeded in establishing a defence under Section 69 of the EqA for the difference in treatment?

f. If the claimant succeeds in the above claims what should be awarded by way of remedy?

7. The claimant gave evidence on her own account. Stephanie Ferris, Dionne Queen, Ishtiak Khan and Anne Kennedy gave evidence on her behalf. The second respondent, third respondent and fourth respondent gave evidence on their own account. The Tribunal also heard evidence for the respondents from Alastair Watson, Relationships Manager and Caterina Valente, Senior Manager Business Operations.

8. The parties lodged productions. The documents referred to below in the claimant's set of productions are referred to with the prefix "C". The documents referred to below in the respondents' set of productions are referred to with the prefix "R".

9. The Tribunal found the following essential facts to have been established or agreed.

Findings in Fact

September 2011 to March 2014

10. Capita Customer Management Limited (Capita) employed the claimant as a Service Desk Advisor. Her period of continuous employment commenced on 12 September 2011. She initially worked on the helpdesk for Fixed Mobile Conversions (FMC) which involved giving diagnostic advice over the telephone.

11. There were two Assure helpdesk nightshift teams. Scott Dickson managed one which primarily consisted of female employees. The other rotation was

managed by second respondent. She also managed the 999 team which consisted of around 20 people. The two teams were in different pods on the one floor.

12. The second respondent's Assure team consisted of the third respondent, fourth respondent, Don McBride and Gary Simpson (the Team). Mr Simpson and Mr McBride joined the Team around 2008 having previously worked in the 999 team. The third respondent joined the Team around 2010. His father was a manager and had worked with the second respondent. They socialise together as part of a pub quiz team. The third respondent facilitated the fourth respondent joining the team around 2011. The third respondent and fourth respondent were friends in their late 20s who socialised out with work.

13. The second respondent found managing the third respondent and fourth respondent challenging even when she stopped having social interaction with them outside of work. She knew that they bickered and joked.

14. In early 2013 vacancies arose on the Assure team helpdesk nightshift teams. The claimant was friendly with the fourth respondent. He worked in the same area of the office as the claimant. The claimant successfully applied to work in the Team. The fourth respondent was enthusiastic about her joining.

15. Around May 2013 Capita was involved in redundancy consultation with several employees including those who were based in the 999 team for whom the second respondent was responsible. Her focus was with the redundancy consultation.

16. After six weeks training the claimant joined the Team in May 2013. Stephanie Ferris who also undertook the training joined Mr Dickson's team.

17. The second respondent welcomed the claimant when she joined the Team. The second respondent indicated there had been some attrition in the Team. Mr McBride was to be the claimant's mentor. There was a lot of on the job learning although initially the Team would be doing some FMC work with which the claimant was familiar. Around December 2013 the FMC work moved to India

18. Working on the Assure nightshift rotation could be stressful and intense. Initially the claimant participated in the general camaraderie. There was joking and sometimes inappropriate language (swearing) was used. The third respondent and the fourth respondent had a sarcastic sense of humour.

19. It was accepted that the claimant had a learning curve but as time passed the Team's perception was that the claimant was struggling as she repeatedly asked the same questions. The Team raised this with the second respondent. She attempted to ease the pressure on the claimant by delayed her taking on the role of Fault Controller. The fourth respondent created a "cheat sheet" with a view to assisting the claimant.

20. The third respondent and fourth respondent continued to behave immaturely and at times inappropriately. They made sarcastic comments about other employees especially those working on the dayshift. The second respondent was under increasing pressure and was unable or reluctant to deal with their inappropriate behaviour. The third respondent from time to time would feel frustrated and would often respond by swearing and one occasion kicked a chair which was next to the claimant.

21. Around February 2014 the third respondent told the claimant that she would be "*the death of him*". The fourth respondent told the claimant not to ask questions until he turned to face her. He made remarks about the claimant being an "*old woman*" and her pension. The fourth respondent also spoke rudely to other members of staff and suggested that they should not speak to the claimant and allow her to get on with her work.

22. The claimant was medically certified as unfit to work between 1 March 2014 and 21 May 2014. She was diagnosed with a blood clot or deep vein thrombosis and was prescribed medication.

23. Around 27 March 2014 the claimant received a letter from Capita advising that the service that the claimant had been working on was transferring to the first respondent on 1 April 2014. Accordingly, the claimant's employment along with the rest of the Team was transferring to the first respondent under the Transfer

of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") (production C1.2).

24. The letter advised that there had been consultation between CWU and employee representatives and representatives from the first respondent Capita. In relation to the claimant's terms and conditions the letter stated:

"*Vodaphone Pay and Grading Structure*
Vodaphone intend to align all staff to their pay and grading structure. We ask for specific information on alignment to be provided by individuals before the transfer and for clarification of what happens if someone is below the band i.e. will their salary be increased to the minimum. We have been advised the pay ranges within Vodaphone are very broad, therefore reducing the risk of individuals sitting below or over the band. In the event that an individual is below band, Vodaphone would manage this on a case by case basis with the individual and their line manager.

Sick Pay
Vodaphone have advised that staff will be aligned to the Vodaphone sick pay policy which provides or 16 weeks full pay followed by 12 weeks SSP. Where this represents an immediate detriment Vodaphone have agreed to enhance individual's salaries by £500 to allow them to purchase sick pay insurance externally. Payment of sick pay is immediate with no waiting days.

Holiday Entitlement
Vodaphone will offer 28 days annual leave. This is in addition to Bank Holidays. Service days will also be added to this and existing continuous service will count towards this. The holiday year runs from 1 December to 31 November each year.

Policies & Procedure
Vodaphone have advised that you will be managed in accordance with Vodaphone policies and procedure post transfer."

April to July 2014

25. The transferring employees, including the claimant transferred to the first respondent under their existing salary. The first respondent paid a bonus to the transferring employees as there was no provision for such a payment in their existing contract.

26. On 22 April 2014, the first respondent wrote to the claimant setting out her terms and conditions of employment (production C1.3). The letter referred to an enclosed Employee Information Handbook. It also confirmed that the letter and handbook superseded all other discussions, correspondence and negotiations. The letter referred to employees receiving a first payslip through the post to their home address and thereafter employees requiring to register for the "*My Payslip*" online service. It provided details of an email helpdesk in the event of any queries.

27. The first respondent knew that the transferring employees had different terms and conditions from those employees who the first respondent had and employed directly. Discussion took place about equalising pay.

28. The claimant had been sending her medical certificates to Capita and then the first respondent. The claimant had been contacting dayshift team leaders to advise of the progress of her absence. The claimant had not been in touch with the second respondent.

29. In accordance with the first respondent's policy a letter was sent from the second respondent to the claimant on or around 14 April 2014 explaining that the second respondent had tried unsuccessfully to contact the claimant on her mobile telephone and landline and that though a sickline had been received which was valid up to 22 April 2014 failure to report meant that the claimant's absence was deemed to be unauthorised. To resolve this the claimant was asked to attend a meeting on 19 April 2014. If the claimant was unable to attend she was to contact Billy Richardson or the second respondent as soon as possible (the 14 April Letter) (production C2.1). Mr Richardson was the Service Operations Manager and the second respondent's line manager.

30. The claimant responded by letter dated 18 April 2014 which was posted and emailed to the second respondent (production C2.3). The letter stated that the claimant was "*aggrieved, extremely shocked and distressed and upset to be advised that her current absence was deemed to be unauthorised*". The claimant explained she had spoken to various managers and had no record of any missed calls from the second respondent. The second respondent did not reply to the claimant's letter although she did email the claimant regarding emergency tax situation resulting from the transfer.

31. The claimant sent a second letter to the second respondent asking for a reply. All she received was further correspondence regarding the completing of a P46.

32. The claimant had hoped to return to work on 5 May 2014. However, she contacted Carol Anne Bell, the dayshift team leader to advise that she had another sick line until 21 May 2014. The claimant was asked to attend an informal chat with the dayshift team leader and the dayshift manager, Liz McGeachy on 9 May 2014.

33. On 8 May 2014, the claimant sent an email to Lorraine Hume, Service Operations Manager (who had replaced Mr Richardson) seeking clarification about her employment and expressing concern about the absence of a reply from the second respondent (production C3.1). The email detailed events since the claimant went on sick leave and attached the 14 April Letter and the claimant's letters to the second respondent. Ms Hume replied by return indicating that she would not be in the office the following morning but wanted to support the claimant and requesting a suitable time to discuss matters.

34. The claimant cancelled the meeting with Ms McGeachy and it was rescheduled for 12 May 2014 when the claimant also arranged to see Ms Hume.

35. Following the meeting on 12 May 2014 Ms Hume prepared an action plan (production C3.8). It involved the claimant returning to work on 26 May 2014 on a phased basis during which she would undertake refresher training on site

for two weeks and would be scheduled to return to nightshift on around 8 June 2014. On her return to nightshift a "buddy/mentor" was to be identified to ensure continued support for the claimant returning to the nightshift to ensure support continued.

36. The claimant confirmed she was happy with the plan of action by email dated 13 May 2014. The claimant also indicated that she would like a reply from the second respondent and that she had doubts about who would volunteer to be her mentor. The claimant said that Mr Simpson would be her first choice of mentor as she did not wish the third respondent or fourth respondent to be asked as they showed her total disrespect. Ms Hume responded that she would ensure that the second respondent responded to the earlier communication as soon as possible and that she hoped going forward that all colleagues would show respect to each other. The claimant returned to work as planned

37. The claimant also raised with Ms Hume a discrepancy in her basic pay. Ms Hume said that she had asked HR to confirm the position.

38. The claimant was absent from work between 1 July and 3 August 2014 for emergency surgery and recuperation. She was in email contact with Ms Hume. During this period the claimant liaised with Ms Hume via email regarding her sick absence.

39. On 29 July 2014 Ms Hume advised that she had arranged for Mr Simpson to be the claimant's mentor and that she was planning to have a chat with him to go through what was expected. She also advised the claimant that she had arranged a call with the second respondent to go through some of the past events but that Ms Hume hoped that everyone could move on from this and start to build a better working relationship (production C4.11).

40. On or around 31 July 2014 Ms Hume was offered a new appointment and had handed in her resignation. At that stage she anticipated working 12 weeks' notice.

August to September 2014

41. On the claimant's return to work on 3 August 2014 she sat at the desk that she had been using while training. This was apart from where the rest of the Team were sitting. Mr McBride spoke to her. The third respondent and fourth respondent kept their interaction with the claimant to a minimum as they had heard via the dayshift that the claimant had been complaining about them. They were unaware of the detail of the complaint.

42. Towards the end of August 2014, the claimant learned of Ms Hume's departure from the second respondent. The claimant was upset about this. The claimant could not find a footstool that she had been before her sick absence. She also noticed and the second respondent was using a chair previously used by the claimant. The claimant was upset about this but did not raise the matter with the second respondent who was oblivious to the matter.

43. In September 2014, the claimant was in discussion via email with the first respondent's payroll team regarding her basic pay.

44. Around 14 September 2014 Mr McBride moved to another team therefore an opportunity arose in the Team for the role of Lead Customer Advisor. Around this time there was also opportunity to travel to the Southend office with a view to learning about work which was to be transferred from Southend office to the Glasgow office. The second respondent spoke to Mr Simpson, the third respondent and fourth respondent indicating that they were eligible and should be considered for the role. The claimant was not included in this discussion.

45. The second respondent spoke to the claimant separately. The second respondent explained that she felt that the claimant was under enough pressure at that moment on return from ill health and that it would be better for the claimant to focus on her existing role. The second respondent still had concerns about the claimant's grasp of her role. There was a reluctance to give the claimant any additional duties but this was not raised with the claimant formally nor was there any form of action plan on her performance.

October 2014

46. The claimant was on annual leave in late September/early October 2014. She returned to work around 13 October 2014.

47. Anne Kennedy joined the Team on a temporary basis from dayshift. Ms Kennedy is about eight years younger than the claimant. On one occasion, she witnessed the third respondent kicking a chair when he discovered the Team was to be short staffed and that claimant was on annual leave. Ms Kennedy left the Team on discovering an email written by the third respondent contained comments about her. Those comments did not relate to Ms Kennedy's age or sex.

48. Around mid-October 2014 Mr Watson was appointed Operations Manager to replace Ms Hume. Ms Hume had by that stage been placed on garden leave. There was no formal handover.

49. The second respondent informed the claimant that outstanding leave had to be taken by 1 December 2014. The claimant applied to take leave but was informed she that she could not do so as it had already been requested by the third respondent who was attending the training at the Southend office. The claimant did not consider this was the case given the information that was on the system.

50. The claimant was concerned that she was not invited the training at the Southend office especially after she contacted Ms Ferris and discovered that that Mr Dickson had told all his team and there was discussion about who should go (production C6.10).

51. In late October 2014 while on the telephone to a customer the claimant overheard the fourth respondent making a comment about not talking about the claimant's age as it was a Government secret. The claimant did not speak to the fourth respondent about this comment at the time.

52. The first respondent recruited Lee Barrington in July 2014 on a starting salary of £17,500. He joined the Team around 28 October 2014. Around July 2014 the first respondent also recruited Gemma Davis on the same terms and conditions as Mr Barrington.

53. At the end of October 2014, the second respondent was endeavouring to clarify the claimant's terms and conditions with a view to resolving salary issues that the claimant had raised with the first respondent's payroll team. The claimant was frustrated with the second respondent as she considered that that information ought to be in the first respondent's possession. The discussion became heated. The claimant was upset and discussed the incident with a colleague, Ms Blair in the ladies' toilet.

54. On 29 October 2014, the claimant worked her last shift with the first respondent. She was unwell and left early. She telephoned Mr Watson to advise that she would be unable to come into work that evening as she had been ill.

55. After that the claimant sent in sick notes detailing work related stress, anxiety and depression as her reason for absence.

November 2014

56. On 28 November 2014, the claimant sent a letter to Mr Watson headed "Letter of Grievance" (the Grievance Letter) (productions R90 to R99). Mr Watson considered that it was a difficult letter to read and he was concerned for the claimant. He contacted HR and his line manager.

57. In terms of the first respondent's grievance policy the Grievance Letter was a formal grievance (the Grievance Policy) (productions R59 to R62). The Grievance Policy refers to the following:

"*If your grievance relates to your manager, you can go to your manager's manager who will investigate and manage your case.*

Stage 3: Investigation & meetings
Depending on your specific case we may need to carry out further investigation. We will interview you and any witnesses, as well as review relevant documentation.

We will also invite you to one or more meetings to go through the facts of the case. You can bring a companion to any of these, which can either be a Vodaphone colleague or a trade union official.

We will be in touch with you usually within one week of the final grievance meeting, to inform you of the outcome of your grievance and any other actions we are planning to take as a result.

Stage 4: Appeal
If you are unhappy with the outcome, you can appeal. We will select a hearing manager who has not already been involved in the process so far. Their decision will be final."

58. The Grievance Policy also refers to a manager checklist which states that on receipt of a written grievance managers should contact manager support who will give advice. The manager will then:

"*Have to identify an independent manager to investigate the allegations. They will speak to your team member and any witnesses as well as review any relevant documentation. They will also hold necessary meetings before making a decision*."

59. Mr Watson decided that he would require to appoint an investigating manager as although he did not know the individuals named in the Grievance Letter he line managed them. Mr Watson therefore decided to approach Ms Valente who was more senior to him and worked in the same Directorate but in a different business area.

60. Mr Watson and Ms Valente discussed the Grievance Letter. They considered that two of the elements could be dealt with relatively quickly as part of Mr Watson's line management duties: issues relating to salary and holidays. The remaining issues which related to allegations of discrimination required to be investigated and were to be dealt with by Ms Valente.

61. Ms Valente recognised the second respondent's name because some years previously she had been managed the call centre in which the second

respondent had worked along with 600 to 800 other employees. Ms Valente did not disclose this information to Mr Watson or the claimant. Ms Valente did not consider that it compromised her position. She had no interaction with the second respondent since 2009.

62. The claimant had holidays to take before the end of the holiday years (November) but was unable to do so because of operational reasons and she then on sick leave. The first respondent had a practice of allowing up to five days leave to be carried forward in these circumstances.

December 2014

63. Mr Watson acknowledged the Grievance Letter by email sent on 1 December 2014 (production R103). He explained that he needed time to fully appraise himself of its contents and ensure that the correct and appropriate steps were to be undertaken. He also explained that he would be contacting the claimant in the next few days and in the meantime, he advised the claimant of the employee's assistance programme. Mr Watson indicated that if she had not already been referred to occupational health this should be done with a view to supporting her. Meantime Mr Watson provided the claimant with his mobile telephone number which he said was always available for her to call. Mr Watson explained that he would be in contact via telephone but if unsuccessful he would email the claimant to arrange a time for them to discuss matters.

64. On 8 December 2014 Mr Watson sent a further email to update the claimant on developments (production R100). The email included the following:

"*I have contacted HR to appraise them of the situation and to ensure this is documented appropriately and in line with the Vodaphone grievance policy. The concerns that you raised within you letter to me are extremely serious one and as such I have initiated a full investigation into the concerns that you have highlighted to me; as per the Vodaphone grievance policy. This investigation will be led by two independent people within the organisation and they will be in touch with you in the coming day to organise a meeting with you. Cat Valente is leading the investigation. Cat is a peer of mine who has been with*

the company for around 15 years and is very well respected throughout our leadership team. I have every faith that Cat will conduct a thorough, professional, sympathetic and independent investigation into the concerns that you have raised.

I trust that you are happy for Cat to contact you to arrange a meeting with you to conduct an interview as part of the investigation. As you have requested I have attached a copy of the Vodaphone grievance policy for you to review and for your records. In addition, further to my last email I have submitted a referral to an Occupational Health Team to contact you to discuss any support that we can offer to you in relation to any part of your health and wellbeing. I hope that the referral to Occupational Health and the employee assistance programme contact details I have sent to you provide you access to appropriate additional support that you may require. If you would like me to take any further steps in regard to this please do let me know.

You have also raised concerns with me about the level of salary you are being paid. I will be looking into this but I would like to discuss this with you to clarify a couple of points before I link in with payroll and HR to investigate this. I would like to call you on Tuesday morning if you are available. I would also like to meet with you informally to talk things through with you. I understand that you would not want this to happen at the office and I would like to discuss potential times and locations for us to meet so I can understand what more you may require from me and to ensure you feel as supported as possible at this time. My phone is always available to you Elizabeth and my number is at the bottom of the mail. I will call you on [ ] at around 11am on Tuesday if this is suitable to you. I will be driving on Tuesday morning so if I am delayed in the traffic it may delay my call but I will do all that I can to ensure I call you at that time that is suitable to you.

I hope that the above provides you with reassurance that your letter and the concerns that you have raised are being taken seriously and acted upon appropriately. As I say please contact me if you have any issues or concerns."

65. The claimant confirmed that she would be available for the telephone call. Mr Watson and the claimant spoke briefly on the telephone. Mr Watson confirmed that Ms Valente would be in touch regarding a grievance meeting.

66. Ms Valente then contacted the claimant via email with a view to setting up a mutually convenient time to attend a meeting to discuss the Grievance Letter. This was arranged for 11 December 2014 which was confirmed by a letter attached to an email sent on 9 December 2014 (production R104 to R106). The claimant indicated that she would be accompanied by Ms Kennedy.

67. On 11 December 2014, the second respondent (who was at that point unaware of the Grievance Letter) wrote to the claimant asking her to attend a well-being meeting on 18 December 2015 with Ms Bell and Ms McGeachy (production R108). This was to update on developments; give information on sick pay and sickness policy. The letter indicated that if the meeting was unsuitable the claimant should say and an alternative can be arranged.

68. Ms Valente met with the claimant on 11 December 2014 (the Grievance Meeting). Ms Kennedy accompanied her. Georgina Henderson was present to take notes. Ms Valente confirmed that the issues relating to pay and comparable pay to new starts were out of the scope of the Grievance Meeting as they were being dealt with by Mr Watson due to the time bound responses requested by the claimant. The claimant confirmed that she was content with that.

69. From the Grievance Letter Ms Valente, had identified that the complaints were:

a. The second respondent had treated the claimant differently with no training or support and having overlooked the claimant when there had been opportunities.
b. Lack of support from others in the Team particularly in relation to derogatory remarks by the third respondent and fourth respondent.
c. The claimant also indicated that she had a medical condition and had received letters about unauthorised absence from the second respondent when the claimant had called in and provided medical certificates.

70. Ms Valente explained the process and that matters were to be kept confidential to protect the interests of all parties concerned. The claimant confirmed that she had no objection to Ms Valente sharing the Grievance Letter with the individuals against whom she had a grievance. Ms Valente also confirmed that she would endeavour to investigate as quickly as possible but due to the shift patterns there may be a delay.

71. During the Grievance Meeting the claimant indicated she had taken legal advice and referred to notes from her lawyer. These stated she had been a victim of age and sex discrimination and harassment. She thought she would have a personal injury claim regarding health issues because of bullying in the workplace. The claimant indicated that she had not thought about an acceptable outcome to her grievance and in discussion indicated that she would want to come back full time on a different night time shift and still wanted the behaviours addressed.

72. Immediately after the Grievance Meeting Ms Valente started the investigation (the Grievance Investigation). She met Ms Kennedy who confirmed that she did not witness any of the incidents to which the claimant had referred (production R116 to R118). Ms Kennedy did, however, witness the third respondent kicking a chair when he discovered that the claimant was on holiday and would not be on shift. Ms Kennedy said that she had received support when she asked questions. Ms Kennedy considered the fourth respondent had shouted at her about being a racist and the comments in the third respondent's email to the second respondent about Ms Kennedy were derogatory.

73. Ms Valente sent the claimant a copy of the Grievance Meeting Notes for approval (productions 109 to 115). The claimant required further time to consider them and this was afforded to her.

74. In the meantime, Ms Valente she continued the Grievance Investigation meeting various witnesses on 17 December 2014 which was the next rotation that the Team was working. The Grievance Investigation was when the witnesses first became aware of the nature of the grievance.

75. She first met the third respondent (productions R130 to R133). During this meeting the third respondent confirmed that the nightshift had worked together for several years. He accepted that there was "*banter*" on the shift and there could be swearing, sarcasm and generally loud behaviour but this had never been challenged. The third respondent accepted that he was frustrated by the job and that this sometimes manifested itself in the him being angry and kicking a chair but this was not aimed at anyone. There had been times when he has been so frustrated that he has walked away from the desk although again this was not aimed at the claimant. The third respondent's position was that he initially gave the claimant support and answered her questions but that information was not absorbed and the claimant consistently asked the same questions making it difficult for him to continue to support her. The third respondent denied deliberately giving false information and taking work away from the claimant. Any work was moved to balance the workload. The third respondent accepted that he ranted in the office but this was not directed at anyone and he was conscious of customers and not colleagues as he thought that if they had a problem they would say so.

76. Ms Valente then spoke to the fourth respondent (productions R134 to R136). The fourth respondent confirmed that he and others swore on shift but this was stress release. The fourth respondent's position was that he gave the claimant the same information repeatedly and that although he may have come across aggressively, no one challenged him on it. The fourth respondent admitted to making a joke about the claimant being an old woman and making pensions jokes; he was having a laugh and thought it was teasing as he was not challenged by the claimant and she initially joined in. The fourth respondent said he had had a good relationship with the claimant but it deteriorated as she did not seem to pick up her role and did not retain information. He had raised this with the second respondent and had also discussed his frustrations with the third respondent.

77. Ms Valente next spoke to the second respondent (productions R137 to R143). The second respondent admitted that she had spoken to the claimant about attrition on the nightshift but this was because she did not want the claimant to

leave and wanted to demonstrate that. There had been one to one meetings at the second respondent's desk. Initially the second respondent did not sit with the Team. She was also responsible for the 999 team. The second respondent found it a difficult year in terms of resources, being pulled in different directions due to the redundancies and the TUPE transfer. The second respondent had not raised the matter with Mr Richardson as he was in the same position.

78. The second respondent maintained that she did not witness any of the incidents to which the claimant had referred but she accepted that the third respondent and fourth respondent could be "*quite childish*" and "*sarcastic and loud*". The second respondent found that due to socialising with the Team at first they did not respond to her challenging them and therefore she stopped socialising with them.

79. The second respondent said that when the claimant initially went off sick medical certificates were handed in but the claimant did not maintain contact with her. The claimant called other managers but not the second respondent and therefore the second respondent wrote to her asking to meet. The claimant had then written to the second respondent and having taken advice from Ms Hume the second respondent did not contact the claimant as Ms Hume was dealing with the matter.

80. The claimant was retrained for returning to the nightshift. The second respondent maintained that she did not treat the claimant badly when she returned to work. In fact, she felt that she treated the claimant with due care due to the comments that had been raised by Ms Hume around potential concerns. The second respondent's view was that the claimant struggled with grasping the concepts of the role and had repeatedly asked questions on some basics. A few of the Team had raised this informally and consequently the claimant was not given additional duties such as fault controlling. The second respondent did not raise performance issues with the claimant formally and did not raise any form of action plan on her performance.

81. The second respondent was asked not to deal directly with the claimant during the Grievance Investigation process.

82. Ms Valente then spoke to Lorraine Blair who occasionally worked with the Team (productions R144 to R146). She had not witnessed swearing, derogatory remarks or abusive behaviour generally on the night shift nor had she witnessed any specific swearing or derogatory remarks carried out by the third respondent or the fourth respondent towards the claimant. Ms Blair considered that the second respondent could be sharp but she did not treat the claimant any differently. Ms Blair recalled a specific incident where the claimant had seemed upset. She maintained that the claimant raised the matter with her and she listened. Ms Blair subsequently commented when approving her note of the meeting that the claimant had been equally sharp with the second respondent on that occasion.

83. Lastly Ms Valente spoke to Mr Simpson (productions R147 to R149). Mr Simpson confirmed that the shift could be loud and derogatory with sarcastic comments being made. The third respondent and fourth respondent thought this was funny. Mr Simpson had never considered that the behaviour was so unacceptable that it had to be challenged. Mr Simpson confirmed that it could be hard to settle into the rotation if you were new and the claimant seemed to struggle in the role. He did not see the second respondent treating the claimant any differently from anybody else.

84. Ms Valente emailed the claimant on 18 December 2014 explaining that she had conducted initial investigations and asking if the claimant was available to meet on 22 December 2014 to discuss form findings and continue with investigations (production R163). The claimant responded that she would rather discuss findings in writing. She was "*extremely stressed and pressured*" by the number of meetings that she was being asked to attend. The email concluded that, "*as I am suffering from depression that being asked to come into work 3 x times within a week is a bit excessive*".

85. On 19 December 2014 Mr Watson sent an email to the claimant dealing with issues which had fallen under his remit (the 19 December Email) (productions R156 to R158). Mr Watson confirmed that the claimant had been underpaid over the period 1 April 2013 to 30 September 2014 but the shortfall was

accounted for and the correct level was paid in October and November. The 19 December Email stated:

"*This would indicate that Sophia and Lorraine had resolved this prior to October salary, however, it appears it has not been communicated clearly to you, I am sorry there was a breakdown in the communication. Unfortunately, due to data protection policies I will not be able to provide you with payslips to you. In order for these to be provided a request has to be made by you using the contact information which was provided.*"

86. The 19 December Email continued:

"*You have asked for clarification on the reasons why the TUPE salary for some individuals in the SDA role is below the base Vodaphone Salary. As you are aware all contracts of employment are binding and if there is a merger or acquisition of those contractual terms and conditions continue to be protected under TUPE. In saying that whenever possible we aim to align terms and conditions post merger but this is not always straightforward and people working alongside each other can sometimes have different terms and conditions including different salaries. This is not ideal but can occur, especially in businesses like Vodaphone who very often grow through acquisitions.*

We have been listening to concerns raised by you and your colleagues. Donna has been working through this issue for several weeks. I am sure you appreciate a change of this nature has to go through a number of approval levels to ensure we are being fair to all as well as agreeing necessary funding to uplift salaries. I am, however, very pleased to be able to confirm that we will align salaries for Capita to the employees whose salaries are below the current Vodaphone threshold of £17.5k. You are currently below the threshold of £17.5k and as such the change will come into effect from 1 January 2015 and I will be raising the request with HR this week so the increase can be paid with your January pay cheque. In addition you will continue to receive your shift allowance on top of your base salary of £17.5k."

87. As the claimant, had requested a copy of the first respondent's sickness and absence policy this was attached to the email. She had also requested information about outstanding leave which had been requested and had been declined. Mr Watson asked the claimant to provide further information so that he could progress this.

88. The claimant had also requested various emails. Mr Watson indicated a willingness to provide these if there could a clear scope as to what the claimant was looking for. Meantime he explained that the second respondent had been writing to him regarding the claimant's salary and had inadvertently copied and pasted a table which included the claimant`s bank details. Given the sensitive nature of the information he had asked the second respondent to advise the claimant of this so that she could decide whether to inform her bank.

89. Finally, in relation to the Grievance Investigation Mr Watson explained that he could not comment on this as he was not involved. The 19 December Email concluded:

"*I would like to meet with you for a wellbeing meeting to ensure we are providing you with the correct level of support. If you provide me with some dates when we could schedule this and you feel comfortable to have this meeting."*

90. The first respondent's sickness and absence policy stated that company sick pay (CSP) was discretionary (production R56). Employees with between two and five years' service were entitled to up to 12 weeks' CSP and a further 16 weeks of statutory sick pay (SSP) in any 52-week period. Employees with five years or more service get up to 16 weeks' CSP. During a phased return to work employees would be paid for hours worked and the rest paid as CSP from the remaining entitlement. If CSP runs out owed holidays allowance can be used before switching to SSP. Statutory holiday allowance continues to accrue during sick absence. Any holidays taken during sickness must be booked on the usual holiday booking form and confirmed with a manager.

91. Mr Watson was aware that the claimant's entitlement to sick pay had expired. He did not mention this in the 19 December Email. He felt it was more appropriate to discuss this issue with her at the well-being meeting particularly as he was aware that the claimant had an appointment scheduled with occupational health.

92. On 19 December 2014 Ms Valente was also involved in an email exchange with the claimant regarding the Grievance Meeting Notes. Ms Valente explained why the claimant had been invited to meetings. In relation to the continued Grievance Meeting Ms Valente explained that it was to discuss initial findings but it also included some follow up questions. The email continued, "*As you have said that you do not feel well enough to attend the meeting, I will compile these questions by email and send these across to you on Monday 22nd December 2014. Please confirm that is how you want to proceed*" (production R162). The claimant agreed.

93. Ms Valente and Mr Watson discussed the situation and agreed that it would be appropriate for all meetings to be co-ordinated through Mr Watson albeit that Ms Valente would continue to deal with the Grievance Investigation. They considered that this would alleviate some of the stress of multiple people writing to the claimant suggesting meeting dates.

94. As part of the Grievance Investigation Ms Valente spoke to Mr McBride on 22 December 2014 as he was on a different rotation. This was the earliest opportunity to meet him (productions R150 to R153). Mr McBride confirmed that he came off nightshift around mid-September 2014. He considered that there was a lot of banter and some inappropriate language when working on the night shift. His position was that it was mutual and not directed at individuals. He said that everyone was involved although the third respondent and the fourth respondent had a "*cutting sense of humour*" and they did not know where to draw the line and were close to the bone. Mr McBride had challenged this behaviour in relation to another colleague before the claimant joining the Team. Mr McBride did not witness the third respondent kicking a chair. Mr McBride said that he mentored the claimant for around 18 months

and then Mr Simpson took over. Initially she joined in with the banter but not when she returned from sick leave. The claimant was also given refresher coaching on her return from sick leave. Relationships were more strained when the claimant returned in August 2014 particularly with the third respondent and fourth respondent.

95. Ms Valente emailed the claimant on 22 December 2014 advising that she expected that it would be the following day before she sent over the questions (production R159).

96. When Ms Valente started to prepare the questions, it was challenging and she had doubts about whether it was the most appropriate way of progressing the grievance given the claimant's comments in the email about suffering from depression and being on medication so it was all "*a bit much*" for the claimant who was "*doing [her] best to try and concentrate and deal with all this but [she] was having difficulty at times*". Ms Valente was aware that Mr Watson was trying to arrange an appointment for the claimant with occupational health on 29 December 2014. She therefore felt that with the onset of the Christmas holidays it would be better to pause the Grievance Investigation and review matters following the occupational health appointment and Ms Valente's return to business on 5 January 2015.

97. Ms Valente endeavoured to contact the claimant by mobile telephone to discuss this but she was unable to do so. Ms Valente therefore sent an email to this effect (production R165). Ms Valente indicated that on 5 January 2015 they could agree how best to progress proceedings based on the claimant's health and how she was feeling. In the meantime, if the claimant had any questions on this at all she was not to hesitate to contact Ms Valente.

98. Mr Watson was aware from Ms Valente that the Grievance Investigation was paused due to the claimant's health and well-being. He wished to preserve the integrity of the investigation and therefore there was no discussion about the Grievance Investigation itself.

99. On 23 December 2014 Christina Wright, Occupational Health Manager to the first respondent emailed the claimant to advise that an appointment had been booked for 29 December 2014 at 2pm and that the Occupational Health Adviser would call the claimant on the telephone at the appointment time (production R187). The claimant cancelled the telephone consultation by email on 29 December 2014 as she was unwell. For the avoidance of doubt, it was immediately clarified that it was a telephone consultation but there was no answer when Diane Kesterton, Occupational Health Advisor telephoned. Later that day the appointment was rescheduled for 12 January 2014 being the earliest available appointment (production 186). Mr Watson was advised of this and the email was copied to the claimant. Mr Watson informed Ms Valente.

January 2014

100. On her return to business Ms Valente made enquiries about the rescheduled telephone consultation with occupational health which Mr Watson agreed to follow up. Ms Valente also noted comments received from people she had interviewed in December and made the necessary amendments to the notes.

101. On 5 January 2015 in response to a request for pay slips the claimant was advised by the first respondent's payroll team that the request should be via HR and copy payslips were chargeable but they could be accessed through the web address that was provided (production 192).

102. The second respondent was absent from work in early January 2015. She did not return until 27 January 2015. Mr Watson received a proforma letter prepared for the second respondent by HR to send to the claimant regarding the claimant's company sick pay entitlement being exhausted. Mr Watson felt that it was not appropriate to send the letter but rather to discuss the matter face to face at a well-being meeting.

103. Mr Watson sent an email to the claimant on 8 January 2015 indicating that he was hoping to call the claimant within the next few days to understand how she was feeling. He explained that there were some items that he needed to pick up relating to questions posed in her letter but wanted to ensure that the

claimant could have the discussion in relation to these matters (production R188).

104. Ms Kesterton emailed Mr Watson on 13 January 2015 with a copy to the claimant advising that the second occupational health appointment was missed and the final appointment was scheduled for 15 January 2015 (production C12.6). The claimant was unaware of the occupational health appointment scheduled for 12 January 2015.

105. On 13 January 2015, the claimant replied to Mr Watson saying that she was not happy that the Grievance Investigation was postponed. Ms Valente had agreed to email questions and did not do so. Further it had not been made clear that the occupational health appointment was a telephone call. It was also unacceptable that she should have to pay for payslips.

106. On 14 January 2015, the claimant and Mr Watson had an email exchange arranging to meet on 19 January 2015 (production C12.8).

107. On 14 January 2015, the claimant sent an email to Ms Kesterton and copied to Mr Watson saying that that she was stressed to receive an email from Ms Kesterton which should not have been sent to the claimant but was about her and was in breach of the Access to Medical Reports Act 1988 (production C12.10).

108. Mr Watson was unaware of the email to which the claimant referred. He emailed Ms Kesterton for an explanation. Ms Kesterton replied to Mr Watson and copied the claimant advising (production C12.12):

"*This email has nothing to do with Elizabeth. I was asked a question from the legal team.*

I do not know why this email has gone astray but will look into it.

No breach of confidentiality has occurred as no name or condition is stated. Please accept my sincere apologies for any distress caused. I have copied my manager into this email."

109. Ms Valente was aware from Mr Watson that the claimant was unhappy that the Grievance Investigation was postponed and that he had arranged a meeting with the claimant the following week. Ms Valente emailed the claimant on 15 January 2015 reiterating the explanation that had been given in the email sent on 23 December 2014 (production C12.13). Ms Valente confirmed that she had been concerned about the claimant's wellbeing and the need for Ms Valente to talk through the issues and this would be difficult to do by email. Ms Valente asked if the claimant now felt well enough to meet and if so when bearing in mind that the claimant already had a meeting scheduled with Mr Watson and the claimant had issues with being asked to attend more than one meeting in a week.

110. On 18 January 2015, the claimant cancelled the meeting with Mr Watson scheduled for the following day as she had tonsillitis (production C12.17). She proposed by email sent on 20 January 2015 that it be rescheduled for the following week when she hoped to feel better.

111. The claimant replied to Ms Valente by email sent on 20 January 2015 indicating that before she agreed to any further meeting she needed information on recent findings and the questions that were to be asked. The claimant said that owing to inaccuracies in the original Grievance Meeting Notes she wanted communications to be emailed. She also indicated that she had other appointments and that she currently had tonsillitis (production C12.14).

112. Mr Watson felt that the situation was getting out of control. He had been unable to meet with the claimant for a well-being meeting; occupational health had failed to meet with the claimant; the Grievance Investigation was paused and the claimant's company sick pay was exhausted. Given the challenges in contacting the claimant by telephone Mr Watson decided that there was a need for a single written response to simplify the process and deal with the sick pay issue. He had wanted to deal with the sick pay issue personally and this face to face but this had not happened and he needed to make the claimant aware of the situation.

113. On 28 January 2015, the claimant sent an email to Mr Watson asking about a response to her email and why she had not been paid sick pay (production C12.18). The claimant contacted HR and was advised by email sent on 29 January 2015 that a letter had been sent to her line manager on 5 January 2015 which should have been signed and passed to her (production C12.19).

114. The claimant wrote to Mr Watson on 29 January 2015 resigning with immediate effect (the Resignation Letter) (production C13.1).

115. The Resignation Letter was sent by post. It stated that the claimant had raised several issues. She felt that she was no further forward and was being punished for putting in a complaint and that she was the one under investigation not the people about whom she had complained. Further the postponement of the Grievance Investigation without consultation was adding to the claimant's anxiety and stress and that Ms Valente had gone back on her agreement as to how this was to be dealt with. Mr Watson and Ms Valente had failed to reply to emails and the first respondent had gone behind the claimant's back trying to obtain a medical report. The Resignation Letter continued:

"*The last straw for me being all of the above as well as finding out that although you mentioned to me in writing that Caterina Valente was and I quote `totally independent with the company (making me think Vodaphone) for 15 years etc` it seems this is not the case at all … it has been brought to me attention that Caterina Valente is in no way shape or form independent to the people involved in this investigation and should not in my opinion be leading this investigation due to the fact that Caterina worked for Cable & Wireless Worldwide for 15 years not Vodaphone and has worked very closely in all that time with my own manager whom I am complaining about Sophia Ghafoor and I have been made aware they know each other very very well and in fact have been told they are friends.*"

116. The Resignation Letter also stated, "*Please note that it has just come to my attention that I have not been paid this month with SSP only going into my account for £344 which won't even cover my rent with notice whatsoever I*

could potentially find myself homeless". The claimant said that she had been informed by HR that the second respondent had been issued with a letter on 5 January 2015 which she failed to send to the claimant.

117. Mr Watson had not received the Resignation Letter when he sent an email to the claimant on 29 January 2015 (the January Email) (production C15.1). Mr Watson confirmed that he would be the point of contact for co-ordinating any communication requests. He reiterated that he wanted to meet with the claimant to ensure that she was being offered all the support that was needed. He suggested a face to face meeting or setting up a time for a call. He stressed that this was in relation to discussing wellbeing and was not in relation to the grievance.

118. About the Grievance Investigation Mr Watson explained that he was not able to go into detail because this was being carried out by Ms Valente. He explained that going forward he would ensure that a clash of meetings was avoided. The Grievance Investigation required a face to face meeting to enable it to be finalised.

119. About her health Mr Watson had suggested that it would be helpful to have a report from occupational health (Nuffield Health) which would be shared with Mr Watson and the claimant. Any information from the claimant's GP or an independent medical practitioner would remain with Nuffield Health and would only be provided with the claimant's express consent. Mr Watson was aware that the claimant had concerns about an email from Nuffield Health but despite a swift apology and explanation that it had been sent on error and no attempts had been made to seek the claimant's records the claimant nonetheless decided not to allow the first respondent to make a medical referral to Nuffield Health. Mr Watson explained that accordingly the support and assistance provided was without the guidance of occupational health. Mr Watson asked the claimant to reconsider this decision so that appropriate measures could be put in place based on meaningful medical information.

120. Mr Watson continued that with regards to pay he had hoped given the sensitive nature of this and the claimant's current health to have discussed this

at the well-being meeting this had not proved possible. The January Email continued:

"*You are entitled to 12 weeks company sick pay in a rolling 12 month period. Your company sick pay finished on 6 December 2014. After this date you will get £86.70 a week statutory sick pay, paid by Vodaphone on behalf of the Government until you have been absent for a total of 28 weeks. This will start immediately after the company sick pay ends, so long as absence is continuous.*

If absence is not continuous, statutory sick pay is paid from the fourth day onwards. The first three days of absence, or absence of three days or less will be unpaid."

121. The January Email concluded:

"*I want to be able to support as much as possible, however, to do that we need to have clear communication plans in place to ensure the correct level of contact and support is in place to help your recovery and return to work. Please can you contact me by the end of Tuesday 3 February 2015 on [ ] to discuss the above and to allow us to organise suitable times to meet with you."*

122. Throughout January 2015 the first respondent wrote to the employees who had transferred in April 2014 advising that their pay was being harmonised with those employees employed directly by the first respondent. This included the Team and Ms Ferris.

February 2015

123. Ms Valente, who was also unaware of the Resignation Letter sent an email to the claimant on 2 February 2015 explaining that she would like to meet to discuss the best possible outcomes for all parties involved in the grievance. Ms Valente offered to be flexible about venue and timings and again requested that the claimant consider a face to face meeting. It was reiterated that the claimant had a right to bring a companion to the meeting but Mr Watson would be the one who would co-ordinate to simplify the communications. The email concluded that if the claimant was not willing to agree to a face to face meeting "*the business may consider a deviation from the standard grievance procedures and consider a written response to outstanding questions I have as investigation manager in order to seek the best possible resolution to this matter*."

124. On receipt of the Resignation Letter Mr Watson was concerned about the claimant. He contacted HR. Mr Watson was aware that the January Email had crossed with the Resignation Letter.

125. He also spoke to Ms Valente who confirmed that she had worked for Cable and Wireless for several years. Around 2009 she had worked in the same part of the business as the second respondent along with 600 to 800 other employees. Ms Valente had been the Call Centre Manager and the second respondent was an agent on the helpdesk. They were not friends although they may have attended a Christmas party at which all employees would have been invited. Ms Valente also clarified that after discussion with HR she had decided to temporarily halt the investigation pending the outcome of the occupation health report that had been requested. This was to ensure that the claimant's needs were being fully considered during the Grievances Investigation.

126. Mr Watson wrote to the claimant on 11 February 2015 advising that he was saddened to hear of her decision to resign especially as matters were still outstanding (productions R206 to 208). The letter continued:

"*I want to ensure that you have the support you require and it is important that we have an opportunity to fully understand and where possible resolve your situation. I would like to meet to discuss an agreed, and supported way forward with all the outstanding questions that remain. This way you have the opportunity to fully consider your resignation notification and for you to retract this and continue your employment with Vodaphone.*

With this in mind can I ask that you reconsider and confirm your final decision to me by the end of Monday 16 February 2015."

127. The claimant did not retract her resignation. At the date of termination, the claimant was 49 years of age. Her period of continuous employment was three years. She earned £1,594 gross per month which equated to £1,326.61 net per month. The claimant was in receipt of Employment and Support Allowance. She found alternative employment around eight weeks after the termination of her employment.

May 2014

128. In line with the first respondent's grievance policy Ms Valente was asked to complete the Grievance Investigation notwithstanding the claimant's resignation. She did so d on the information that was available to her from the Grievance Letter and the Grievance Meeting. The claimant was unaware of this.

129. On 7 May 2015 Ms Valente wrote to the claimant advising her of the outcome of the grievance based on the incomplete investigation that had taken place (productions R209 to R211).

Observations on Witnesses and Conflict of Evidence

130. The Tribunal had no doubt that the claimant genuinely believed what she said in evidence. However, this was based on her perception and recollection of events which the Tribunal felt with the passage of time had become the reality. The Tribunal formed that view because at the time the incidents occurred, particularly those involving the third respondent and fourth respondent the

claimant did not indicate that this behaviour was unwanted. While she raised some concerns about their behaviour with Ms Hume there were no specific allegations of discrimination on the grounds of age or sex. The Tribunal considered that by the Grievance Investigation the claimant was unable or unwilling to acknowledge that others might have a different perception of events; her contribution to the Team and that their versions had also to be considered.

131. Ms Queen, Ms Kennedy, Mr Khan and Ms Ferris gave evidence on the claimant's behalf. Ms Queen was an unpersuasive witness but she had little to contribute to the issues that the Tribunal had to determine. The other witnesses the Tribunal found to be credible and reliable.

132. The second respondent gave her evidence honestly. The Tribunal considered that she was credible and reliable. The Tribunal's impression was that during the period in question the second respondent was under considerable pressure in that she had to manage two teams through significant changes involving redundancy and transfer to a new employer. The third respondent and fourth respondent were challenging individuals to manage. The second respondent appeared out of her depth and the dealt with them by avoiding conflict.

133. The third respondent and fourth respondent also gave their evidence candidly. The Tribunal considered that they were frank in acknowledging that their behaviour was at times unacceptable and inappropriate although at the time they appeared to have no insight how their behaviour impacted on their colleagues particularly the claimant. The Tribunal did not consider that excused their behaviour but the Tribunal did acknowledge that the third respondent and fourth respondent were under stress at work and were undergoing a considerable amount of change in their working lives without benefit of robust management.

134. Mr Watson was, in the Tribunal's view an impressive witness. He gave his evidence in a straightforward manner and readily conceded that with the benefit of hindsight he might have done things differently. The Tribunal felt that

he was a compassionate line manager who genuinely empathised with the position in which the claimant found herself and his actions were motivated by what he thought were in the claimant's best interests.

135. Ms Valente was also, in the Tribunal's view, a reliable and credible witness who gave her evidence in a quiet, professional manner. The Tribunal felt that she took the grievance seriously and approached the Grievance Investigation with an open mind.

136. The Tribunal did not consider that there were significant conflicts in evidence in relation to the material findings in fact because much was recorded in contemporaneous documents. The exception to this was in relation to the specific allegation of discriminatory remarks which the claimant attributed to the third respondent and fourth respondent which the claimant said happened in February 2014 and one remark made in October 2014.

137. The claimant had a very clear recollection of what she said was said and by whom. The remarks were allegedly made in the fortnight before the claimant's sick absence for an unrelated matter. At the time the alleged comments were made the claimant did not indicate that she found them to be offensive nor did she raise these matters with the second respondent or Mr Richardson who was at that time the Operations Manager. While the claimant did raise with Ms Hume issues about the behaviour of the third respondent and fourth respondent there was no evidence that the claimant said that the comments that were made were ageist and sexist. Indeed, the Tribunal's understanding was that the claimant did not disclosed to Ms Hume specifically what was alleged to have been said. The complaint appeared to about their general behaviour and lack of support.

138. It appeared that the first time these allegations were specifically raised with the third respondent and fourth respondent was in December 2014 as part of the Grievance Investigation. At that stage although the third respondent acknowledged that he might have made certain comments he denied saying that *"Better still you will be the death of you so why don't you just go and do that*". The fourth respondent accepted that he had made jokes about the

claimant being an old woman and referred to pensions but recalled that the claimant joked about his age and referred to him as being a "*whipper snapper*".

139. The Tribunal noted from the Grievance Investigation that the behaviour of the third respondent and fourth respondent did not change when the claimant joined the Team. Indeed, their behaviour was generally immature and sarcastic. Initially the claimant did not appear to have a problem with it. When the FMC work moved to India the claimant felt that she was being unsupported and did not want the comments made by the third respondent and the fourth respondent but she did not specifically tell them so. The Tribunal was not convinced that the comments were directed at the claimant as their behaviour was the same even when the claimant was not present.

140. In relation to that allegation that around October 2014 the fourth respondent referred to the claimant's age being a Government secret, the fourth respondent had no recollection of this although he accepted that both he and the claimant joked about age. The Tribunal thought it was probable that the fourth respondent did make the comment as at this stage he did not know that the claimant found remarks about her age to be offensive.

141. There was also a dispute in relation to the claimant's performance. The claimant maintained that she did not receive sufficient training; there was a lack of support from her colleagues and the second respondent; and that she did not repeatedly ask the same questions. In contrast information obtained from the Grievance Investigation and the evidence of the second respondent, the third respondent and the fourth respondent was that the claimant received the same initial training as other employees. She also received mentoring from Mr McBride and refresher training after a period of absence followed by mentoring from Mr Simpson. Their position was that the claimant appeared to have difficulty retaining information and formed this view because the claimant repeatedly asked the same questions.

142. The Tribunal considered that the claimant received the same initial training as all employees working on the Assured desk. The Tribunal's impression was that the nightshift teams generally did not have the same support as those

working on the dayshift. The issues that were likely to arise were diverse. When the claimant initially worked on the Assured desk she continued to deal with FMC queries. There was no suggestion of any difficulties in working relationships at this period and indeed the claimant appeared to have a good rapport with the fourth respondent. The Tribunal therefore considered that it was likely that when the FMC work was no longer being undertaken that the claimant was exposed to more work with which she was not familiar. By this stage she had been part of the Team more than six months. There appears to have been an expectation amongst her colleagues that she would be more confident in dealing with matters than in fact she was. The claimant then had a prolonged sick absence. Before returning she then received refresher training. The claimant was also supported by Mr Simpson. When she returned to work in August 2014 there was no evidence to suggest that she was not capable of undertaking her core work albeit she did not have the same hands on experience as her colleagues.

143. The Tribunal considered that the claimant was an intelligent and capable woman and had no reason to doubt that she had the ability to do the job as was evident from the fact that she found new employment in a similar role. However, it appeared to the Tribunal that owing to the nature of the work she undertook during the first six months on the Assured desk and her subsequent periods of absence she did not have the level of confidence and experience that would have been expected by her colleagues. That said, the claimant was still capable of doing the job as the second respondent had not raised any specific issues. This did not mean that her colleagues did not feel a sense of frustration at having to continually assist her and there being a perception that others might be better placed to undertake more onerous tasks such as fault controlling and new training in Southend.

144. There was an issue in relation to a letter prepared by HR and sent to the second respondent on 5 January 2015. The claimant received an email from HR attaching a copy of the letter on 29 January 2015. The second respondent's evidence was that she on holiday, then ill. She did not return to the rotation until 27 January 2015. Her personal emails were not being

forwarded to anyone else. Since the Grievance Letter the second respondent was not dealing with the claimant. Mr Watson's evidence was that he was dealing with the claimant's absence by this stage and wanted to discuss matters with her at a meeting. The Tribunal considered that the evidence of the second respondent and Mr Watson was plausible particularly as the claimant did not receive the letter in early January 2015.

Submissions

The Respondent

145. Mr Grant-Hutchison said that the note issued following the Preliminary Hearing on 24 March 2016 had characterised the decision of the Preliminary Hearing on 17 February 2016 as a finding that the claimant was entitled to protection from discrimination by reason of disability from 27 October 2014. In fact, the claimant was only entitled to such protection at the end of January 2015 when the claimant had resigned.

146. However, all the claims are *prima facie* time barred. The claimant's claim was submitted to ACAS on 6 February 2015.

147. The claimant was signed off work on 29 October 2014 and did not return. The claims against the third respondent and fourth respondent are founded on alleged acts of discrimination. They had no managerial responsibility and accordingly any alleged acts that could have been done before 29 October 2014 are timebarred.

148. The second respondent's only interaction with the claimant after that date are based on one letter sent by her requesting to advise of her condition (production R108). Mr Watson spoke to this being a pro forma letter provided by HR but modified by the second respondent. It was highly unlikely that this could be the basis of a claim for direct discrimination. In relation to the first respondent insofar as it may be vicariously liable for the actions of the other respondents, the claim is also timebarred.

149. The only actions of the first respondent that are not subject to timebar considerations in relation to the action of Mr Watson and Ms Valente regarding are queries about salary, investigations into harassment and discrimination complaints unless the claimant can show that there was a continuing act of discrimination "*extending over a period of time*". The Tribunal was referred to *Hendricks v The Commissioner of Police for the Metropolis [2003] IRLR 96*. Applying this case, it cannot be described as a continuing act.

150. The claim for compensation for unfair dismissal is not subject to consideration of time bar if the acts complained of are those described in the Preliminary Hearing Note of 24 March 2016.

151. There is central relief from timebar and it is for the claimant to ask for and lead evidence as to why the "*just and equitable leave should be granted*". The onus is on the claimant. There would be prejudice to the third respondent and fourth respondent who are accused of acts of discrimination some of which date back to shortly after May 2013. Their recollection of what occurred would be limited by December 2014 when the investigatory process commenced let alone by the time of Tribunal Hearing. To a lesser extent this also applies to the second respondent. The claimant only became affected by her medical condition from 27 October 2014. She could submit a substantial grievance complaint by November 2014 and take legal advice. In these circumstances, it cannot be just and equitable to extend time for consideration of the claims against the second, third and fourth respondents. There were no complaints to management about any forms of discrimination before the Grievance Letter of 28 November 2014. Prejudice to the respondents investigating the complaint and thereafter conducting the hearing is considerable. They cannot be expected to remember generally un-particularised events the claimant said occurred. In the context of considering whether it is just and equitable reference should be made should not be referred to the judgment following the Preliminary Hearing on disability at paragraphs 52 to 54. It was submitted that it was not just and equitable to extend the three months' time limit of discrimination and accordingly the Tribunal has no jurisdiction to consider those claims.

152. About the claim under Section 66 of the EqA the defence under Section 69 of the EqA the claimant states that male individuals were being paid more for substantially the same work. She points to Mr Barrington as a comparator. The claim is directed only against the first respondent.

153. The first respondent accepts that male individuals such as Mr Barrington were paid more for substantially the same work. However, the first respondent maintains that there is a material factor defence. Mr Barrington was a new recruit to the first respondent and he was paid more as a new recruit. He commenced employment on 11 August 2014. The claimant accepted that both men and women transferred contracts to first respondent at their existing salary. Mr Watson spoke to the fact that the first respondent immediately paid a bonus to those transferring over as there was no provision for such payment in the original contract. He also spoke to the fact that a transfer of the contracts from Cable & Wireless gave rise to immediate discussions as to equalisation in pay. That equalisation took place on or about January 2015. A material factor defence has been established.

154. Turning to the discrimination based claim the claimant was disabled at the end of January 2015/October 2015. Nothing was done at the end of January 2015. The nearest event which might possibly be held to be discriminatory was the decision to pause the grievance investigatory process. This decision was largely because of concern for the wellbeing of the claimant.

155. On 23 December 2014, the claimant advised Ms Valente by way of an email that she was "*stressed and pressured*" and "*suffering from depression*". The first respondent had reason to believe that the claimant would be discussing matters with Occupational Health and then the investigating process would be completed. Ms Valente found that it was better to wait for a short period and have a more complete investigatory process rather than burdon an unwell complainer with a series of difficult questions. The secondary reasoning for not proceeding by way of email is the sheer difficulty in drafting such questions. The claimant complains that this was not discussed with her. However, Ms Valente's evidence was that she did try to phone the claimant and given an

Occupational Health discussion was to take place on 29 December 2014 and she was to return to work on 5 January 2015 the delay would not be significant. Ms Valente also realised if the worst came to the worst and the Occupational Health advisor said that the claimant could not attend for the meetings then she would proceed by way of email questions. In such a situation employers are often dammed if they do and dammed if they do not. The respondent was to proceed based on the wishes of the claimant who is disabled by way of mental difficulties in a way which is procedurally unsatisfactory then they are open to criticism or alternatively are open to criticism for the decision that they did take. However, in the matter of the nature of such criticism it is not ideal to found a complaint based on disability discrimination nor for that matter to be a final straw in an unfair dismissal argument.

156. Considering the events from 27 October 2014 the claimant was absent from work on 29 October 2014. She did not return afterwards and there could not be any discrimination against the second, third or fourth respondents.

157. The only two other matters which caused the claimant concern were the cessation of statutory sick pay and her suspicion that Ms Valente was not totally independent. This is commented on further below.

158. In relation to the evidence the Tribunal was reminded that throughout the claimant's presentation of her case she has made accusations of others which have not been subject to a formal investigation in disciplinary procedures. Such procedures are there to protect the accused as much as the accuser. If they are not used then the respondents require the anxious scrutiny and protection of the Tribunal. The Tribunal must also be cautious about the quality of the claimant's evidence because of the nature of her physical and mental health difficulties. The Tribunal must decide whether her evidence is credible and reliable. Much of the claimant's evidence is unreliable because of the nature of her health difficulties. The claimant may genuinely believe much or all of what was said in the evidence but it is given from a very distinct

perspective. The claimant's evidence must be considered through the prism of her health difficulties.

159. About the allegations of direct discrimination because of age and sex and harassment any remedy in terms of these sections should be considered in the alternative. They cannot be compensated twice. Per the claimant`s chronology her complaint is that the third respondent repeatedly told her to "*shut up*" and made a comment about why she should "*just not go away and die*". Because of the passage of time both the investigation meeting and this Hearing the third respondent cannot categorically deny that he said it but he states it unlikely that he would have made such a comment. No one seems to have heard the alleged comments made by the third or fourth respondents. On the last day of cross-examination of Ms Valente the claimant said that they were only made when nobody could hear. If the claimant is right that suggests an unusual degree of deliberation and planning which is unlikely to be correct. Even if the comment was made it does not of itself constitute any form of discrimination or harassment based on age or sex. In the context of a stressful and difficult workplace such a comment, if made, is not discriminatory (see *Weeks vNewham College of Further Education [2012] EQLR 8A*).

160. The claimant also states that the fourth respondent called her "an old woman" on the same day and associates it with the same confusion about turning around and being asked questions. It seems entirely rational given the working environment that questions between colleagues shall be asked face to face but if there is any inference about inappropriate behaviour it cannot consider it to fall within any acts of discrimination. The claimant also made complaints over a period that the third respondent allocated her a fault to deal with and then allocated it to another person. She then claims this was a form of abuse. She says the fourth respondent also abused her. The third respondent had an entirely rational explanation why he should reallocate work. The fourth respondent denies any such abuse. Why should the claimant take the views that she does? Is it because she is looking back at all matters through a prism of what happened subsequently and through her own illness. She did not complain at the time although she had access to her own manager and other

managers at the time of the changeover when she worked with them. Her recollection was flawed when she drafted the grievance and when she now gives evidence. If the claimant's version of events is partially accurate Section 136 of the EQA is habile to be engaged and the Tribunal could find there is another explanation for what might have occurred. They can also consider it at the first stage (*Nazir & Others v Assim [2010] ICR 1225*). Nightshift was a stressful working environment. They may get less calls than the dayshift but also had less resources. When things got busy they were very busy. An individual's stats were important. The third respondent and fourth respondent may have acted inappropriately but they were not motivated by gender or age nor did the claimant think they were. Ms Blair is older than the third and fourth respondents and as part time worker worked both shift rotations. No bad behaviour based on age or gender were directed towards her. This was also the situation with Ms Kennedy. What differentiates the claimant from them is the claimant was perceived rightly or wrongly to be slow in absorbing information about her job and that her team mates were becoming exasperated on having to assist and answer her questions. The third and fourth respondents would have acted the same to anyone regardless of age or gender who they perceived as delaying their work.

161. What the second respondent is accused of is that on the first day she advised people did not last long in the team, she said nothing about the bad behaviour of the third and fourth respondents, she wrote two letters requiring her to report to face to face disciplinary action when she was absent from work. She did not include her in the discussions about who should take on Mr McBride's duties or training in Southend and she did not reply to her letters. The second respondent has explained each of these events which are unrelated or have any connection with age or gender. The claimant, herself, when she states that the second respondent was in a relationship with the third respondent is advancing an argument consistent with age or sex discrimination. Taking these allegations separately or together they are not habile to constitute unfavourable treatment because of sex or age and cannot constitute unwanted conduct because of sex or age.

162. If the Tribunal does not accept this and finds that the claimant has been discriminated against in guidance in *Da'bell v NSPCC [2010] IRLR* should be followed. It is entirely appropriate that awards for injury to feelings should be updated in line with inflation. The Tribunal found that top of the bottom band of injuries to feelings should be updated from £5,000 to £6.000. The respondent accepted that if discrimination had indeed been found to have occurred the claimant would have been entitled to awards at the higher end of the bottom band. In *Henery v Quoteline Insurance Services Ltd (t/a Sureplan Insurance) [2004] EQLR 94* the claimant had returned from maternity leave and was told she had to work three full days a week rather than two full days. She was dismissed as distinct from constructive unfair dismissal. The claimant`s mother gave evidence that the process had caused her daughter to lose self confidence and that she had become a nervous wreck. The Tribunal awarded £5,000. Given the update the top award would have been £6,000. There has been very little inflation since that time and accordingly that would be the appropriate award.

163. The claimant's constructive unfair dismissal claim is categorised as the first respondent being in breach of the implied term of trust and confidence by failing to deal with the grievance properly (the employment of a person who was not independent); attempting to obtain medical records without the claimant's knowledge and failing to pay the amount of wages due in January 2015. If the first respondent was in breach the question to be asked was whether the first respondent had a potentially fair reason for the conduct which was breached and if so did it act reasonably in conducting itself that way.

164. In answer to the first question Mr Watson and Ms Valente acted with remarkable courtesy in responding to the grievance and their timeline shows that they did everything that could reasonably be expected to support and respond afterwards. The claimant showed a degree of reluctance to engage with them. Ms Valente was an individual who was both experienced and independent. She was independent in the sense that she was not part of the claimant`s line management and more importantly not part of the line management of those that the claimant was accusing. The claimant wrongly

assumed that she was not independent because she previously had been employed by Cable & Wireless. She had indeed been employed by that company but in a much more senior capacity to the second respondent. Ms Valente's knowledge of the second respondent was tangential. The claimant could not believe the first respondent had attempted to obtain her medical records before her resignation. It was an administrative error which Mr Watson attempted to rectify as soon as it was brought to his attention. The first respondent did not in fact fail to pay the full amount of wages in January 2015. There had in fact been an overpayment of wages. It is important to note that in construing contractual obligations little account can be given to the personal difficulties of the claimant. The objective standard of the person or individual on the "Clapham Omnibus" is paramount. The objective individual who has had a considerable period of sick leave must know that her compensatory and statutory sick pay had run out. The claimant was aware enough of the situation to quite properly ask for the sick absence policy to be sent to her. There is nothing in the third paragraph of the first respondent's production R159 to suggest otherwise. The paragraph refers to salary not sick pay. If the first respondent was indeed in breach of contract, which is denied, then it had potential fair reason for being so and it acted reasonably in the way it conducted itself.

165. If the Tribunal does not agree there was an unfair constructive dismissal then there is very little loss that follows. The claimant secured further employment at a higher salary and generally better terms within eight weeks of her resignation. Her losses are clearly restricted to the basic award, loss of statutory rights and the minimum amount of compensatory award.

166. In a constructive unfair dismissal it is unusual to deduct for contributory fault However, this is an unusual case. Had the claimant not chosen to resign during the investigatory proceedings events may have occurred not less of which the recommendations would have been put into place that would have allowed the claimant to have continued in her employment with the first respondent. Accordingly, the Tribunal should consider reducing both the basic and compensatory awards.

167. In relation to the question of accrued holiday pay the first respondent, in an exercise of caution, is prepared to concede that the claimant should have been allowed to carry over five days holiday pay to a gross value which would be £305. The first respondent has no difficulty with the figure being used as an award albeit it is a gross figure.

168. The first respondent admits no liability and does not understand any purported claim in relation to "repayment relating to the pension scheme".

The Claimant

169. The claimant kindly prepared written submissions in which she set out the evidence that she had given orally. The claimant also explained how the treatment that she received from the respondents resulted in her loss of confidence and the difficulty that she has experienced in representing herself.

170. The claimant said that the respondent's own witness statements were contradictory and contrary to the first respondent's policies. The respondents have ruined her reputation by implying and saying that she was stupid and unable to retain information and failed to provide a reference to enable her to find a job.

171. The claimant believes and feels the she was directly discriminated and harassed because of sex and age by the second respondent, the third respondent and the fourth respondent.

172. The claimant feels/believes that she was directly discriminated against because of her disability because of the acts/omissions that occurred after 27 October 2014. The first respondent did not comply with its Grievance Policy, pay the claimant when promised or give notice that that she would not be paid.

173. She also believes that she was harassed in relation to disability because of the acts/omissions that occurred after 27 October 2014. She was also harassed again by the second respondent when the claimant complained about her to Mr Watson.

174. The claimant believed that she had a claim for the breach of the equality clause because Mr Barrington was paid thousands more than her for doing the same job on the same team.

175. The claimant believed she was entitled to holiday pay.

176. Although she had withdrawn the victimisation claim she still felt victimised because of the first respondent's conduct on the first day of the Hearing.

177. The claimant maintains that she has a disability and that she satisfied the test that her health impairment had a substantial and long term effect on her abilities to carry out normal day to day activities at the relevant time.

178. Considering all that she has been through the claimant believed that there has been a breach of the implied term of mutual trust and confidence. There was bullying and a failure to effectively deal with the problem through internal procedures and the appointment of someone who was not independent. There as an attempt to obtain medical records without consent and failure to pay wages without giving notice. The fundamental breach does not have to be the only cause of the resignation.

Discussion and Deliberations

179. The Tribunal started its deliberations by considering the discrimination claims which were directed against all the respondents. The Tribunal felt that it was appropriate to consider first the claims (direct and harassment) relating to the protected characteristics of sex and age.

Discrimination - Sex and Age

180. The respondents raised a preliminary issue in relation to time bar. The Tribunal referred to section 123 of the EqA. The general rule is that a complaint of work related discrimination (other than an equal pay claim) must be presented to the Tribunal within the period of three months beginning with the date of the act complained of. Conduct that is extending over a period is to be treated as done at the end of that period.

181. The Tribunal agreed with the respondents' submission that the third respondent and the fourth respondent the had no managerial responsibility. The claimant's last day at work was 29 October 2014. Accordingly, any act of discrimination by the third respondent and the fourth respondent must have taken place before on or before 29 October 2014.

182. The second respondent had managerial responsibility for the claimant. She did not speak to the claimant after 29 October 2014. The second respondent wrote to the claimant on 11 December 2014 regarding a well-being meeting. This letter was not related to the claimant's age or sex. The second respondent did not have any direct contact the claimant during the Grievance Investigation. The second respondent was absent from work most of January 2015 only returning on 27 January 2015. The claimant resigned on 29 January 2015. The Tribunal considered that any act of discrimination in relation to sex or age by the second respondent must have taken place before 29 October 2014.

183. The claims of discrimination (direct and harassment) directed against the second respondent, the third respondent and fourth respondent were therefore in the Tribunal's view presented out of time. The claimant did not explain why she delayed in raising tribunal proceedings relating to discrimination against the second respondent, third respondent and fourth respondent or why it would be equitable for the Tribunal to extend the time limit for doing so.

184. The Tribunal appreciated that the claimant was absent from work between 1 March and 21 May 2014 and between 1 July and 3 August 2014. While the claimant complained to Ms Hume about the behaviour of the second respondent, the third respondent and the fourth respondent there was no evidence to suggest that she was complaining of discrimination of any type. The claimant was abroad on annual leave for two weeks returning to work on 13 October 2014. Her last day of work was 29 October 2014. The claimant was absent from work due to depression until her resignation. The allegations of discrimination were first raised in the Grievance Letter sent on 28 November 2014. There was no evidence to suggest that the claimant was mentally or physically unable to raise the proceedings during this period. The claimant had

taken legal advice before the Grievance Meeting in December 2014; she was aware of her rights to bring a claim indeed she did so without delay following her resignation. The Tribunal acknowledged that from November 2014 the claimant was involved in an internal process. However, the claimant did not indicate in her evidence that this was the reason for any delay. Her evidence was that the Grievance Investigation was unilaterally put on hold at the end of December 2014. The claimant did not explain why she did not raise proceeding against the second respondent, the third respondent and the fourth respondent then.

185. While the claimant started ACAS conciliation on 6 February 2015 the first respondent became aware of the discrimination allegations in late November 2014 and immediately stated an investigation. The second respondent, the third respondent and the fourth respondent only became aware of the discrimination allegations in late December 2014 during the Grievance Investigation. Some of those allegations related back to incidents in May 2013. The Tribunal considered while the third respondent and the fourth respondent readily conceded that their general behaviour was inappropriate they genuinely had difficultly recollecting the specific incidents to which the claimant referred.

186. The Tribunal felt that there was considerable prejudice to the second respondent, the third respondent and fourth respondent being asked to comment on events which the claimant did not complain about at the time and were not notable from their perspective.

187. While the Tribunal acknowledged that if it did not exercise its discretion the extent of the claimant's claims was restricted, the Tribunal considered that the claimant still had claims against the first respondent.

188. The Tribunal was not minded to exercise its discretion by extending the time limit for presenting the claims relating to sex and/or age discrimination (direct and harassment) against the second respondent, the third respondent and the fourth respondent.

189. In these circumstances the Tribunal dismissed the claims against the second, the third respondent and fourth respondent of discrimination on the grounds of the protected characteristic of sex or age.

190. The Tribunal then considered the time bar issue in relation to the sex and age discrimination claims in so far as directed against the first respondent. The Tribunal considered that the allegations relating to acts by Mr Watson and Ms Valente were not time barred. These related to the handling of the Grievance Investigation and salary issues in December and January 2015. The Tribunal then considered whether there was a continuing act such that the allegations before October 2014 were part of a continuing act.

191. As mentioned above the first respondent became aware of the discrimination allegations on 28 November 2014. Those allegations related to acts by the second respondent, the third respondent and the fourth respondent in May 2013, February 2014 and between August and October 2014. The Tribunal referred to its findings. The Tribunal considered that there was not an act extending over time. There were a series of incident before October 2014 which were unconnected and did not involve Mr Watson or Ms Valente.

192. If the Tribunal was wrong and there was a continuing act it was mindful that section 136 of the EqA provides that once a claimant shows *prima facie* evidence from which a Tribunal could conclude, in the absence of any other explanation that an employer has committed an act of discrimination the Tribunal is obliged to uphold the complaint unless the employer can show that it did not discriminate.

193. The Tribunal was not satisfied on the evidence that any less favourable treatment of the claimant by the third respondent and the fourth respondent was due to her sex. The evidence from the Grievance Investigation was that before the claimant joined the Team the third respondent and fourth respondent had treated a male colleague who repeatedly asked questions the same.

194. The Tribunal was also not satisfied on the evidence that any less favourable treatment of the claimant by the third respondent and the fourth respondent was due to her age. The Tribunal considered that correct comparator was a younger woman who was perceived by the third respondent and fourth respondent to be slow in absorbing information about the job and repeatedly asking questions. Ms Kennedy and Ms Blair worked in the Team. They were older than the third respondent and the fourth respondent. Neither of them received the less favourable treatment of which the claimant complained. However, neither of them were considered by the third respondent and fourth respondent to be slow in absorbing information and repeatedly asking questions. The Tribunal felt that from the evidence it was likely that that younger woman who was perceived by the third respondent and fourth respondent to be slow in absorbing information about the job and repeatedly asking questions would have been treated in the same way as the claimant. Accordingly, the reason for that treatment was not the claimant's age.

195. The Tribunal understood that the less favourable treatment by the second respondent about which the claimant complained was lack of support since joining the Team; delay in being given fault controller duties; not acting on the inappropriate behaviour of the third respondent and the fourth respondent; sending a letter about unauthorised absence when on sick leave; not receiving a letter of explanation/apology; the second respondent using her chair; being excluded from the discussion about the Lead Customer Advisor role; and not being offered the training opportunity at the Southend office.

196. While the Tribunal had no doubt that the claimant felt the second respondent treated her less favourably on the claimant's evidence the Tribunal was not satisfied that treatment was because of either the claimant sex or age. There was no evidence linking the treatment by the second respondent to the claimant's sex and/or age. Further in the Tribunal's view the second respondent explained these events which were unrelated to the claimant's sex and age.

197. In relation to the harassment claims based on sex and age against the second respondent, the third respondent and the fourth respondent the Tribunal accepted that the conduct was unwanted. The Tribunal was satisfied that the third respondent and fourth respondent were involved in jokes which the claimant found unacceptable. They were also loud and shouted. Some of the comments related to age. The third respondent and the fourth respondent kept their interaction with the claimant to a minimum when she returned to work in August 2014. The second respondent was aware of the Team's concern about the claimant's perceived ability. None of the second respondent's conduct related to the claimant's age or sex. The second respondent in the Tribunal's view was trying to alleviate the pressure upon the claimant by allowing her to focus on core tasks rather than become involved in Lead Customer Advisor or new training in Southend.

198. The Tribunal considered the conduct of the third respondent and fourth respondent was inappropriate but it was not satisfied that its purpose was to violate the claimant's dignity or create an intimidating, hostile and degrading, humiliating or offensive environment for the claimant. The Tribunal's reasoning was that this was how they behaved even when the claimant was not working with them and they were unaware of the effect that their behaviour was having on her.

199. The Tribunal considered that the conduct of the third respondent and the fourth respondent had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. However, the Tribunal was not convinced that it was reasonable for the conduct to have that effect. The claimant knew that the night shift was a stressful working environment for everyone and that there were less resources than on than the dayshift. She also knew that the Team were increasingly frustrated by her repeatedly asking questions. Other female colleagues of a similar age to the claimant who worked with the Team did not receive this conduct which suggested that conduct was in response to her performance rather than her age or gender. There was no suggestion that the claimant had

any interest to become Lead Customer Advisor or travel to Southend for training.

200. The Tribunal then turned to allegations of direct discrimination on grounds of sex and age against the first respondent which were not time barred.

201. The Tribunal noted that section 13 of the EqA provides that a person directly discriminates against another person if it treats that person less favourably than it treats or would treat other and the difference in treatment is because of a protected characteristic.

202. The less favourable treatment about which the claimant was complaining, the way in which the first respondent dealt with her queries about salary and the handling of the Grievance Investigation.

203. The Tribunal was not satisfied that there was an ostensible case of direct sex or age discrimination on the evidence. The claimant's issues in relation to her salary arose from the transfer of her employment to the first respondent. The claimant was treated no differently than any of the other employees who were transferring. The calculation of her basic pay was complicated by her being on sick leave. This was unrelated to her age or sex. The non-payment of her salary in January 2015 was due the expiry of company sick pay and was unrelated to her sex or age. The Tribunal also considered that the claimant's age and sex was unrelated to the handling of the claimant's grievance and the investigation that followed.

204. For these reasons the Tribunal also concluded any unwanted conduct by the first respondent did not relate to the claimant's age or sex.

205. Accordingly, the Tribunal concluded that the claims of sex and age discrimination against the first respondent should be dismissed.

Discrimination - Disability

206. The Tribunal then turned to consider the disability discrimination claims. The Tribunal noted that the respondents had raised a preliminary issue about the

date from which the claimant was entitled to protection under the EqA for the protected characteristic of disability.

207. The respondents' submission that such entitlement was only from the end of January 2015 notwithstanding the note following the preliminary hearing on 17 February 2016 that identified the issues for the Tribunal.

208. A preliminary hearing to determine whether the claimant was disabled in terms of the EqA took place on 29 January 2016. The Tribunal referred to the Judgment dated 11 February 2016: the claimant was disabled for the purposes of the Equality Act 2010 at the relevant time.

209. The Tribunal noted that the claimant's mental impairment was discussed at paragraphs 48 onwards. In paragraph 51 consideration is given whether the substantial and adverse effects could be described as long term at the relevant time: when the claimant had suffered the alleged acts of unlawful discrimination which were the subject of her present claim. This involved deciding when the claimant first suffered the mental impairment and how long it was likely to last. At paragraph 54 the Employment Judge states, "*Accordingly I found that the date upon which the claimant began to suffer an impairment which might constitute a disability in terms of the act was 27 October 2014*". The Employment Judge then judged whether the claimant's mental impairment was long term at the time of the alleged acts of unlawful discrimination to the extent that they occurred after the onset of the impairment. In the subsequent paragraphs the Employment Judge refers to the evidence as to the likelihood assessed between 27 October 2014 and 29 January 2015 (the date of resignation) that the claimant's mental impairment would continue for at least 12 months. The Employment Judge decided that the claimant's mental impairment did have a substantial and long-tern adverse effect on her ability to carry out normal day to day activities at the relevant time.

210. The Tribunal did not agree with the respondent's submission. The Tribunal's reading of the Judgment was that the claimant was disabled within the meaning of the EqA from 27 October 2014.

211. The disability discrimination claims are direct discrimination and harassment. The Tribunal turned first to consider whether the claimant was treated less favourably because of disability on or after 27 October 2014.

212. The Tribunal did not consider that there were any acts of disability discrimination in the actual workplace from 29 October 2014 as the claimant was not at work.

213. While the claimant's chronology referred to several matters such as arrangements for meetings and the accuracy of notes the Tribunal considered that the only possible less favourable treatment because of disability was Ms Valente's decision to pause the Grievance Investigation on 22 December 2014; and the decision not to write to the claimant in early January 2015 about the expiry of sick pay.

214. To ascertain whether the claimant was treated less favourably because of her disability the Tribunal asked how would someone who does not have the claimant's disability but is in the same material circumstances as the claimant and has her abilities would have been treated. The Tribunal asked how someone who was on long term absence taking medication which resulted in difficulty concentrating; who was feeling under pressure and was already scheduled to attend an occupation health appointment during the Christmas holiday but was willing to communicate by email would have been treated by the first respondent.

215. In the Tribunal's view the claimant was not treated less favourably. The Tribunal felt that it was highly unlikely that the Grievance Investigation would be progressed over the Christmas holiday as Ms Valente was not returning to work until 5 January 2016. Against this background the Tribunal considered that Ms Valente would not have wanted to put someone who had difficulty concentrating under further pressure of replying to an email the content of which might have caused further distress.

216. About the decision not to write to the claimant in early January 2015 about the expiry of sick pay, the Tribunal considered that a further factor to put the

claimant and the comparator in the same circumstances at this stage was that they were agreeable to attend a well-being meeting at the beginning of January 2015. Once again the Tribunal did not consider that the claimant was treated less favourably because of her disability. The Tribunal considered that it was highly likely Mr Watson would have taken the same decision not to send the letter preferring to discuss the situation face to face.

217. About harassment relating to disability the Tribunal accepted that the Grievance Investigation was paused because Ms Valente was concerned about the pressure the claimant was under and the effect of her medication. The conduct was therefore related to disability. However, the Tribunal was under no doubt that the purpose of pausing the Grievance Investigation was not to violate the claimant's dignity or create an intimidating, hostile and degrading, humiliating or offensive environment for the claimant. Even if that was the effect the Tribunal did not consider that was reasonable. On reading the email sent by Ms Valente the claimant knew that unsuccessful attempts had been made to contact her before sending the email. The matter was being paused but would be revisited on Ms Valente's return to business on 5 January 2015 by which stage the claimant would have had an occupational health appointment.

218. The decision not to write to the claimant about the expiry of her sick pay was in the Tribunal's view conduct related to her disability. The Tribunal was not convinced that it was unwanted conduct given that at the time the claimant was agreeable to attending a well-being meeting with Mr Watson in early January 2015 when that would have been discussed.

219. The Tribunal concluded that in the circumstances the disability discrimination claims (direct and harassment) should be dismissed.

Equality Act Claim

220. The Tribunal turned to consider the claim that the first respondent paid males more for substantially the same work. The first respondent conceded that it paid males, such as Mr Barrington more for substantially the same work.

221. The Tribunal therefore focussed on the first respondent's defence of material factor. The Tribunal found that around April 2014 men and women transferred to the first respondent under their existing salary. The first respondent paid a bonus to the transferring employees as there was no provision for such a payment in their existing contract. The first respondent knew that the transferring employees had different terms and condition from those employees who the first respondent had employed directly. Discussion took place about equalising pay which happened in January 2015.

222. The Tribunal was satisfied that the difference in pay was due to the claimant transferring on her existing terms and conditions. While Mr Barrington was paid more than the claimant he was also paid more than Mr Simpson, the third respondent and fourth respondent. Mr Barrington and other female employees were recruited directly by the first respondent and this was the reason for the difference in pay. As soon as it was able the first respondent harmonised the terms to ensure that all employees regardless of gender were paid the same for the same work. The first respondent had established the material factor defence. Accordingly, the Tribunal dismissed the claim that the first respondent was in breach of the sex equality clause.

Unfair Constructive Dismissal

223. The Tribunal then turned to consider the constructive dismissal claim. The Tribunal referred to Section 95(1)(c) of the Employment Rights Act 1996 (ERA) which states that an employee is dismissed by his employer for the purposes of claiming unfair dismissal 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".*

224. The claimant asserted that she resigned because the respondent was in breach of the implied term of mutual trust and confidence. The Tribunal referred to the Resignation Letter. The claimant stated that she resigned because:

a. The first respondent was failing to deal with her grievance by postponing the Grievance Investigation without consultation which was adding to the claimant's anxiety and stress.
b. Ms Valente had gone back on her agreement as to how this was to be dealt with.
c. Mr Watson and Ms Valente had failed to reply to emails.
d. The first respondent had gone behind the claimant's back trying to obtain a medical report.
e. The last straw was that Ms Valente was not independent.
f. Without notice the first respondent failing to pay her January salary.

225. While the Resignation Letter specifically said that Ms Valente's appointment was the last straw, the Tribunal also treated the failure to give notice of non-payment of salary was also a last straw.

226. The Tribunal noted that the essential quality of the last straw was that when taken with the earlier acts upon which the claimant relied it amounted to the breach of the implied term of trust and confidence. When viewed in isolation the last straw may not always be unreasonable, still less blameworthy. An entirely innocuous act on the part of the employer cannot be a final straw.

227. The Tribunal considered whether Ms Valente's appointment amounted to a last straw. The Grievance Policy states that a manager receiving a written grievance should identify an independent manager to investigate the allegations. Mr Watson asked Ms Valente to conduct the Grievance Investigation. Ms Valente was a senior manager. Mr Watson was unaware that she had any connection with any of the individuals about who the claimant complained. The clamant wrongly assumed that Ms Valente had been continuously employed by the first respondent. On receiving the paper work Ms Valente recognised the second respondent's name because some years previously she had been managed the call centre in which the second respondent had worked. Ms Valente did not disclose this to Mr Watson or the claimant. In late January 2015, the claimant became aware that Ms Valente was previously employed by Cable and Wireless Worldwide before transferring

to the first respondent. The claimant believed from what she was told by a third party that Ms Valente had in that time worked very closely with the second respondent. The Tribunal considered that Ms Valente's knowledge of the second respondent was peripheral. While it could understand why Ms Valente did not consider that it prevented her from conducting the Grievance Investigation the fact that she did not disclose the association at the start of the process led the Tribunal to consider that it was not an entirely innocuous act. The Tribunal concluded that this was capable of being a final straw.

228. Turning to the failure to give the claimant notice of non-payment of her salary in January 2015, the claimant was unaware of this until 28 January 2016 when she noticed that she had not been paid company sick pay. The following days she was informed by HR that a letter advising of the claimant of this had been sent to the second respondent on 5 January 2015. The claimant assumed wrongly that the second respondent had failed to send her the letter. Mr Watson knew that the claimant had requested and received the sick pay policy. He also believed that she knew or ought to have known that her sick pay was exhausted. However, the first respondent normally wrote to the employee concerned advising then of this. Mr Watson did not send that letter. While the Tribunal appreciated that his reason for doing so was because he fully intended to discuss the situation face to face with the claimant, when that meeting did not take he did not advise her of the situation. The Tribunal considered that this was capable of being a last straw.

229. Having reached this conclusion, the Tribunal went on to consider the earlier acts.

230. The claimant alleged that the first respondent was failing to deal with her grievance by postponing the Grievance Investigation without consultation which was adding to the claimant's anxiety and stress. Further Ms Valente had gone back on her agreement as to how this was to be dealt with.

231. The Tribunal accepted that the decision to pause the Grievance Investigation was taken by Ms Valente. However, the email exchange refers to the attempts that Ms Valente had made to contact the claimant to discuss matter before

sending the email. The Tribunal therefore felt that the claimant was being disingenuous in her evidence by saying is that the Grievance Investigation was postponed without any consultation in her whatsoever and no thought on how this would make her feel. To the contrary the Tribunal considered that Ms Valente's actions were entirely motivated by what the claimant had said about her current health; her ability to concentrate and how Ms Valente thought the claimant would feel in being asked to comment on others' perception of events which where differed from hers. While Ms Valente had initially agreed to deal with matters by email she explained why she had reconsidered this. It was not done in a pre-emptory manner and was to be discussed further on 5 January 2015 when Ms Valente returned to business. The Tribunal was mindful that the claimant had an occupational health appointment during the Christmas holiday and was making comments about the pressure she was under. The Tribunal therefore considered that the first respondent had reasonable and proper cause to pause the Grievance Investigation to ensure that claimant was medically fit to continue with the process and if so for that process to be conducted in a way that did not place her at a disadvantage because of her ill health.

232. The claimant alleged that Mr Watson and Ms Valente had failed to reply to emails. The Tribunal appreciated that the Grievance Letter contained several different types of grievance. Mr Watson decided to deal with the salary and holidays issues. This was a reasonable and pragmatic approach given that the remaining issues required significant investigation. It was understandable that he did not want to be involved in the Grievance Investigation as this was not part of his remit. The claimant did not object to this approach. However, in practice it resulted in numerous emails being sent to different people who were not necessarily involved in the subject matter of the email and there being an appearance of the left hand not knowing what the right had was doing. The first respondent acknowledged this and Mr Watson subsequently endeavoured to coordinate meetings. While Mr Watson and Ms Valente did not always respond to the claimant immediately given the volume of issues the Tribunal considered that they replied as reasonably soon as could be expected.

233. The claimant also thought that the first respondent had gone behind her back trying to obtain a medical report. While the Tribunal accepted that this was what the claimant initially believed it was apparent from the exchange of correspondence that there had been an administrative error by the occupational health providers. Mr Watson dealt with the matter as soon as it was brought to his attention. While this was an unfortunate mistake, the Tribunal had difficulty understanding why the claimant continued to believe that first respondent had attempted to obtain her medical records.

234. The claimant complained that Ms Valente's appointment was not independent. As indicated above the Tribunal felt that in the circumstances it would have been prudent for Ms Valente to have disclosed her previous association with the second respondent to the claimant before undertaking the Grievance Investigation. The Tribunal did not however consider that the fact that Ms Valente had previously worked in the same call centre as the second respondent of itself meant that she was not independent. The previous association was professional. There was no direct line management and it took place long before any of the allegations raised in the Grievance Letter. While the claimant had genuine concerns about Ms Valente the claimant did not give Mr Watson an opportunity to consider these before she resigned as they were first raised in the Resignation Letter.

235. The Tribunal turned to the issue of non-payment of salary (CSP) in January 2015. The Resignation Letter focussed on the fact that the claimant did not receive notice of this and the second respondent did not send the letter of 5 January 2015. The first respondent does not dispute this. The reason for the letter not being sent was that the second respondent was no longer dealing directly with the claimant given the Grievance Investigation and was in any event absent from work until 27 January 2015.

236. The Tribunal considered the claimant knew that she would not be entitled indefinite CSP. Since February 2014 she also knew that she had several absences (1 March to 21 May (11 weeks); 1 July to 3 August (5 weeks) and from 29 October onwards). From the letter sent by Capita on 27 March 2014

the claimant knew that, "*Vodaphone have advised that staff will be aligned to the Vodaphone sick pay policy which provides or 16 weeks full pay followed by 12 weeks SSP.*

237. The claimant requested a copy of the first respondent's sick pay policy. The claimant was aware from the letter dated 11 December 2014 that the first respondent had asked her to attend a well-being meeting on 18 December 2015 with Ms Bell and Ms McGeachy to update on developments; give information on sick pay and sickness policy. That meeting did not take place. The claimant was provided with the respondent's sick pay policy From that document the claimant would have known that given her length of she was entitled to 12 weeks CSP. The Tribunal did not consider that the comments in the 19 December Email regarding the alignment of salary from January 2015 meant that the claimant was entitled to full salary in January 2015.

238. Mr Watson knew of the impact of the claimant's long term absence on her pay. He knew that she had a copy of the first respondent's sick absence policy. He decided not to write to the claimant preferring to meet with her to discuss this as part of the well-being meeting. The meeting was arranged for 19 January 2015. The Tribunal considered that Mr Watson had reasonable and proper cause to delay writing to the claimant and wanting to discuss matters face to face. In the event the meeting was postponed by the claimant and was to be rescheduled.

239. The claimant had asked for and received the first respondent's sick pay policy. She was aware that over the past twelve months she had been absent and receiving CSP. The claimant had paid 19 weeks CSP. While the claimant suggested at the Hearing that the first respondent was in contractual breach by not paying her CSP in January 2015 the Tribunal was not satisfied on the evidence that was the case. She was entitled to 12 weeks CSP. While the Tribunal considered that when the meeting scheduled for 19 December 2015 was postponed it would have been prudent for Mr Watson to have contacted the claimant the Tribunal was satisfied that the claimant was entitled to in CSP January 2015 and the claimant ought to have been aware of that.

240. The Tribunal looked at the first respondent's conduct as a whole in order to determine whether it was such that its effects, judged reasonably and sensibly were such that the claimant could not be expected to put up with it.

241. In the Tribunal's view the claimant had been a valued employee who in 2014 had a series of long terms absences from work due to significant and unrelated medical conditions. During 2014, the claimant, the Team and the second respondent worked in a pressure role, in business that was undergoing redundancies and a business transfer. The senior management team was of a high calibre but there were several changes of personnel between March and October 2014. The claimant raised a grievance which the first respondent treated seriously and endeavoured to investigated thoroughly. Mr Watson had empathy toward the claimant and genuinely wanted to resolve her concerns. Ms Valente took her role in the Grievance Investigation seriously. She sought to ascertain the facts acknowledging that people had difference perceptions of events. She did not seek to draw any conclusion until the claimant had had an opportunity to respond to some of the issues arising from the witness statements. Ms Valente's approach was motivated by ensuring that everyone was dealt with respectfully. The Tribunal had no doubt that her actions were determined by a genuine concern for the claimant's well-being. There was no evidence to suggest that either Ms Valente or Mr Watson wanted the claimant to leave the first respondent. To the contrary the Tribunal's impression was that they wanted to meet with her and resolve issues to her satisfaction.

242. The Tribunal was satisfied that the first respondent's conduct as a whole was not a breach of the implied term of trust and confidence entitling the claimant to resign.

243. Being satisfied that there was no fundamental breach of contract the Tribunal did not require to consider whether the claimant had affirmed the contract following the breach. The claim of unfair constructive dismissal was dismissed.

Holiday and Other Pay

244. The Tribunal heard evidence about holidays taken by the claimant during 2014. It had anticipated that there could be an agreement as to what holidays the claimant was entitled on termination. There was uncertainty as to what holidays had accrued and Capita's arrangement for taking annual leave.

245. The Tribunal was satisfied that at 29 October 2014 the claimant had outstanding holidays which she was unable to take for operational reasons. The first respondent accepted that it would have allowed her to carry forward five days' holiday into the new holiday year which was calculated at £305.

246. The Tribunal considered that the claimant was also entitled to a further five days' holiday in respect of annual leave accrued between 1 December 2014 to 29 January 2015.

247. The total gross amount that the Tribunal calculates that the first respondent is due to pay the claimant in respect of holidays accrued but not paid for on termination is £610.

248. The Tribunal did not understand any purported claim in relation to "repayment relating to the pension scheme".

Employment Judge: Shona MacLean
Date of Judgment: 29 March 2017
Entered in register: 30 March 2017
and copied to parties