EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100565/2017 Hearing at Edinburgh on 6, 7, 8, 13, 14, 15 and 17 August, 18 September and 3 October 2018

Employment Judge: M A Macleod
Ms G Kennedy
Mr I Drysdale

Dawn Bingham	Claimant Represented by Mr G Bonelle
West Lothian Council	Respondent Represented by Ms E Mannion

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims all fail and are dismissed.

REASONS

1. The claimant presented a claim to the Tribunal on 7 April 2017, in which she complained of unfair constructive dismissal, discrimination on the grounds of disability and sex, and detriments following the making of protected disclosures.

2. The respondent presented a response in which they resisted all claims submitted by the claimant.

3. Following a number of Preliminary Hearings in this case, a Hearing on the Merits was fixed to take place on 6, 7, 8, 13, 14, 15 and 17 August, and 18, 20 and 21 September 2018. In the event, the hearing took place on 6, 7, 8, 13, 14, 15 and 17 August, but only on 18 September 2018 and then, owing to an unfortunate administrative error whereby the sitting Employment Judge was allocated to two ongoing cases at the same time, it was not possible to sit on 20 September. 21 September had already been vacated as it was not considered to be necessary, and accordingly the parties and Tribunal reconvened on 3 October in order to hear submissions in this case.

4. The claimant attended throughout and was represented by her husband, Mr G Bonelle, a former lay representative from the Citizens Advice Bureau who was acting in a private capacity in this case. The respondent was represented by Ms E Mannion, solicitor.

5. The parties each presented a bundle of documents, to which they each made reference during the course of the hearing. There was some overlap between the bundles, but where reference is made to a document in the claimant's bundle, it will be referred to with the prefix "C" herein, and in the respondent's bundle, with the prefix "R".

6. The following witnesses gave evidence:

- Dawn Bingham, the claimant;
- Sally Emma Burton, Fair Trading Officer;
- Craig Hugh Smith, Environmental Health Manager;
- Craig Miller McCorriston, Head of Planning;
- Stuart Saunders, Senior Counter-Fraud and Compliance Officer;
- Edward Machin, Trading Standards Manager;
- Andrew Blake, Environmental Health and Trading Standards Manager;

- Mark Grierson, Human Resources Business Advisor;
- Fraser John Thomson, Business Resource Officer; and
- James Cameron, Head of Service for Education.

7. Based on the evidence led, and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

8. The claimant, whose date of birth is 12 February 1957, commenced employment with the respondent on 27 August 1997, as an Project and Consumer Advice Officer within the Environmental Health and Trading Standards Department (EHTS) of the respondent. EHTS falls within the Development and Regulatory Services service in the respondent's organisation. She worked within the Trading Standards arm of the department, and in early 2005 she became an Enforcement Officer within EHTS, again concentrating on trading standards.

9. In November 2005, the claimant was appointed to the position of Senior Enforcement Officer (SEO). Her statement of particulars of employment (C1.1ff) provided that her base was to be at Inchmuir Road, Bathgate. Clause 3 of the statement dealt with her place of employment: *"You are employed initially at the undernoted workplace, but following negotiation and mutual agreement, you may be required to work at another workplace in order to fulfil your employment duties."*

10. The Job Specification of the role of Senior Enforcement Officer (C1.8ff) provided that her location would be *"Trading Standards, Whitehill, Bathgate".* Under *"Job Scope",* it was stated that:

"The post holder will work under the immediate supervision of a Senior Trading Standards Officer within the operational team. The Trading Standards functions within West Lothian are wide ranging and include Consumer Advice and Education, Consumer Safety, Metrology, Fair Trading, Animal Health and Welfare, Special investigations, Petroleum and

Explosives Safety. Age restricted sales activities demand that the post holder works in direct contact with young people."

11. The claimant's line manager was Ken Inglis, throughout her employment as an SEO. Mr Inglis' direct line manager was Edward (Ed) Machin, who reported to Andrew Blake, manager of the EHTS department, and Craig McCorriston was the Head of Service.

12. In 2011, Mr Blake wrote to staff in EHTS (C36.2/3) by email, and confirmed that there was to be a review of the impact on the new consumer advice policy on Trading Standards, in which civil complaints were to be directed to a new body called Consumer Direct for advice, and a review of County Buildings accommodation. County Buildings was an office based in Linlithgow, and at that time, the Trading Standards team was based in the Annexe attached to it. Mr Blake went on to say that *"Many staff have already signed up to use the flexible work arrangements from other offices. I would urge you to consider this if you see both personal and service delivery benefits."*

13. The flexible work arrangements which were, and continue, in place for staff of the respondent are under the "Worksmart" scheme, whose arrangements are set out in a document produced at R331ff. The statement said that *"The Worksmart is focused on the effective implementation of flexible and mobile working which will make us more efficient and able to provide better services for our customers."* The benefits were said to include reduced travel time and costs as well as reduced environmental impact, enhanced recruitment and retention through improved access to work for a diverse range of employees, and improved work-life balance for staff.

14. Essentially, Worksmart was a programme for the delivery of services through increased mobile and flexible working, allowing colleagues who already worked in a mobile way to *"utilise technology and desks in multiple locations across the County to undertake their job."*

15. From 2009, the claimant was working 4 days a week at the Civic Centre, Livingston, under Worksmart, and one day a week at the County Buildings

Annexe in Linlithgow. A Worksmart desk was made available to her in the Civic Centre. She was content with this arrangement as she preferred to be close to the shopping centre in Livingston where many retail outlets were based which she would have to visit as an SEO. The claimant also lives in Livingston and accordingly found it convenient to have most of her working week based in that town.

16. On 10 February 2015, Craig McCorriston wrote to staff, including the claimant, (R781) about a number of matters arising from the staff survey action plan. He noted that in that action plan, concern had been expressed about different applications of provisions relating to a number of areas, including Flexi, Working at Home, Worksmart and Time Off in Lieu, and that as a result, it had become clear that the approach was variable across the service. The purpose of that email was to ensure that this could be addressed by reminding staff of the provisions and that the respondent would have an approach which was consistent across the Council.

17. Under Worksmart, Mr McCorriston said:

"Worksmart was introduced to allow some flexibility in work patterns which would generate an efficiency for the council and the employee. The scheme sets out that it is an ad hoc arrangement and should not be used to introduce permanent changes to work patterns. As with Flexi, officers who require to work outwith normal working hours, including breaching flexi core time, should agree that arrangement on a case by case basis with their line manager. If a Worksmart arrangement has not been agreed with your line manager, out of work hours will not be credited to your flexi balance."

18. On 2 March 2016, Ed Machin met with the claimant for a "1-2-1" meeting. He made a handwritten note of the meeting in his work diary, in the following terms (R728):

"2/3/16

1-2-1 with DB. Advised I would be asking all staff to attend CB Annexe the majority of working weeks – cited communication issues and lack of

teamwork highlighted at some review meetings. For her this will equate to 3 days per week and 2 per week for Employee B. DB advised she had travel problems – only 1 car share offered to do 2 per week. I agreed 3 per week did not need to start immediately and gave her time to sort."

19. Mr Machin had a further conversation with the claimant, again noted in his work diary (R725):

"10/3/16

Advised DB I want her to attend CB 2 days a week from w/b 14/3 and 3 days for [obscured]. Again explained there would be similar for Employee B. DB response – I suppose I'll have to do it if I'm told to."

20. In her evidence before this Tribunal, the claimant claimed that there was one conversation, not two, and that Mr Machin had simply told her she had to start attending the County Buildings Annexe for 3 days a week "because I said so". We rejected this evidence. Mr Machin's evidence was consistent with his notes, and we accepted it as credible, and preferred his version to that of the claimant.

21. In addition, we accepted Mr Machin's evidence that in her discussions with him at this stage she made no reference to her medical condition as a reason for resisting the change of base. She referred to the difficulties with regard to her car.

22. There was no evidence that Mr Machin told the claimant that it was the respondent's intention to move her to work at County Buildings Annexe for the entirety of the week.

23. In February 2016, a "TS Review" had taken place, involving the Trading Standards team, and a "SWOT Analysis was undertaken in discussion with the staff. The claimant participated in this analysis. "SWOT" refers to "Strengths/Weaknesses/Opportunities/Threats". A note of the issues arising from these discussions was produced (R833). The team identified that "sharing information" was a weakness, as people were failing to share information from meetings attended; in addition, it was noted that

communication was a weakness, due to the room layout, the team being split between two rooms, and the team being in different locations due to Worksmart". It was agreed that the proposed action arising from this would be to review the use of Worksmart and the current room split.

24. It was as a result of the concerns raised within and by the team members of the Trading Standards Team that the respondent decided to increase the number of days on which the claimant and Employee B should be required to attend at the office where the rest of the team was based.

25. Although the claimant agreed (with great reluctance and, as she put it, "under duress) to move to the County Buildings Annexe, initially for 2 days per week and then for 3 days per week, she did not in fact increase her days working there following the discussions with Mr Machin owing to intervening events, primarily due to her long term absence due to illness from 7 April 2016.

Grievance

26. On 3 March 2016, the claimant submitted a grievance to the respondent (R320). In that grievance, she stated:

"Dear Craig [McCorriston],

A situation has arisen to do with my employment that means that I may have to raise a formal grievance against my managers, Ed Machin and Andrew Blake, which is why I am coming directly to you in the hope that you can bring a swift and satisfactory outcome to the problem.

I have worked in the Civic Centre four days a week for over 5 years. I have spent one day in the main Trading Standards office, either in County Buildings (annex) or Lomond House when that was being utilised. This has allowed me to build a range of contacts in many of the departments of the council, enabling me to do my job much more smoothly and efficiently, being able to question and receive advice from the people able to respond. It also works the other way with a range of Council Employees from other departments coming to me for advice to do with a problem from a member

of the public with which they are dealing. Some of this advice is given 'off the record' but it is still valid to answering questions from the public and helping to solve complaints. I have even managed to build a rapport with some of the Councillors who come to me for advice to pass on to their constituents. This networking has been beneficial to many of the other departments and to myself over the years.

This has not, however, precluded me being an active team player with the rest of the trading standards department, going on many trips with the Trading Standards officers, where witnesses and support were needed. Trips have also been taken with Animal Health officers taking statements etc. I am able to access the largest consumer user centre in West Lothian, often getting to a trader in the Almondvale Centre within minutes of a complaint being lodged, thus increasing the public perception of the efficiency of the council. Public often drop in to the Civic Centre asking to meet with a trading standards official, meetings I am usually able to accomplish without asking them to return at a later date.

In January I was forced to change my job title of Senior Enforcement Officer to Fair Trading Officer. It is in itself a small change but it has ramifications which are now being felt. I have to sign a new contract which I will annotating the signature as 'Under Duress'.

The reason given for the change was that we had two female employees who basically did not have a role in the Trading Standards section, a hangover from when the consumer advice service was stopped some four years ago. We have now been amalgamated into one team under the Fair Trading banner.

That is the factual background as to my position as of the 1st March 2016.

On Wednesday 2nd of March 2016 I was informed by Ed Machin that I was now to come to County Buildings 3 days a week. I have been given no logistical or business reason why this may be beneficial to the service that I provide. I am able to see a number of detrimental aspects to this move:

Loss of networking availability

Additional transport costs to myself and the council

Contravention of the council 'Green Policy'

Need to obtain a poll car to come to Livingston to resolve issues (from an oversubscribed service in Linlithgow)

Unable to meet the public need in interviews held in the civic centre

Loss to the public of the ability to meet an adviser at short notice, both business and vulnerable consumers

It is a noticeable complication that these changes and request to attend at County Buildings has only arisen following the departure of Employee A who would have flatly refused to accommodate such a request, it being counterproductive to his working time activities which had nothing to do with work. It is a known that this ex employee has committed fraud using WLC time and facilities, such as pool cars etc, and that the two managers not only knew about it for several years, but turned a blind eye and allowed it to happen. This is an issue that I will address separately.

I strongly believe that I am being bullied, and harassed.

I have offered to go to County Buildings twice a week as a compromise.

I would like to meet with you at your earliest opportunity as I am having to go back to my Manager next week to discuss the arising situation.

Yours

Dawn Bingham

Fair Trading Officer

Trading Standards"

27. Mr McCorriston met with the claimant on 11 March 2016 in order to discuss the informal grievance. He wrote to Mr Machin and Mr Blake on that date

(C50) to advise that the claimant had met with him, and that she intended to raise a grievance about her treatment. He told them that he had met with her on an informal basis, and had agreed with her that he would discuss with them her grievances. He also mentioned that she had raised some serious issues which she said she may pursue under the Whistleblowing policy.

28. Following that meeting, the claimant emailed Mr McCorriston (C50A) to say that *"…I forgot to ask at our meeting this morning if the status quo can be maintained (with my 4 times a week at the Civic Centre, and once a week at County Buildings, and my job title of Senior Enforcement Officer), staying as they are until the Grievance Procedure has been exhausted, or we come to an amicable settlement…I do not like the thought of seeing the two managers twice a week, face to face, and my job title has nothing to do with the two consumer advisers changing their job title."*

29. The claimant also expressed concern to Mr McCorriston about a number of matters, which included allegations of bullying and harassment involving Mr Machin and Mr Blake, and also some issues relating to Employee A and Employee B.

30. Mr McCorriston suggested that the claimant should meet with him and Mr Machin and Mr Blake in order to seek to resolve the grievance at the informal stage. On 10 April 2016, Mr McCorriston wrote to Mr Machin and Mr Blake to inform them that she had agreed to a "round table meeting" in order to discuss her concerns. Mr Machin and Mr Blake both agreed to attend such a meeting. Mr Blake wrote to Mr McCorriston on 12 April 2016 (C56.2), in advance of the meeting, to confirm that they were both available to attend the meeting but were concerned to be clear on the purpose of the meeting. He went on:

"If it is general discussion about her being asked to attend CB, or the change to her title, then no advance prep is needed. However, if she intends to make accusations against either of us about bullying, preferential treatment of other employees, sex discrimination or mismanagement, then

the meeting takes on a different perspective and Dawn should be aware of the provisions within the whistleblowing policy which identifies that if an employee makes a malicious accusation found to be untrue, then they may be subject to disciplinary procedures. We are sure that if the conversation starts going down that route, you will be able to steer it back on track and prevent any unpleasantness…"

31. Mr McCorriston replied to Mr Blake, copied to Mr Machin, (C56.1) on 12 April, confirming the following:

"Dawn has indicated that she intends to take out a grievance claiming bullying, harassment, sexual discrimination. Dawn has provided no substantive written evidence to support her claim although I have met her at which stage she set out the issues I have previously discussed with yourself and Ed. These are:

- *An agreement that Dawn would work at WLCC so that she wasn't in the same building as an officer she didn't get on with.*
- *A revocation of that agreement now that the officer in question no longer works for the council.*
- *A failure to be reasonable about the day of team meetings which Dawn had to attend.*
- *Incorrect application of the 'special provisions' entitlements following a cancellation of a holiday flight.*
- *Demotion Dawn's status for the change of job title.*
- *Changes to Dawn's job description which weren't progressed via the proper routes.*
- *The title was only implemented in the first place because of a management error in the grading of another post back in 2005.*
- *An unreasonable requirement to work at County Building Annex 3 days per week given that most of Dawn's work is in Livingston.*

- *Dawn has never signed up to Worksmart (Dawn has subsequently confirmed that this isn't correct).*

- *Other people in the service are not pulling their weight. This has been reported by Dawn but no action has been taken by the service management.*

We discussed each of these issues when we met following my first meeting with Dawn.

I would intend that this is broadly the agenda for the meeting. I will take the role of mediator and won't be instructing in outcome but may offer some suggestions. Following the meeting it will be for Dawn to decide if she wishes to formalise matters."

32. The meeting took place on 14 April 2016, at the Civic Centre. At the start of the meeting, there was an informal discussion about recent holidays, Mr Machin having just returned from a holiday in New York. Mr McCorriston had recently been in New York himself, and considered that opening the meeting with a short informal chat might make the meeting more informal, though at that point the meeting had not actually started.

33. The meeting then went through the agenda set out in the email of Mr McCorriston following his discussions with the claimant. There was no comment made by the claimant at any time to suggest that she was uncomfortable with the manner in which the meeting was being handled. The claimant's manner in the meeting was "forceful", according to Mr McCorriston, but although she was anxious in the meeting it was generally conducted in a courteous manner.

34. At the conclusion of the meeting, it was apparent that no agreement was reached, and therefore that it was likely that the claimant would wish to escalate the matter to a formal grievance.

35. On 18 April 2016, the claimant emailed Mr McCorriston (C14A):

"Craig,

Having spent the weekend discussing the informal meeting we had on Thursday 14th April with my family and my husband, I have decided that I am going to make my grievance official, and I will have paperwork ready for this by Thursday April 21st, which is five working days from the informal meeting.

The meeting was a big disappointment to me, especially since nothing has changed at all, except my perception that I was 75% convinced that I was being bullied and victimised. I was willing to sit down and try to sort something out with the two managers. I am now 100% that not only was I being bullied, this situation will continue. This is not assisting my return to work, rather the reverse.

Whilst I understand that you would not back me up on my allegations, it doesn't take a genius to know by their behaviour that I am a victim.

I am off work at the moment due to work related stress, hopefully I will be back next week, but if I feel as bad as I do at the moment I will need to visit my GP for medical assistance.

Regards,

Dawn Bingham"

36. The claimant commenced a period of sickness absence on 18 April 2016. That sickness absence endured until the termination of her employment, with effect from 7 April 2017. The claimant never returned to work with the respondent.

37. On 21 March 2016, the claimant emailed Mr McCorriston again (C50.A.1), enclosing a business case (attached at C51.1). The business case set out a number of reasons why she should be permitted to continue working at the Civic Centre, and asking "if it works, why change it?"

38. The claimant then submitted a formal grievance against her managers, by letter dated 20 April 2016, to Elaine Cook, Depute Chief Executive (R322). She stated in her covering letter that she had already had a meeting with

her managers on 14 April 2016, but that that meeting had proved to be "worthless". She confirmed that if Ms Cook considered that it was appropriate for another manager to deal with the grievance, she should feel free to pass it to them. She also confirmed that *"…I have already started the process for an Employment Tribunal, due to the time restraints imposed by the tribunal legislation, and the tardiness of West Lothian Council when dealing with grievances (despite the time limits published in their own policies and procedures) I have had no choice in the matter."*

39. The grievance itself was attached to that letter (R323ff) and ran to some 8 pages, with attachments appended to the grievance.

40. At the outset of the grievance, the claimant confirmed that having worked for the respondent for 18.5 years, she had never been the subject of a disciplinary hearing. Her only "failure" was, as she said, being put on a stage one sickness absence process, which was *"due to long term disabling conditions that are diagnosed with my GP and hospital specialists, but I have not been referred to Occupational Health, despite me requesting this on several occasions."*

41. Having set out the background, the claimant said:

"In January 2016, I was forced to change my job of Senior Enforcement Officer (which I have held for 12 years) to Fair Trading Officer. It is in itself a small change but it has ramifications which are not being felt. I have been forced to accept a new contract which was annotated on the signature block as 'under duress'. This was a unilateral change in my contract terms and I did not agree to it, so it could be classed as a breach of contract.

It could also mean that I may have a claim of 18+9 weeks (at one and a half weeks for each full year of employment) for a redundancy payment as the job I held as Senior Enforcement Officer has ceased to exist.

There are now three fair Trading Officers in the TS Department. The other two staff members have had no official job for nearly 5 years. They were taken on as Consumer Advice Officers, but Consumer Advice was stopped

about five years ago by WLC Councillors in order to save money. They have had no 'official job' since Advice was stopped, but have been kept on by the service. Whilst I have no feelings one way or the other to the two staff members' employment position, I believe my job has been changed to theirs for no other reason than bullying me. It should also be noted Employee A (the officer who recently retired on December 31st 2015) was aa Senior Enforcement Officer for 20 years, and the job was only changed once he had left. If it was that important it would have happened years ago.

I am now being forced to work 3 days a week at County Buildings despite having worked at the Civic Centre 4 days a week for the last 6.5 years. I have been given no valid business reason for this and I can see many advantages to working at the hub of the council in the Civic Centre, compared to an office on the borders of the county several miles from the main town. At present I am within walking distance of the largest Retail and Designer Outlet in the county. When I asked Mr Machin why I now had to come to County Buildings, three days a week his only reply was 'because I say so'. This again is victimisation, as no one else who works on Worksmart has been given these instructions. I have written a Business Case for staying in the Civic Centre and I will enclose it with this grievance."

42. The claimant went on to set out what she saw as the arguments for and against working at County Buildings (which was understood to be a reference to the Annexe to County Buildings, where the team was based).

43. She referred to an email from Andrew Blake to staff in December 2015, in which he said that there was no decision at that stage about the location of the EHTS team, though there was a strong possibility that the team would end up in the Civic Centre. She also suggested that the County Buildings Annexe was to be sold in March 2017, and therefore there was no need for the stress and confusion being caused. She queried why Environmental Health staff were not being required to move, having been told that they were not part of the Trading Standards team. This was "nothing short of bullying".

44. She concluded this section by pointing out that the letter head of the EHTS team and the email address is the Civic Centre, and querying therefore that if she was in fact working in the head office, were the other staff in the wrong place?

45. In her grievance, the claimant made no reference to her illness, and at no stage said that the reason why she could not or would not increase her working days at the County Buildings Annexe was because the toilet facilities were inadequate.

46. The claimant moved on to give further incidents and examples of bullying, including the issues arising in relation to her new identification badge, when her previous badge expired in June 2015. She pointed out that her new badge referred to her as a Fair Trading Officer, which "doesn't have the same perceived authority or experience as Senior Enforcement Officer".

47. She referred to a number of incidents, and then to a cancelled flight in 2015. She said that she had had to miss one day at work due to a cancelled flight while in Madeira. She asked either to be allowed to lose one day's pay or work back the 7 hours and 12 minutes over the next flexi time period. She had to take a day's annual leave, and complained that her requests and comments about this matter were being ignored by Mr Machin and Mr Blake.

48. With regard to the meeting of 14 April relating to the informal grievance, the claimant said this:

"At the meeting on the 14th April in the Civic Centre I asked if I could have someone accompany me as this would help my moral (sic) and make me feel less uncomfortable. I was told no and had to face the two bullies on my own and felt intimidated.

CMC spent the first five minutes of the informal grievance talking to EM about his holiday in New York, last week. They were having a good laugh about the experience. I was ignored during this. It made me feel even more under duress, especially as I was denied any moral support.

The informal grievance meeting led me to realise that my perception of being bullied was not a thing of my imagination. It was real…"

49. The claimant concluded her grievance by enumerating the effects upon her of the *"work related stress due to being bullied and victimised".* Included within that was a reference to *"flair (sic) up in my long term ulcerative colitis".* She went on to say: *"Although it is my intention to return to work as soon as practicable, I am conscious of the fact that returning to the same situation that is causing my anxiety will quickly lead to further stress. In Linlithgow I work on the top floor of the annex with only three rooms, and only 8 people, two of whom are the Ed Machin and Andrew Blake. This is, at present, an intolerable situation."*

50. On 4 May, Mr McCorriston conducted a Stage 1 Grievance Hearing. No formal minutes were taken of the hearing, but Mr McCorriston summarised the grievance and the claimant's submissions at the hearing in his outcome letter, dated 13 May 2016 (R348ff).

51. With regard to the claimant's grievance about being asked to increase her working days at the County Buildings Annexe from 1 to 3 per week, Mr McCorriston observed:

"When we discussed this at the Stage 1 Hearing you accepted that your statement about the service relocating to the Civic Centre was without foundation as there had been no discussion about the location of the service post March 2017.

You went on to explain that the cause of stress referred to in paragraph 1 was that you didn't get on with your work colleagues at County Buildings Annex…

Andrew has reviewed your diary entries which show that you carry out occasional visits averaging around two per week and these vary throughout the district. This level of work does not support your assertion that you should be based in Livingston for workload management reasons.

Nevertheless, you will still have the ability to work from the Civic Centre in Livingston for up to two days per week and it appears to me that this would be sufficient to assist with the efficient management of your workload in the south of the county.

…Worksmart is a provision which allows occasional changes to working hours and work locations where there is a business need to do so. There is no provision through Worksmart to make permanent changes to work patterns or locations. The justification you have provided is inconsistent with the terms of Worksmart and can't be supported for that reason. Your proposal is also inconsistent with wider service development matters which are set out elsewhere in my response.

Paragraph 20 sets out a range of personal difficulties which you would encounter in travelling to Linlithgow three days per week. While I am sympathetic to these issues they are personal in nature and do not override the need for effective and efficient service delivery."

52. Mr McCorriston went on to set out the justification for requiring the claimant to work for a greater amount of her time at County Buildings Annex, referring to the SWOT analysis which identified the need for greater team working, better sharing of knowledge and improved resilience given reduced resource levels. He confirmed that Mr Machin had advised that another officer who was working a high proportion of his time away from the County Buildings Annex had also been asked to work more frequently from that office.

53. He concluded:

"Having reviewed the matters set out in this section I have found no evidence that the requirements for you to work at County Buildings Annex at least three days per week are unreasonable or discriminatory.

I am satisfied that a reasonable justification for the requirement has been provided to you and that you have been involved in a number of service development sessions and 1-2-1 meetings with your manager which

informed the need for change and that these changes have been fully explained to you. I am also satisfied that the requirement will assist with service delivery and are not in conflict with any council policy.

I recognise that you have a number of concerns about the requirement. However, on the whole these appear to be driven by personal matters (working relationships), personal preferences (cost and inconvenience of working at County Buildings Annex) or based on false assumptions (about the likelihood of the service being relocated to the Civic Centre in the near future). I have not been provided with any evidence to suggest that the requirement has been driven by the discriminatory actions of managers which you claim and, indeed, I have been advised by managers that the provisions apply equally to all members of the Trading Standards team.

For these reasons I conclude that the requirement to work for a greater proportion of your time at County Buildings Annex is a reasonable management requirement and is necessary for the effective and efficient conduct of service delivery. Consequently, I do not uphold your grievance in this regard."

54. Mr McCorriston sought then to address the allegations of bullying and victimisation made in the claimant's grievance.

55. He found that the workload information provided to him did not support the claimant's assertion that she was being given less work than her team colleagues.

56. He then addressed the change of the claimant's job title to that of Fair Trading Officer: *"While I appreciate that you see the change in your job title as making the job sound less important than it did previously, the revised structure of the service, which was pursued in accordance with the council's change management policies, has three posts which have the same responsibilities and are paid at the same pay grade. It would not be appropriate to have different titles applied to one of these posts."*

57. With regard to the cancelled flight, Mr McCorriston observed that the claimant was seeking to rely upon provisions which related to the disruption caused by the volcanic ash cloud, and therefore that the document she was using to support her claim did not apply to the circumstances of her cancelled flight.

58. Mr McCorriston went on to find that: *"In Paragraph 17 you allege that Andrew does not like female members of staff and that five female members of staff 'were all bullied out of their jobs'. You do not, however, provide any evidence to support these serious allegations. When I asked you at the Stage 1 Hearing if you had any evidence to support the allegation you confirmed that you didn't but that you could contact some of the members of staff to see if they would provide that evidence. I set out to you at the meeting that you had made a statement of fact in your grievance and that seeking to gather evidence 'after the fact' would be at odds with the statement you have made. To have made the statement with the certainty that you have would require you to have the evidence to support that statement at the point you made it. Given this, I cannot see how the statement that you have made can be justified."*

59. The claimant raised the fact that she had made a complaint under the respondent's Whistleblowing policy some four years before, and that managers were aware that she was the person who had done so. Mr McCorriston, reviewing the evidence put forward by the claimant, found that there was no basis for her assertion that Ken Inglis or other managers knew that she had made a protected disclosure.

60. Having reviewed the full grievance, Mr McCorriston set out his conclusion, which is that he could find no evidence to support the claimant's claims either in whole or in part, and as a result he did not uphold the claimant's grievance in whole or in part.

61. The claimant stated in evidence that she objected to Mr McCorriston hearing the Stage 1 Grievance, when he had handled the informal

grievance. Mr McCorriston's evidence was that no such objection was raised before or during the grievance hearing.

62. The claimant was dissatisfied with the outcome of Stage 1, and accordingly sought to make an application for a Stage 2 Grievance, again to Elaine Cook, dated 1 June 2016 (R355).

63. The claimant complained that there were no minutes of the Stage 1 meeting, though she had understood that Lesley Donegan from HR, who had been presented, was taking notes which would then become the minutes of the meeting.

64. She observed that ACAS requires in its guidance that minutes should be taken of formal meetings between employer and employee, and that if minutes were not to be provided this should have been made clear. She requested that the Stage 2 meeting should be recorded or minutes be taken in order that a record would be available for her Stage 3 or Employment Tribunal claim.

65. Attached to this letter was a Paper Apart containing her Stage 2 Grievance (R359ff). She reiterated the complaints contained in her Stage 1 Grievance, and sought to address Mr McCorriston's responses. She argued that she had been treated less favourably than a number of male employees, and repeated her complaints about bullying and harassment in the workplace.

66. Again the claimant did not rely upon her medical condition in her assertion that the requirement for her to move to County Buildings Annexe for 3 days a week was unfair to her. She made no mention in this grievance about her concern over the inadequacy of the toilet facilities in that building.

67. The Stage 2 Grievance was heard by Dr Elaine Cook, Depute Chief Executive of the respondent, on 5 July 2016, and following that meeting, she confirmed the outcome of the Stage 2 by letter of 3 August 2016 (R391).

68. Dr Cook's decision was that the Stage 2 Grievance was not upheld. She set out her findings in the letter, including the following:

"In relation to the element of your grievance relating to the issue of your work location I feel that the evidence around the business need for you to spend more of your working week at County Buildings was fully covered in Craig McCorriston's response following the Stage 1 Hearing. There was some discussion around your view that your working relationship with colleagues in County Buildings was detrimentally affected by you making a protected disclosure relating to a colleague several years ago. However you were not able to provide any evidence that your colleagues were aware that you had made the disclosure. You advised that you would provide this evidence when your case was heard by the employment tribunal but as I explained I can only take a decision based on the evidence presented to me during the hearing. I am therefore unable to uphold this element of your grievance."

69. She went on to say that she did not uphold the allegations of bullying and harassment, and was satisfied that proper procedures had been followed in relation to the change of the claimant's job title and job description.

70. Dr Cook referred to the protected disclosure made some 4 years ago, and also to the more recent protected disclosure made, but stressed that that was a separate process, and therefore these matters could not be considered under the grievance procedure.

71. The claimant, remaining dissatisfied, submitted a Stage 3 Grievance to the respondent, and a hearing was fixed to take place before the Employee Appeals Committee on 2 December 2016. As it turned out, by that stage a separate bullying and harassment complaint was being considered by the respondent, and accordingly the Stage 3 did not take place on that date, and on 20 January 2017, Ms Deborah Brown, Clerk to the Committee, wrote to the claimant to confirm that the Stage 3 should not commence before the conclusion of that bullying and harassment investigation (R510).

72. The claimant resigned her employment with the respondent on 7 April 2017, and no further steps were taken to reconvene the Stage 3 Grievance hearing.

Bullying and Harassment Complaint

73. Notwithstanding the fact that the claimant's grievance had included a component within which she had complained that she had been bullied and harassed by Mr Machin and Mr Blake, she was advised in September 2016 that the respondent has a separate process in relation to bullying and harassment complaints, and that it would be appropriate for her to submit that complaint under that process.

74. Accordingly, on 15 September 2016, the claimant made a formal complaint under the procedure for dealing with complaints of bullying and harassment (R518ff). Attached to the form was a statement which set out the incidents which the claimant regarded as bullying and harassment.

75. In the background section, the claimant explained that *"The reason I started working at the Civic Centre was at the request of my manager's (sic) and in line with the CEO (Graham Hope) start of Worksmart, and I was asked to attend the Civic Centre on a regular basis as a trial run, that worked well and therefore carried on for over 6 years. I am now been told to go back to County Buildings initially 3 days per week, but to become 5 days per week in the near future. This is for no other reason than to bully me. There are no business reasons why I should be forced to do so, and despite many requests for the reasons my two managers claim to have to be put in writing for me to understand they have refused to do so."*

76. She then set out 8 numbered paragraphs in which she delineated the incidents which she alleged amounted to bullying and harassment.

77. The complaints were as follows:

    1. *"In January 2016, I was forced to change my job of Senior Enforcement Officer (which I have held for 12 years) to Fair Trading Officer along with two other women in the office who had not had a proper designation since the cessation of Consumer Advice some 5 years earlier. Since the three of us became*

Fair Trading Officers the workload for the two members at Linlithgow has been much more than mine giving the impression that my work load is a lot less despite the far greater experience and knowledge that I possess. I have the most experience, qualifications and training yet am ignored. In my last week at work before going off sick I had no work given to me from Linlithgow.

2. *I recently attended training/updates on new Package Travel Directives legislation and the first case following this course were given to a new FTO who handled the case inappropriately. This was despite me asking EM face to face to give this case to me as I had just been on the course. This request was ignored. I wanted it, but he did not give it to me. Can this be perceived as victimisation or bad management of staff and resources, or both?*

3. *My Identification badge expired in June 2015. My new badge was ordered by Ed Machin and showed my job title as Enforcement Officer, having deliberately missed out the 'Senior'. I challenged EM on this omission of Senior, and he admitted he had changed the title on purpose and that it was only 'a word'. In March my title was changed unilaterally and under duress to Fair Trading Officer. Apparently because 'enforcement' is such a negative term. I asked why Employee B's Enforcement Officer title was being retained if Enforcement was such a negative term and Senior just a word, but no satisfactory answer was given apart from 'sometimes Employee B calls himself something different'. His work badge states Enforcement Officer, as do his business cards, and employment contract. He is paid on a different pay grade to me. This is a possible Sex Discrimination issue.*

4. *I had a flight cancelled in June 2015. I had to miss one day at work due to this. I asked to be allowed to either lose one day's pay (which I could claim back from Easy Jet) or work back the 7 hours and 12 minutes over the next flexi period. EM told me he had spoken to HR and was awaiting their response, however, he told CMC that he never spoke to HR. Did EM speak to HR or not. Only other person in TS with similar problem due to the ash cloud in April 2010 was given the choice of extending her flexitime, or taking annual leave, she choose to take annual leave. I did not. HR informed me that I could lose a day's pay or work back 7.12 hours over 1 flexi period. They stated that anyone losing 5 days in the ash cloud worked back the 5 days over the next 5 flexi periods. One month per day of loss. I also asked EM if I could work back TOIL accrued at weekends in the Almondvale Centre checking the weekend only traders that were breaching TS legislation. I was ignored and never had a reply to this suggestion. I was of the opinion that he had forgotten about this until he raised it at the meeting on the 14th April, and with disregard to my perfectly reasonable suggestion.*

5. *When I asked if EM would consider changing the newly organised staff meetings for the next 3 months, as he had organised them for a Tuesday and I went to County Buildings on a Wednesday (due to Tuesday being TS's day) I was told it did not matter if I didn't attend…*

6. *At the meeting on the 14th April in the Civic Centre I asked if I could have someone accompany me as this would help my moral (sic) and make me feel less uncomfortable. I was told no and had to face the two bullies on my own and felt intimidated. The informal*

grievance meeting led me to realise that my perception of being bullied was not a thing of my imagination. It was real.

7. *I called EM on 18th April, at 8.15am, as per the WLC Sickness Absence policy, to say that I would not be in to work this week as I was suffering from work related stress. He was not interested and just wanted me off the phone. He did ask how I knew I had stress. He asked if I had been to see the doctor. I advised him that the doctor's surgery has not been open since I was last at work, as it had been the weekend.*

8. *I made a protected disclosure 4 years ago against TS and his falsification of documents, improper use of pool cars, and other issues. At the meeting on the 14th April both AB and EM claimed they knew nothing about who put in the disclosure 4 years ago regarding Employee A's working time fraud and the lack of management of this employee. I find this difficult to believe for two reasons. TS told everyone from the cleaners to managers that it was me that had made the disclosure. (I do not know how he knew) and I suffered a vicious verbal abuse incident from TS where he cornered me and was shouting and spitting in my face. This happened without witnesses and only happened once. This was my only reason for not reporting this event. Had it been repeated I would have made a report to the police of verbal assault and had it investigated. This led to me being ostracised by my co-workers in TS and EH at County Buildings. This was another good reason for working at the Civic Centre. EM admitted that he did his best to keep me and TS apart, even to not having to attend the monthly meetings if the two of us would be there. The Employment Rights Act*

specifically mentions that failure to stop bullying in the workplace is tacit complicity. Bullying following a protected disclosure is 'suffering a detriment'. Again, management failing to deal with this is tacit acceptance and bullying. In the event that the blame for making a protected disclosure is wrongly attributed to a particular person, it is still a detriment if the person or people doing the bullying are allowed to do this and the management is still guilty if they do not take action."

78. Fraser Thomson, Business Resource Officer, was commissioned to carry out an investigation into the bullying and harassment complaint, and to deliver a report to James Cameron, the Nominated Officer. Mr Thomson carried out a number of interviews with the claimant (in the course of three meetings with her), Mr Blake, Mr Machin, Mr Inglis and Mr McCorriston, and also provided documentary evidence gleaned from his investigation.

79. The report was completed and delivered to Mr Cameron on 27 January 2017 (R523).

80. Mr Thomson summarised the basis upon which the claimant was alleging that she had been bullied and harassed, at p8 of the report (R529). He noted that:

"Mrs Bingham informed the investigation that the bullying and harassment had been caused as a result of her raising a protected disclosures (sic) related to Employee A breaching Council regulations and working fraudulently and also against Andrew Blake and Ed Machin's management.

Mrs Bingham stated 'The disclosure was not just about my concerns over Tom, it also related to Ed and Andrew hence the reason they were off with me. It concerned their lack of management and skills and condoning the fraudulent use of council tax payer's money. This situation was what caused me to lodge a Protected Disclosure against the two managers being complicit in the fraudulent use of the pool cars and work time that was accepted by them regarding Employee A's working practices. They started

nit picking everything I said or did and didn't let me go on training courses'…

Mrs Bingham's complaint stated that she 'found it difficult to believe' that Andrew Blake and Ed Machin did not know that she had submitted the protected disclosure. In interview Mrs Bingham stated 'I have no evidence apart from their attitudes towards me after the investigations had commenced. There was no bad atmosphere before this incident.'"

81. He also recorded the denials of Mr Machin and Mr Blake to the allegation that they had been aware that the claimant had made the protected disclosures, and said that the claimant had made reference to medical symptoms resulting from the alleged bullying and harassment and work related stress, including nausea, headaches, sleeplessness, lack of energy, weight loss, mouth ulcers, and the exacerbation of her long term gastro intestinal medical conditions.

82. Mr Thomson went on in his report to summarise his key findings under the different complaints made by the claimant. He then set out his conclusions (R550ff). He affirmed that the claimant held a genuine belief that she had been bullied and harassed, and that her health was suffering as a result.

83. He summed up his overall conclusion as follows (R556):

"When meeting Mrs Bingham for interview it was made clear to her that Bullying and Harassment complaints required witness evidence or documentary evidence in order to provide the Nominated Officer with sufficient evidence to make a decision. Mrs Bingham spoke with strong belief and produced documentary evidence which has been included whenever possible.

Mr Blake and Mr Machin provided a lot more written evidence of management guidance and business justification that supported their decision making.

Whilst Mrs Bingham may have strong opinions and a strong personal justification for her belief of how things should be done, the investigation did

not find any evidence of Mr Blake or Mr Machin taking any decisions that were outwith their areas of responsibility or accountability. To the contrary, business justification appeared to be evidenced throughout the investigation by Mr Blake and Mr Machin.

The investigation found a significant lack of corroborating evidence of Bullying and Harassment by Mr Blake and Mr Machin towards Ms Bingham."

84. The report was passed to the Nominated Officer, Mr Cameron, who convened a meeting with the claimant on 7 February 2017 in order to convey to her the outcome of the investigation and to explain the basis for his conclusions. He gave consideration to the investigation report, and reached his conclusion before meeting with the claimant.

85. Following that meeting, Mr Cameron wrote to the claimant (R919) to confirm his decision and the outcome of the process.

86. His conclusion, found at R920, was as follows:

"In summary I concluded from all the information presented to me in the Investigating Officer's report that, although you were clearly dissatisfied with a number of management decisions taken with regard to the foregoing matters, those decisions were driven by operational and/or strategic considerations and legitimately exercised within the delegated areas of responsibility and accountability of the officers concerned. Other matters such as the ordering of an incorrect identity badge, I concluded to be a genuine oversight for which you received an apology at the time.

Whilst the general theme underlying your complaints implies a concerted campaign of being singled out by your managers for less favourable treatment, I have to say that I found no corroborated evidence to support this in terms of the manner in which you have been managed.

I am satisfied that the investigation into your complaint has been conducted impartially, assiduously and in good faith and as such I have concluded that there are no grounds to progress this matter through the disciplinary

process. Nevertheless there is clearly a need to try to re-establish working relationships between the service and yourself going forward and whilst I am aware that you are currently on sick leave, the offer to explore ways of doing this which would assist your return to work is open to you.

I understand that an Absence Review meeting with Craig Smith has been arranged for 17 February 2017 and perhaps this can form part of that discussion."

Protected Disclosure March 2016

87. The respondent operates a confidential whistleblowing process whereby a complainer may submit an anonymous complaint to them setting out information tending to show that certain obligations have been or are being breached by individuals or by the Council.

88. On 16 March 2016, the claimant submitted a complaint which she described as a Protected Disclosure under section 43B of the Employment Rights Act 1996 (ERA), and in particular reference to section 43B(1)(b) and (f) (R925).

89. She identified the persons under section 43B(1)(b) as Employee A and Employee B, and the persons under section 43B(1)(f) as Andrew Blake and Ed Machin.

90. The claimant alleged that both Employee A and Employee B had a pool car booked for each day of work up to 6 months in advance following the introduction of the pool car scheme. She said that this meant that out of a working week of 21.36 hours each, 15 hours plus per week were out in the pool cars, all of which should be recorded in the diary. She went on:

"…The length of time they had the pool cars per day, and the mileage done each day (easy enough to prove I am told, since the trackers were installed) will easily prove they were both using the cars fraudulently. Both persons kept their calendars locked so that other staff member could not see what they were supposed to be doing, or where they were going, despite being told by the managers on numerous occasions that this was required for health and safety reasons. It is not known even if the managers had this

information, but on making comments about them both hiding their calendars I was told that the managers did have sight of them, however what the calendars showed that covered about 5 hours per day is any ones guess. It was common knowledge that Employee A used to babysit his grandchild on some afternoons, as well as going to Whitburn Gym some mornings (all during core times) whilst using a pool car to get to and from his home, gym etc. Even on a Tuesday when TS worked out of County Buildings, he disappeared for 5 out of 7.12 hours from 10.00AM to 15.00Pm with little or no work to do that required him to leave the office or showed any results of visits or inspections. The mileage was nearly always the same from week to week…

All the staff in the department have been told that their diaries are not to be blocked to allow access to all other staff. This is a Health and Safety decision so that we can all see where the other staff members are working or visiting. Employee A and Employee B were the only members of staff who had blocked their diaries to prevent staff knowing that they were not carrying out work related to duties when they were away from the office. The managers were aware of this and did nothing about it at the time. They are now reminding us all to have our calendars correctly filled in and on display, but they are preaching to the wrong people, the ones that needed to be made to do it never were.

In February 2015 another verbal complaint was made about Employee A to Mr Andrew Blake by two members of the Animal Health Team. Mr Blake's reply was 'Never mind, he is leaving at Christmas'. This reply made both Animal Health Officers question his ability as a manager of the EH & TS team. Mr Blake did not seem to care that TS had another 10 months to continue to defraud the council, and he was going to do nothing about it.

My disclosure is:-

Under section 43B(b) of the ERA 'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject'.

I would suggest that this applies to both Employee A and Employee B with respect to their contract of employment and job descriptions, a legal obligation which neither of them consider to be important.

Under section 43B(f) of the ERA 'that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.'

This seems to be the case with Mr Andrew Blake and Mr Ed Machin who were aware of the fraudulent behaviour of Employee A and should have had a good knowledge of the behaviour of Employee B. It would be a simple process to correlate Pool Car Bookings with their diaries and work reporting, and mileage carried out on each pool car tracking device. Mr Blake in particular was well aware of Employee A's behaviour and either ignored it or was tacit in his behaviour, in any case, not behaviour to be expected from management. They concealed his behaviour in a previous investigation despite being well aware of the commission of the fraudulent behaviour of the two employees.

During the leaving party for TS, AB made a speech to all the staff of TS & EH, stating what good friends they had always been with each other, how their two families had always been close, how AB's mother was taken to work by TS etc. This could be one of the reasons why the previous report about TS's behaviour was covered up and allowed to continue.

Whilst Employee A has left WLC employment, Employee B has not.

Both managers are still in WLC employment."

91. The complaint was received by the Counter-Fraud team responsible for investigating whistleblowing complaints. Stuart Saunders, Senior Counter-Fraud and Compliance Officer since April 2016 (and prior to that, an Internal Auditor since 2002) received the disclosure, and Roberta Irvine, Counter-Fraud and Compliance Officer, carried out the investigation which followed.

92. The department received the complaint as an anonymous one, and throughout the investigation, the department was unaware of the identity of

the complainant. Mr Saunders only became aware that it was the claimant who had lodged this complaint when she contacted him about it, in February 2017. Mr Machin and Mr Blake, though interviewed as part of the investigation, were never told that the claimant had raised the complaint, and did not know that she was the source of this disclosure.

93. The investigation report was completed in December 2016 (R927).

94. The conclusion of the report (R935) was that *"Based on the enquiries and evidence gathered, it is concluded that there is sufficient evidence to support the allegation that both Employee A and Employee B were consistently and significantly abusing both the flexi time system and their use of council pool cars.*

Other than Katie McDonald's [former Animal Welfare Officer] statement, we found no evidence to substantiate the allegation that managers were aware of the behaviour of both Employee A and Employee B and chose not to address it. When interviewed both Andrew Blake and Ed Machin noted their concerns about the investigation findings and Andrew Blake stated that if he had been made aware of those issues previously he would have put a stop to it. Ken Inglis (Senior Trading Standards Officer) was not interviewed as he was on long term sickness absence at the time of the investigation.

Management are required to take account of the findings of this report and consider what further action is deemed necessary."

95. On 20 February 2017, the claimant emailed the respondent's whistleblowing email address (WhistleBlowing@westlothian.gov.uk) (C79), saying this:

"Hi

In March 2016 I lodged a protected disclosure against Mr Ed Machin and Mr Andrew Blake with regard to their mismanagement of one of the Trading Standards staff, Employee A. Since lodging the claim I have heard nothing from the Whistle Blowing department.

I have re-read your published information in your Disclosure of Information by Employees (Whistle-Blowing) Procedure and it states in paragraph 3.3.8 that I will be notified if no action is to be taken and the reasons for this decision and in para 3.3.9 I will be notified if action is to be taken and the likely timescale. I can also request a written or verbal progress report from the appropriate manager.

It is now almost 12 months since this whistleblowing action was taken and I am now requesting information under the council policy and procedure. I am quite comfortable with email communication should you agree that this is a suitable medium. I am currently off on long term sick due to the treatment of the two aforementioned managers and would wish you to respond to the email address on this communication rather than my works email."

96. Mr Saunders replied on 23 February 2017 (C80):

"Hi Dawn

Please find below an update on the Whistleblowing referral that we received from you on Wednesday 16 March 2016.

- *The referral was assessed and accepted on Thursday 17 March 2016 and the formal investigation commenced immediately.*
- *The investigation was concluded and reported to the relevant Depute Chief Executive and Head of Service on 12 December 2016.*
- *The investigation concluded that there was sufficient evidence to support the allegation that the two members of Environmental Health and Trading Standards (EHTS) staff had consistently and significantly abused both the flexi time system and their use of council pool cars.*
- *Disciplinary action commenced against the current council employee on 20 January 2017 and is currently in progress. The other member of EHTS staff retired in December 2015.*

Thank you for raising your concerns to the Counter Fraud Team and I hope that you feel that your concerns have been fully addressed.

Please feel free to get in touch with any feedback or comments on the Whistleblowing process."

97. The claimant did respond to that email, on the same day (C81). She confirmed that she felt vindicated that the concerns she had been bringing to her managers' attention had "finally been properly investigated and proved correct". However, she observed that while actions seemed to have been taken against one member of staff, the investigation seemed to have ignored the original terms of the original disclosure, in that reference had been made to the managers, Mr Machin and Mr Blake, and their having been aware of and complicit in the allegedly fraudulent behaviour.

98. The claimant asked if management were "once again defending their managers at the expense of the junior officers and employees". Finally, she commented that it was her understanding that fraud and misuse of council property was gross misconduct, the sanction being instant dismissal, and then asked if there was a valid reason as to why this had not happened. She knew that Employee B remained an employee of the respondent but did not know why, and asked what had happened or was happening to Mr Machin and Mr Blake.

99. Mr Saunders sent a short reply on the following day (C81.1) in which he indicated that disciplinary action was in progress but that that was outwith their remit and he could not answer her questions. He confirmed that he would forward her response to Mr McCorriston to highlight her further concerns.

100. No further information was provided to the claimant as to the outcome of any disciplinary action which had commenced against Employee B. That matter was considered to be confidential as between the respondent and an employee. No action was taken against Mr Machin and Mr Blake on the basis that the investigation report by the Counter-Fraud team did not uphold that part of the complaint made.

Sickness Absence Management

101. The claimant commenced long term sickness absence from her position with the respondent on 18 April 2016.

102. An Absence Review meeting took place on 6 July 2016, conducted by Mr Machin as the claimant's line manager, in order to review her health and the ongoing absence from work, and to discuss any support required in order to assist her return to work. Following that meeting, Mr Machin wrote to the claimant on 11 July 2016 (R955).

103. Mr Machin explained that the meeting was held under the West Lothian Council Policy and Procedure on Managing Sickness Absence, and advised that her absence did cause serious operational difficulties, and was therefore not sustainable indefinitely.

104. He went on to summarise the discussion, and said:

"You advised that you were generally well, apart from the times when you thought about the issues that were causing you stress, citing a recent Grievance hearing as an example. We discussed the Counselling Referral that I had previously made on your behalf and you confirmed your first counselling session was due to take place on 20/7/16…

We discussed the previous agreement you made with Ken Inglis in December 2015 to defer making an Occupational Health referral, pending the outcome of the … outpatient appointments. We agreed that I would discuss your situation again with OH Early Interventions Service in light of all the current circumstances. I can confirm I have had that discussion and have now made a Referral for Occupational Health Assessment. I am uncertain of the timescales involved in this process however you should expect to receive contact directly by Occupational Health.

As you advised there was no imminent prospect of your return to work, we agreed to defer any discussion on a phased return that could be put in place to support your return to work. We agreed this could be discussed at the

point you are ready to return to work or at any further Absence Review Meeting should your absence continue."

105. The claimant then attended an Occupational Health (OH) appointment on 19 July 2016. She was seen by Anne Young, OH Adviser, and she presented a report following that consultation (R957).

106. She confirmed that *"As you are aware, Dawn has been absent from work since 18th April with what she perceives to be work related stress. Dawn informed me today that there have been changes in the workplace and also issues with work colleagues which have had a negative impact on her health. Dawn claims that she is being bullied in the workplace and I understand that she has submitted a grievance and there is an ongoing investigation into this."*

107. When asked if there was an underlying cause for the sickness absence, Ms Young stated that *"Although Dawn does have underlying medical conditions, these are not the reason for her ongoing absence from work".*

108. Ms Young confirmed that it was her opinion that at that stage the claimant was unfit to carry out her substantive role of Fair Trading Officer, and that she was unable to predict a return to work date, though said that *"…it is unlikely that Dawn will be fit to return to work until the grievance procedure has been concluded."*

109. Ms Young expressed the view that the claimant was not, at that point, disabled within the meaning of the Equality Act 2010 as her condition had not lasted long enough, but said that she did have underlying medical conditions which would be covered by the Act. She also said that there were no adjustments which could be made at that point to enable her to return to work.

110. A further Absence Review meeting took place on 24 August 2016. Ed Machin chaired the meeting, and Mark Grierson of Human Resources was also in attendance. The claimant attended and was accompanied by

Mr Bonelle, her husband. The purpose of the meeting was to discuss her ongoing absence, consider the terms of the OH report, and discuss any support needed to help her return to work.

111. Following the meeting, Mr Machin wrote to the claimant (R959). In that letter he said:

"We discussed the Occupational Health Adviser's report and you confirmed that you accepted the contents. The report stated that although you have underlying medical conditions, these are not the reason for your current ongoing absence and further advised that it was unlikely that you would be fit to return to work until your ongoing grievance procedure is concluded. You advised that a Stage 3 Appeals Committee was set for 2/12/16.

We discussed the Counselling Referral that I had previously made on your behalf and you advised you had only attended one session which had ended with the counsellor stating that she wasn't able to offer any more help. You were advised that a further referral, either by management referral or self-referral, for Occupational Health Counselling, could be made in the future, should the need arise.

As you advised there was no imminent prospect of your return to work, we agreed to defer any discussion on a phased return until the point at which you confirm you are ready to return to work.

We discussed whether there are any supports or adjustments which would help to facilitate your return to work and you confirmed that you would not be in a position to consider a return to work until your grievance, and employment tribunal, had been resolved.

It was noted that Occupational Health had closed the case following your appointment on 19/07/16 however, you were advised that I would be seeking to continue to support you through attendance at Occupational Health and that a further appointment would be sought.

You confirmed that you were in agreement with this measure…"

112. Following receipt of that letter, the claimant emailed Mr Grierson (C24) to point out a number of areas in which she was in disagreement with the terms of the letter.

113. A further OH appointment was arranged for 13 September 2016, and Ms Young produced a report from that appointment (R961).

114. Again, Ms Young confirmed that there was "no underlying cause" for the absence, that she remained unfit for work, and that it was highly unlikely that she would be fit to return to work until the grievance procedure had been concluded. She suggested that the claimant be re-referred to OH once the grievance procedure had been concluded.

115. On 15 November 2016, the claimant attended a further review by OH, and on this occasion she was seen by Dr Kathryn Allan, Consultant Occupational Physician, who produced a report (R963).

116. She said that the uncertainties around the claimant's situation at work appeared to have had an impact on the claimant's psychological wellbeing, and that she described symptoms consistent with work-related stress. Dr Allan then answered the questions set out in the referral, and said that the claimant had more than one pre-existing physical health condition, but the reason for her absence was due to the impact on her psychological wellbeing of the grievance procedure and the uncertainties at work. In her opinion, the claimant was not fit to return to work at that time.

117. However, Dr Allan confirmed that *"Mrs Bingham would be able to undertake light or alternative duties, but if her grievance procedure is concluded she should be able to return to her own substantive post."*

118. She concluded by saying that *"Adjustments that would be supportive for Ms Bingham in the first instance would be to bring the grievance procedure to a conclusion at your earliest opportunity. I note that one of Ms Bingham's physical health conditions is a gastrointestinal condition and it is important that she has easy access to toilet facilities. I understand that part of her complaint is due to a proposed change in her place of work, which*

would relocate her to a building with limited toilet facilities. This is likely to be unsuitable due to her health needs."

119. On 12 December 2016, Craig Smith, Environmental Health Manager, wrote to the claimant (R965) inviting her to a formal Absence Review Meeting on 20 December 2016 to discuss her absence and any support available to assist her to return to work. He explained that *"As a result of other ongoing issues I have been requested by the Head of Planning, Economic Development and Regeneration to take on responsibility for the completion of this absence review meeting."* The "other ongoing issues" mentioned was a reference to the complaint of bullying and harassment which the claimant had made against Ed Machin and Andrew Blake, making it inappropriate for Mr Machin to continue to manage the claimant's absence from work.

120. Mr McCorriston asked Mr Smith to take on responsibility for the absence review process as he was employed as a manager in another area and had had no prior involvement in the matter, though he knew who the claimant was.

121. Following the meeting of 20 December 2016, Mr Smith wrote to the claimant to summarise the discussion which had taken place (R971). Mr Smith had chaired the meeting, with the assistance of Vera Muir, of HR, and the claimant had attended and been accompanied by Mr Bonelle.

122. Mr Smith confirmed that the claimant's continued absence was having an impact on the delivery of the service, and was not sustainable indefinitely. He noted, however, that the claimant's position was that the length of time the respondent was taking to deal with her grievance had contributed to the length of her absence.

123. He went on to address the Occupational Health report dated 15 November 2016, and said:

"We discussed the point in the report regarding access to toilet facilities due to a gastrointestinal condition. When asked you confirmed this was not an

issue which was preventing you from returning to work, or indeed one which would prevent from coming to work normally, although you did mention occasional absence due to flare ups in your condition. You indicated that you felt toilet facilities within the County Buildings Annex were not suitable, and that you needed close proximity access to toilet facilities, such as provided in the Civic Centre. I advised that the toilet provision in County Buildings Annex exceeds the requirements of the welfare regulations, and there are single occupancy toilets with suitable hand washing facilities available. You indicated that access was not suitable due to having to go down stairs, and the potential for the toilets to be occupied. I then asked if, given the need for close proximity, and quite access to toilets there were any issues with working out of the office, as required in your job. You indicated that it was not, as you could generally manage your condition through tablets, and would be able to find toilets if necessary.

You confirmed the sole reason for continued absence related to stress as a result of the unresolved grievance procedure. You advised that the satisfactory outcome of the grievance procedure would be the determining factor in whether you were able to return to work.

…For clarification I asked if there was anything at this stage other than the satisfactory resolution of the grievance process which would allow you to return to work. You stated there was nothing…"

124. The claimant replied to this letter by email dated 23 December 2016 (R966), making a number of comments about the terms of the letter. She observed that Mr Smith had made no reference to the welfare regulations in the meeting, and that the bullying and harassment complaint was another reason for her being unable to return to work.

125. Mr Smith replied briefly to say that the letter was only intended to reflect the main elements of the meeting, and that he was satisfied that it did so (C29A).

126. On 24 January 2017, Dr Allan provided a short review following a consultation with the claimant that day (R967). In that report she said:

"…Ms Bingham tells me that she was due to have a Stage 3 grievance meeting for Friday 20/01/2017. This meeting was convened but immediately deferred until the bullying and harassment investigation is concluded. Ms Bingham has no date for either the conclusion of her Dignity at Work investigation or for the next grievance meeting. These ongoing stressful circumstances are having an impact on her psychological wellbeing. They have also aggravated some physical health symptoms. I would recommend that it would be in her best interests to conclude these processes at your earliest opportunity. Her psychological symptoms do not yet constitute a mental health illness but there is a possibility that this could develop if the stressful circumstances are prolonged.

It seems unlikely that Ms Bingham will return to her substantive post while these issues are not concluded. If there was a suitable redeployment opportunity outwith her department, either on a temporary or longer term basis, then it might be good for her to return to work in some capacity. You may wish to discuss with her what work options may be available."

127. Mr Smith invited the claimant to a meeting on 17 February 2017, and she attended with Mr Bonelle accompanying her. Mr Smith was assisted by Mark Grierson, HR Business Adviser.

128. Mr Smith wrote to the claimant summarising the discussion (R969). In that letter he wrote:

"At the meeting we discussed the report received from Occupational Health following your appointment on the 24 January 2017 noting the suggestion that, if there was the possibility of suitable, temporary redeployment, outwith Environmental Health and Trading Standards, you may be able to return to work.

You confirmed that you would be happy to consider a return to work on this basis, stating that, such a return to work would need to be a suitable role.

I advised that I would be happy to discuss the option of temporary redeployment with Craig McCorriston, Head of Planning, Economic

Development and Regeneration. I further stated that I would confirm to you what suitable roles were available with a view to facilitating your return to work and ultimately to returning you to your role as a Fair Trading Officer. You indicated a willingness to consider roles within other parts of Planning, Economic Development and Regeneration which will be the focus of these consideration. I confirmed that it would be a requirement to work at the place of temporary appointment. I also confirmed it would not be the County Buildings Annex due to this being the office for Environmental Health and Trading Standards.

We also discussed any adjustments or supports that we could offer to assist you and you advised that, following the conclusion of your bullying and harassment complaint, it was suggested there is a clear need to try to re-establish and rebuild working relationships within the Service. You further advised that mediation had been suggested and you confirmed to me that you would be willing to participate in this process…"

129. Mr Smith confirmed that the reason why he continued to manage her sickness absence process notwithstanding the conclusion of the bullying and harassment complaint against Mr Machin was that he had been requested to do this by Mr McCorriston, and would continue to do so until instructed otherwise.

130. Following the meeting, Mr Smith referred the question of redeployment to Mr McCorriston, who underwent the process of seeking to identify suitable posts outwith EHTS. Mr McCorriston was able to identify a potential post but that was never put to the claimant as she resigned on 27 February 2017, and no further steps were taken to address this issue or seek to find redeployment for her. Similarly, the possibility of mediation was not taken further once the claimant resigned.

Resignation

131. On 27 February 2017, the claimant sent a letter to Fraser MacKenzie, Human Resources Manager, in which she intimated her resignation from her employment (R973).

132. The claimant made the following statements in her letter, which ran to 4 pages:

"Dear Mr MacKenzie,

I have no choice but to resign from my position as a Trading Standards Fair Trading Officer (Senior Enforcement Officer) with the West Lothian Council.

In my 19.5 years' service I have had many people praise me for my efforts and results on their behalf, and was adjudged by my former manager, John Lee, as being passionate about the job, something my line manager Mr Ken Inglis also stated early last year. In that time I have never even had a verbal caution, let alone disciplinary action taken against me. I have always been a conscientious, hardworking and honest employee. I used to love my job and I know I was good at it, but I know for the sake of my health, and that of my husband and family I cannot return to work for two managers who have constantly ignored me, undermined me, and for whom I have lost all confidence, and trust not to mention respect.

I regret having to make this decision, but based on various issues which I shall enumerate in chronological order below you will see why I am having to take this action.

(1) For years I watched officers of the Trading Standards Team abuse the systems in place. This included fraudulently using the pool car system, wasting council time playing golf, going to the gym, babysitting their grandson, etc, while their managers knew what they were doing, making them complicit.

(2) A protected disclosure submitted by me against the worst offender in our team in 2011 resulted in the named TSO being 'exonerated' by either nothing less than the managers lying on his behalf and the council being loath to take action or a poorly and incompetent investigation into the corruption.

(3) Following this I was subjected to a series of discriminatory and bullying incidents.

(4) In January 2016 I was informed that I was having my job title changes to bring me into line with two other officers in the team. I was now going to be a Fair Trading Officer. I had been a Senior Enforcement Officer for over 11 years. I was now having to work with two officers who had not even had an official job or role for 5 years following the cessation of Consumer Advice, ostensibly done to save council money but still paying the same salary to these two officers. One of these two officers had applied for the position of Senior Enforcement Officer at the same time as I in 2005. She was unsuccessful as she did not have the qualifications or experience that I did. She was offered the position I vacated. I was now expected to have the same job as her, and this was not considered to be a demotion?

(5) In February 2016 I was told that I was to work in County Building annex for 3 days a week. I had worked one day there and 4 days per week in the civic centre for 6.5 years. On asking why I would need to work there, Ed Machin's answer, 'because I say so'. The change of job title and change of work I consider to be unilateral fundamental changes to my contract terms. I emailed my manager and told him at that time that I did not accept these changes. I still do not accept these changes.

(6) In March 2016 I made a second protected disclosure against the same two managers who had been complicit in the fraudulent behaviour of the officers.

(7) I submitted a grievance to the council in March 2016. The grounds of this grievance were: Bullying and Harassment, Sex Discrimination, Disability Discrimination.

(8) The informal Grievance was heard by Craig McCorriston, in April 2016. Stage One of the Formal Grievance was also heard by him. This was despite my objection to him having already made up his mind at the informal meeting that there was no case to answer. Stage Two of the Formal Grievance was heard by Ms Elaine Cooke. The appeal to the Councillors was not scheduled to be heard until 2nd December 2016.

This was cancelled until the 20th January 2017. This has now been deferred until the 24th March 2017. To date despite have gone through the West Lothian Council's Grievance Procedures I am still waiting to have Stage Three heard nearly one year after my complaint started.

(9) The reason for the deferment was that although in March 2016 I made it clear that bullying and harassment constituted part of my grievance, it was not until September that I was informed that a separate procedure existed, which I duly followed. However this had not concluded by the 20th January 2017 which was the excuse used for deferring the grievance appeal. The result of the bullying and harassment claim was made known to me on February 7th 2017. Hence the appeal meeting being rescheduled for the 24th March 2017.

(10) Having been informed of the separate Bullying and Harassment procedure 8 months after my original grievance was lodged I was interviewed for the first time in September 2016. After 6 hours of interviewing on three separate occasions I felt that it might achieve something. On 7th February 2017 I was invited to a meeting where the result of this separate grievance was to be given to me. I was allowed to see the report that had been compiled and immediately saw blatant lies on it from my manager. I stated that these were lies to be told that I was not able to challenge the report, it was final. I asked to be allowed to take a copy away to study at length to be told that the report was not to be taken out of the room and would be destroyed once the meeting was over! The report (as expected) did not uphold my grievance. The failure of the council to conduct these grievance investigations and meetings in a timely and correct manner is another factor causing my current work-related stress. The whole bullying and harassment procedure was flawed from the start which I knew when I was told by Fraser Thomson that the two managers (Andrew Blake and Ed Machin) were interviewed separately a week apart from each other giving them both the perfect opportunity to collaborate with each other on the questions asked of them and their responses.

(11) An absence meeting was held on the morning of February 17th with Craig Smith, Environmental Health Manager, not my own Trading Standards Manager. Derek Grierson (from HR) was also there and it was regarding my long-term absence due to Work Related Stress. The meeting should have been between my line manager (Ken Inglis who is also absent from work for almost a year with the same work-related stress) or Ed Machin my Manager in Trading Standards. However, for whatever pathetic excuse Ed Machin came up with he could not even face me at an Absence Review meeting, so how will he face me should I ever have gone back to my job in his Trading Standards Office? Craig Smith also mentioned that he would be chairing all future meetings with myself regarding my work-related stress absence. How does this give me confidence in the EH & TS Managers?"

133. The claimant went on to point out that she had received confirmation that the investigation into her protected disclosure of 2016 had found that there was sufficient evidence to support her allegation that two members of EHTS staff had consistently and significantly abused both the flexi time system and their use of council pool cars, which she considered to be vindication of her concerns over the previous 6 years, which had been consistently ignored, resulting in bullying and harassment, raising in turns the issue of sex and disability discrimination.

134. She said that she did not feel that she would ever be able to work again due to the stress from which she had suffered as a result of these events and the daunting process of going back into a small office of 6 other people. She continued: *"This came home to me just a few days ago when I walked past two of my colleagues (equal rank not managers) who both gave me a look of disgust and then completely ignored me. I have lost all my confidence in being able to return so I have had no choice but to resign."*

135. She asserted that this provided a basis for a claim of constructive dismissal, due to a breach of the mutual trust and confidence between an employer and an employee; she also believed that she had suffered a

detriment due to making a protected disclosure (though she did not identify that detriment).

136. She offered her contractual notice of 12 weeks, which she calculated would make her last day of employment 19 May 2017, and raised the need for payment to her of her accrued annual leave entitlement to the date of termination of employment.

137. The claimant's last day of employment was, in fact, 7 April 2017.

138. Since the termination of her employment, the claimant has not found alternative employment. She attributes this to three main reasons.

139. First, there are Trading Standards departments in other local authorities in Scotland but they have all been subject to budgetary cuts, and she is of the view that there are no jobs to be had in Trading Standards. She has had nearly 20 years' experience in this field, and has her only qualification in Trading Standards, and therefore considers herself "too old" to look for jobs in other fields.

140. Second, she appeared to suggest that her former managers, in her view, have been taking steps to ensure that she would be unable to find employment elsewhere in Trading Standards. However, when giving evidence about this, she started by saying "I have no evidence that he [her former manager Ed Machin] has been speaking to others but…", at which point the Employment Judge intervened to advise her that without evidence it would not be appropriate to continue to make such allegations.

141. Third, she started work at 40, having married young and had a family of 4 children, 2 of whom were disabled, and having divorced her first husband at 31 she had to wait until then to commence her studies. She complained that she has had to give up her working life at 60 instead of 65 or 66 as she intended. She will be entitled to have access to her state pension at 66, and that was the age she intended to retire.

142. She has not made significant attempts to find alternative employment, on the basis that she considers herself well qualified in the

Trading Standards field, and therefore does not consider it appropriate to seek alternative employment. When it was put to her that she could have found a different job simply to mitigate her financial losses, she responded by saying that "Even working in Asda you have to have some qualification to work on a till." She also confirmed that she wanted work at the same rate of pay. She did, however, search for employment in Trading Standards, as well as in the Scottish Government and Scottish Enterprise for work which was similar to that which she had carried out in her Trading Standards role.

143. The claimant and her husband have, for a number of years, taken holidays of four weeks' duration in April or May, on a long cruise.

144. She also had to await an operation to correct a hiatus hernia. following the termination of her employment, and she did not commence her attempts to find alternative employment until December 2017. In 2018 she and her husband have had two holidays out of the country, one for 2 weeks and the other for 24 days.

145. The claimant also maintains that she suffered injury to feelings as a result of the treatment she received at the hands of the respondent. She suffered from a year's absence from work due to work-related stress, during which she lost a lot of weight, lost her appetite, felt sick all the time, did not sleep well and required the prescription of amitryptiline to help calm her down at night. She lost her temper with her husband and her children on a regular basis. She said that she feels "useless" when she thinks about all that happened and how she had loved her job, even when she goes into a shop now, since that is a reminder of her role scrutinising the trading standards of shops in West Lothian.

146. She said that she is still upset when she thinks about it. She feels she has lost a lot of friendships as a result of these events. She does accept that she is not so upset as she was in the months immediately following her resignation.

147. The claimant has not applied for any state benefits.

148. She has had access to an Occupational Pension, from the Lothian Pension Fund, arising from her membership of the respondent's pension scheme. On leaving her employment, she received a lump sum (though she did not say how much that amounted to, in her evidence) and then payments, backdated to April 2017, of £418 per month.

Submissions

149. Both parties presented substantial written submissions, to which they spoke before the Tribunal. The submissions are summarised briefly below.

150. Mr Bonelle, for the claimant, submitted that the claims were, broadly, that the claimant had been constructively dismissed, discriminated against on the grounds of disability, suffered a detriment following the making of a protected disclosure and been subjected to bullying and harassment.

151. Mr Bonelle suggested that, in terms of the constructive dismissal claim, the first breach of contract was disability discrimination. He said that the respondent knew that the claimant was disabled but refused to acknowledge it. She was then forced to change her job title "with subsequent changes to her Job Description". There was a failure to have any meaningful consultation with the claimant by her management, which was part of her contract of employment. In addition, Mr Bonelle pointed to the change of work location to which she was subject, in March 2016, in being required to work three days a week at the County Buildings Annexe (possibly rising to five days). She objected to this and was granted a period when she only attended 2 days per week, in contravention of her written statement of terms and conditions of employment which states that "following negotiations and mutual agreement you may be required to work at another workplace". There was no negotiation and the claimant never agreed to the change.

152. The claimant presented a formal grievance, but the respondent breached almost all of the timescales in the procedure in handling the grievance. In addition, he submitted, a bullying and harassment complaint was badly handled and flawed.

153. The acts of discrimination and detriments made the claimant's position untenable and therefore she lost all trust and confidence in her employers. She was forced to submit her notice of resignation. She was forced to take lengthy sickness absence.

154. In February 2017, she became aware of the outcome of the protected disclosures, and discovered that although Employee B had been guilty of gross misconduct he was still employed in the same position and working in the same office to which she was to return. This knowledge, submitted Mr Bonelle, was the final straw which led to her resignation.

155. Mr Bonelle then went on to argue that the claimant had been subjected to disability discrimination under section 15 and section 20 of the Equality Act 2010.

156. He referred to the claimant's disability, namely ulcerative colitis, and summarised the symptoms of the condition, and in particular that the claimant on occasion needs access to toilet facilities urgently. He submitted that the respondent imposed upon her conditions which they were aware could have left her in a humiliated and distressed condition. The premises in which they insisted she work three, and possibly five, days per week were inadequate to her needs in the event of a flare up of her medical condition. She has no advance warning of an upset and has to be constantly prepared for this. Working one day a week in the County Buildings Annexe allowed her to vary her days of attendance to contain her condition, going to the Civic Centre on days when she knew she would need facilities. Mr Bonelle argued that the refusal of the respondent to allow her to continue working in the Civic Centre should be classed as a failure to make reasonable adjustments. This also amounted to the "worst form of Bullying".

157. Mr Bonelle argued that further evidence of discrimination came from her treatment up to going off on sickness absence. Had the respondent treated her condition as a disability, her sickness absence would have been treated differently. Managers failed to comply with her request to be referred to Occupational Health.

158. There were "various recommendations" made by OH but none was adopted by the respondent.

159. The sickness absence management process was initially handled by Mr Machin, but then by Mr Smith, who continued to deal with the claimant even after the bullying and harassment complaint had been concluded. This amounted, he said, to a breach of the respondent's procedure, and thus a breach of contract.

160. Mr Bonelle cast doubt on the assertion that the respondent was in the process of identifying an alternative post for the claimant when she resigned.

161. Mr Smith's assertion that the toilet on the floor of the County Buildings Annexe on which the claimant worked could have been redesignated as a unisex or female toilet was also criticised, as it would not have dealt with all of the problems encountered by the claimant. He called this an afterthought. He also pointed out that the claimant suffered from breathlessness and sore and aching joints as side effects of her disability, so that walking up and down stairs was detrimental to her health.

162. Mr Bonelle asserted that the respondent failed in its duty of care towards the claimant, in its dealings with her during her sickness absence and in light of the comments of OH relating to her psychological wellbeing.

163. He submitted that the respondent had discriminated against the claimant under section 15 of the 2010 Act by treating her unfavourably due to her disability and they cannot show that this amounted to a proportionate means of achieving a legitimate aim.

164. Mr Bonelle then submitted that the respondent had subjected the claimant to a detriment following a protected disclosure made by her. Initially reference was made to the protected disclosure in 2011, but that has already been excluded from these proceedings and therefore Mr Bonelle focused on the 2016 disclosure.

165. Although the disclosure was made anonymously, Mr Bonelle said that she had told Ken Inglis, her line manager, that she intended to make a protected disclosure, and he had forwarded to her the link to the policy which would show her what to do. He insisted that Mr Saunders knew that the claimant was the person who had made the disclosure, after she had submitted further documents for the investigation. Given that Employee B had been found guilty of gross misconduct he should have been summarily dismissed, and was not. He submitted that the respondent had ignored the findings of the protected disclosure investigation and there was a further loss of trust and confidence as a result.

166. Management consistently refused to take her complaints about Employee A seriously. Mr Bonelle said that Mr Blake was simply sticking up for a friend.

167. Mr Bonelle then attacked the credibility of Andrew Blake, whom he accused of having lied to the head of service, to Fraser Thomson, to the Counter Fraud Service and to the Tribunal.

168. He turned to a claim that the claimant had been subjected to bullying and harassment on the grounds of disability under section 26 of the 2010 Act. His position was essentially that since the claimant believes she was being bullied, she was. The bullying was in the form of disability discrimination. He cited the handling of a day's absence due to a cancelled flight, the change of job title, the change of work location, the refusal to permit the claimant to go on particular training and being forced to work in an environment not suitable for her which could have left her in a distressed and humiliated condition as examples of bullying and harassment.

169. He accused the respondent of having conducted a biased investigation, referring to the questions asked by Mr Thomson of the witnesses in the course of that inquiry. He expressed great concern about the email sent by Mr Blake to Mr McCorriston as part of the Stage 1 grievance in which he gave 14 examples of conduct on the part of the claimant of which he was critical. This was a "character assassination" and

was likely to unduly influence investigating officers, and amounted to bullying and harassment. Several of these examples were, he said, proven to be untrue before the Tribunal. This was an indication of the mindset of Mr Blake and his persecution of the claimant, he submitted.

170. It was accepted by the claimant that she did not see that email until it was released to her by way of a subject access request following her resignation. However, they were still a slur on her character and definite evidence of Mr Blake's prejudice towards her.

171. Mr Bonelle took the opportunity during his submission to attack the credibility not only of Mr Blake, but in time, also of Mr Cameron (whose memory he described as "singularly untrustworthy". Mr Cameron's findings were "without foundation" and he was subordinate to Elaine Cook and equal to Craig McCorriston, both of whom had previously found against the claimant. Initially he sought to limit the scope of his criticisms about the credibility of the respondent's witnesses to Mr Blake and Mr Cameron, but in time he expanded his criticisms to say that Mr McCorriston and Mr Machin, as well as Mr Blake, had lied when they denied that they knew about the protected disclosure. He referred to C56.2 in support of this.

172. With regard to remedy, Mr Bonelle submitted that the claimant had taken reasonable steps to mitigate her losses, and noted her attempts to do so by registering with websites and seeking alternative employment within her field. He made reference to the terms of the schedule of loss presented to the Tribunal and relied upon that. He sought to include a further witness statement by the claimant, but was prevented from placing reliance upon evidence which had not been presented to the Tribunal or spoken to by the claimant.

173. Mr Bonelle then presented a supplementary submission in which he sought to address points made by Ms Mannion in her submissions.

174. He clarified that although reference had been made in his submission to "direct discrimination", a claim was not being advanced under section 13 of the 2010 Act, but section 15. He disavowed any suggestion that the

claimant was seeking to rely upon Employee B as a comparator, since Employee B does not suffer from a disability.

175. Mr Bonelle sought to address the Tribunal in relation to criticisms made by Ms Mannion of his conduct during the claimant's evidence, in which she accused him of seeking to signal to her by knocking on the desk or clicking his pen. He denied this, though went on to say that if he was signalling her, he was only doing it to calm her down and not lose her temper. The Tribunal reminded Mr Bonelle that he was not giving evidence and that some aspects of this submission were outwith the scope of the hearing.

176. It appeared that in his supplementary submission Mr Bonelle was suggesting that the respondent should have installed a disabled toilet for the claimant's use, as a reasonable adjustment.

177. Mr Bonelle therefore invited the Tribunal to find in favour of the claimant and to award her compensation in the sums sought in the schedule of loss.

178. For the respondent, Ms Mannion relied upon a written submission, to which she also spoke. Her submissions are summarised briefly here.

179. Dealing first with the claim that the claimant was subjected to a detriment on the ground that she had made a protected disclosure, Ms Mannion submitted that since no detriment had been pled, nor any evidence led about this, no finding could be made against the respondent on this head.

180. She then sought to address the disability discrimination elements of the claim. Under section 20 of the 2010 Act, she said that the duty to make adjustments does not arise automatically just because an employee has a disability. It arises where the employee is subject to a substantial disadvantage, caused either by the application of a PCP, a physical feature or the lack of an auxiliary aid, as compared with those who are not disabled.

181. Having cited a number of authorities setting out the test to be applied by the Tribunal, Ms Mannion observed that the claimant's further and better particulars (R37) stated that OH had recommended "the reasonable adjustment of working in a building with sufficient bathroom and toilet facilities. This was ignored."; and that the claimant in her evidence had said that the reasonable adjustment was to allow her to stay where the toilet facilities were adequate, namely the Civic Centre in Livingston.

182. Ms Mannion accepted that the claimant had sent an email to Mr Inglis, Mr Machin and Mr Blake on 26 January 2011 (C15) saying that she had ulcerative colitis, and that she needed to get to the bathroom quickly when she had a flare up. However, she argued that this did not qualify as a request for a reasonable adjustment, but informed the readers that the claimant needed to get to a bathroom quickly when she had a flare up of a medical condition. It did not indicate that the toilet facilities in County Buildings Annexe were inadequate, or unsuitable for her needs, nor that in March 2016 this was still an issue for her.

183. There was no evidence, in Ms Mannion's submission, that the claimant had ever drawn the respondent's attention to the need for her to be located in an office which had particular toilet facilities. She also submitted that in the conversation with Mr Machin on 2 March 2016, Mr Machin had said that there was no conversation about toilet facilities, and this is supported by his contemporaneous note.

184. In her grievance on 3 March 2016, the claimant raised a number of detrimental aspects of the projected move to County Buildings Annexe for three days a week, but none of these included any reference to her disability, nor does she request a reasonable adjustment. When asked about this, she said that it was not something that Mr McCorriston needed to know. Ms Mannion submitted that she had ample opportunity to raise this matter with the respondent, and that it "seems incredible that this issue was so pertinent to the Claimant that she has raised a disability discrimination claim about it, but failed to raise it with her employer at the time she states it was relevant."

185. Ms Mannion argued that the claimant's case for failure to make reasonable adjustments is a "contrivance". She challenged the decision to move her base for three days a week throughout the grievance procedure, but did not mention her disability in the course of the process.

186. In referring to the OH report by Dr Allan in November 2016, Ms Mannion suggested that Dr Allan did not visit the building to make her assessment, and it cannot be that she was making a medical assessment of the toilet facilities in the building. She simply stated that a building with limited toilet facilities is unlikely to be suitable, not that the toilet facilities in the County Buildings Annexe were unsuitable.

187. In any event the claimant has failed to show that the toilet facilities in the County Buildings Annexe were unsuitable or inadequate. Further, in November 2016, the claimant was absent due to work-related stress, and therefore there was no requirement upon the respondent to make the adjustment in order to enable her to return to work. In December 2016, the claimant said that only the satisfactory resolution of her grievance would allow for a return to work. In February 2017, the claimant was advised that she would not be returning to the County Buildings Annexe, at least on a temporary basis. Her absence was unrelated to her disability but was caused by work-related stress, and therefore the recommendations of OH do not amount to reasonable adjustments in relation to her condition of ulcerative colitis.

188. With regard to the claimant's claim of constructive dismissal, Ms Mannion set out the authorities upon which she sought to rely. Broadly she submitted that any breach in the claimant's contract was not fundamental nor material sufficient to justify the claimant's resignation, and in any event, the claimant delayed for so long in resigning that she must be taken to have affirmed the breach.

189. The claimant's suggestion that had she been aware of the possibility of redeployment that may have made a difference cannot be supported, in

Ms Mannion's submission, in that a fundamental breach of contract cannot be cured afterwards by the employer.

190. Ms Mannion then went on to address the various actions or failures on the part of the respondent which the claimant suggested amounted to breaches of contract leading to her resignation.

191. She summarised her position as being that the claimant's claim of constructive dismissal should be dismissed.

192. Ms Mannion then addressed the Tribunal on the issue of credibility of witnesses. Where there is any divergence in the evidence, she submitted that the respondent's witnesses (by which we understand her to mean those witnesses employed by the respondent but called by either party as witnesses) should be preferred to the claimant's evidence. She argued that the claimant spoke mainly in sweeping statements with little detail, and presented supposition as fact. She went on to say that the claimant was dishonest in her answers, demonstrated by her evidence about her ID badge, in which she changed her position in evidence because, said Ms Mannion, the truth did not suit her case.

193. She also pointed out that she had had to draw the Tribunal's attention to the claimant's representative's conduct during the hearing in which he had sought to signal to the claimant during her cross examination, by knocking on the desk and clicking his pen. She asked the Tribunal to find that the claimant was not a credible witness.

194. Ms Mannion then submitted that the claimant's claims were time barred. As her submission developed, however, it appeared that in relation to the constructive dismissal claim, her argument was that the claimant had affirmed any breach, rather than that she had failed to present the claim in time. So far as the discrimination claims are concerned, she argued that it would not be just and equitable to allow the claims to proceed though late because she had taken so long to raise the claims after the events complained of, and once she knew of the need for promptness in taking action she failed to take the necessary steps to deal with the matter.

195. Ms Mannion went on to make submissions in relation to the remedy sought, agreeing certain figures based on the schedule of loss but pointing out where the differences between the parties lie.

196. She pointed out that no claim of harassment under section 26 of the 2010 Act has been raised by the claimant, and therefore no findings may be made under this section since the respondent has had no notice of such a claim.

197. The Tribunal noted and carefully considered the full submissions of both parties, but it is appropriate only to summarise their terms here.

The Relevant Law

198. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
>
> …
>
> (c) 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."

199. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221**.

200. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the "classic" definition:

> "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

201. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

> "…whether the employer's conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably, if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

202. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

203. The Tribunal also took account of, the well-known decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462**, in which Lord Steyn stated that "The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

204. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

205. The Tribunal also took into account the Employment Appeal Tribunal decision in **Wright v North Ayrshire Council UKEATS/0017/13/BS** from June 2013. In that case, having examined the line of authorities relating to claimants who resign for more than one reason, Langstaff J cautioned against seeking to find the "effective cause" of the claimant's resignation, but found that Tribunals should ask whether the repudiatory breach played a part in the dismissal.

206. Section 6(1) of the Equality Act 2010 ("the 2010 Act") provides:

"A person (P) has a disability if –

i. P has a physical or mental impairment, and

ii. The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

207. Section 15(1) of the 2010 Act provides,

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

(a) A treats B unfavourably because of something arising in consequence of B's disability; and

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

208. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes

of this case is sub-section (3): *"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

209. Section 21 of the 2010 Act provides as follows:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…"

210. The Tribunal was referred to a number of cases by both parties on these statutory provisions, which were taken into account in reaching our decision.

211. Section 43A of the Employment Rights Act 1996 ("ERA") provides:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

212. A qualifying disclosure is defined in section 43B as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*

a. *That a criminal offence has been committed, is being committed or is likely to be committed;*
b. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*

c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*

d. *That the health or safety of any individual has been, is being or is likely to be endangered;*

e. *That the environment has been, is being or is likely to be damaged; or*

f. *That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."*

213. Section 47B prohibits a worker who has made a protected disclosure from being subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker made a protected disclosure.

214. Helpful guidance is provided in the decision of **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** at paragraph 98:

"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content.

2.. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by

reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."

Observations on the Evidence

215. A large number of witnesses gave evidence in this case, and an unusual feature of the proceedings was that a number of the respondent's employees were called to give evidence by the claimant.

216. The Tribunal found the majority of witnesses who gave evidence in this case to be entirely straightforward and honest witnesses, who were seeking to give truthful and careful evidence in order to assist the Tribunal.

217. It is appropriate to make mention of several individual, however, in making clear certain observations on the evidence led before us.

218. Mr Machin, who was for a time the claimant's line manager, we found to be a clear and honest witness, whose evidence was given calmly and with assurance. He was not distracted by the behaviour of the claimant at certain points during his evidence and remained composed in the face of strong opposition. We were impressed by Mr Machin's evidence and rejected any criticisms of his evidence by the claimant and her representative.

219. Mr Blake gave what we found to be honest evidence as well, but he did not remain so calm during the course of questioning, and it was clear that he was wrestling with very strong emotions as he sought to answer those questions put to him by Mr Bonelle. In submissions, Mr Bonelle attacked Mr Blake's credibility very strongly, assertion on a number of occasions that he had been lying, though he did not put that to him directly when he was questioning him.

220. We were ultimately satisfied that Mr Blake was seeking to tell the truth, and that we were able to accept his evidence as honest. His strong

reactions to questions were, we concluded, the product of a long and difficult relationship with the claimant, culminating in these proceedings.

221. Mr McCorriston, who was also the subject of criticism by Mr Bonelle in relation to credibility, we found to be a mature and experienced manager who was able to answer questions clearly and straightforwardly. We found no reason to question his honesty and his demeanour before us told of an individual who understood the need to answer criticisms. We were able to accept Mr McCorriston's evidence as both credible and reliable.

222. We turn now to the claimant. The claimant is clearly an articulate and experienced individual, with a highly refined sense of injustice. She conveyed to the Tribunal a very strong sense that she had been very badly treated by the respondent, and repeatedly cast criticisms at her former managers. Mr Blake, for example, was obviously a prime example of those by whom she felt most grievously wronged.

223. We must account for the fact that in this case the claimant was, rather unusually, being represented by an experienced representative before this Tribunal, from his days with the CAB, who also happened to be her husband, and that she herself had no or very little direct experience of being in an Employment Tribunal hearing room.

224. However, notwithstanding that inexperience, both the conduct and the evidence of the claimant in these proceedings caused the Tribunal great concern.

225. Dealing first with her conduct, the claimant, while giving evidence, was notably reluctant to address questions which she found to be difficult, and sought to evade them by the repetition of earlier answers. She made a number of assertions which she considered factual but which on closer inspection were merely suspicions on her part which she was unable to substantiate. For example, she repeatedly said that she knew that the

respondent intended, once she moved to 3 days a week at County Buildings Annexe, to increase her hours so that she would have to work there full time. There was simply no evidence that she knew that to be true. At no stage was that said to her by anyone, and indeed it was denied by her managers through the grievance process.

226. She also said that she did not accept the changes to her contract of employment when her job title was changed, but in fact she did accept those changes, albeit “under duress”.

227. In addition, the claimant consistently directed accusations against managers without backing up those allegations. She had no hesitation in suggesting that Mr Machin had said to her, when she asked why she had to increase her working days at County Buildings Annexe, “because I say so”. There was no basis, in our judgment, for this accusation, which was made in order to undermine Mr Machin’s credibility and to damage his standing in the Tribunal’s eyes.

228. Furthermore, the claimant’s conduct both while giving evidence and during the remainder of the hearing when seated next to her representative was disruptive, noisy and at times so disrespectful that the Employment Judge found it necessary to warn her to behave herself in a more appropriate manner.

229. For example, when Mr Machin was asked if he was sure that the claimant had not mentioned her disability or the toilet facilities in County Buildings Annexe when they spoke on 2 or 10 March, and replied “100%”, the claimant expostulated loudly, making clear her disagreement with the evidence. She was warned as to her conduct and reminded that she had been treated respectfully by others, and she required to show them and the Tribunal the same courtesy.

230. When that warning required to be repeated on several occasions, the claimant's demeanour was sullen and defiant, making it clear that she regarded it as her right to maintain a commentary on the evidence of others throughout.

231. While ultimately this had little impact upon the evidence itself, at least in part because the respondent's witnesses demonstrated great patience in the face of such conduct, the claimant's behaviour in this hearing was well outwith what would be regarded as acceptable, even giving a degree of latitude to a claimant who feels very strongly about her case.

232. In addition, the behaviour of her representative bordered was, on occasions, similarly unacceptable. Whether subconscious or otherwise, his habit of sighing theatrically, throwing down his pen and rolling his eyes when evidence was being given was disruptive and unfair to the witnesses, and disrespectful to the Tribunal. He sought to explain, at one point, that he was trying to restrain the claimant who, he could see, was beginning to become very angry and agitated, and therefore liable to say something unhelpful, without understanding that no representative can justify intervening in the evidence of their witness or client by assisting them to give their evidence in a better way.

233. The claimant's evidence, in general, was unimpressive, and delivered in an unhelpful and evasive manner. Her constant criticism of others, without ever accepting any criticism of her own conduct, undermined her credibility, and we were left, in the end, to conclude that where there was a conflict in evidence between the claimant and any other witness, we would resolve that conflict by preferring the evidence of the other witness.

Discussion and Decision

234. The issues in this case are as follows:

1. **Was the claimant suffering from a disability (that is, ulcerative colitis) at the material time, and were the respondent, or ought they reasonably to have been, aware of the claimant's disability?**

2. **Did the respondent directly discriminate against the claimant under section 13 of the Equality Act 2010?**

3. **Did the respondent fail to make reasonable adjustments in respect of the claimant under section 20 and 21 of the Equality Act 2010?**

4. **Did the respondent constructively unfairly dismiss the claimant from her employment?**

5. **Did the respondent subject the claimant to a detriment or detriments on the grounds of having made a protected disclosure in March 2016?**

6. **If the claimant's claims, or any of them, are upheld, what remedy should be awarded to her?**

235. The Tribunal sought to address these issues in turn.

1. **Was the claimant suffering from a disability (that is, ulcerative colitis) at the material time, and were the respondent, or ought they reasonably to have been, aware of the claimant's disability?**

236. The respondent admits that the claimant suffers from the condition of ulcerative colitis and that that condition falls within the definition of disability for the purposes of the Equality Act 2010. That admission was contained in an email dated 6 October 2017 by Ms Greig, then the solicitor for the respondent, to the Tribunal (R70). That email, which was in the form of an agreement by the parties, confirmed that the claimant did not seek to argue that she was suffering from any other physical or mental impairment amounting to a disability under the 2010 Act.

237. The next question is whether the respondent was aware of the claimant's disability. On 26 January 2011, the claimant emailed John Keenan, Andrew Blake, Ed Machin and Ken Inglis (C15) to inform them that *"I also have Ulcerative Colitis, so when I have a flare up, which I did yesterday, I need to get to the toilet quickly, I cannot wait until I have had a 10 minute walk to get to the nearest bathroom."*

238. The claimant gave evidence to the effect that Ken Inglis, who was for a number of years her line manager, was aware of the effect of the condition upon her, and the need which she had to manage that condition.

239. We have concluded that while there is little information about the detail which the claimant provided to her managers, particularly in 2015 and 2016, about the nature and effect of her condition upon her, the respondent knew from 2011 that she was suffering from a condition known as Ulcerative Colitis. We have been unable to conclude that the respondent had a detailed knowledge of the effects upon her of that condition in 2015 and 2016 in the absence of any evidence from Ken Inglis, who we understand was unfit to give evidence before us.

2. Did the respondent directly discriminate against the claimant under section 13 of the Equality Act 2010?

240. The respondent expressed the view, in submission, that the claimant's claim of direct discrimination is unclear, and that in any event, no comparator has been identified by the claimant.

241. The claimant's claim was refined by a lengthy process of further particularisation undertaken by way of case management in this case. The direct discrimination claim, as set out in those further particulars at R157, was that the respondent treated the claimant less favourably than they treated or would have treated a person not sharing the same protected characteristic as she did, (that is, disability) on the grounds of that disability, in requiring the claimant to attend the County Buildings Annexe for 3 rather than 1 day per week in March 2016.

242. Mr Bonelle's submission refuted the suggestion that there was a comparator, or that it was Employee B, on the basis that he did not suffer from a disability. Unfortunately that submission betrays a fundamental misunderstanding of the nature of a comparator under section 13, since it is the very fact that Employee B did not suffer from a disability that might qualify him as one.

243. The claimant predicated her claim on the ground that the respondent required her to move her work location from the Civic Centre in Livingston to the County Buildings Annexe in Linlithgow for 3 days per week rather than the existing one. Her contract of employment required any change of work location to follow negotiation and agreement. She maintained that she never agreed to the change of location on this basis.

244. This is an issue which arises in relation to the constructive dismissal claim, but under this heading requires to be addressed according to the test under section 13.

245. The claimant had been working at the Civic Centre for 4 days a week for some 5 years. The remainder of the EHTS team worked at the County Buildings Annexe, apart from Employee B. For the remaining day of the week, she worked at County Buildings Annexe. The reason for her flexibility was that she was operating under Worksmart, a scheme run and encouraged by the respondent in order to allow staff to work flexibly. On the evidence, however, there having been a number of changes of location of the team over the years, her primary base was County Buildings Annexe, with the remainder of the team, but due to her personal circumstances (primarily due to the fact that she lives in Livingston and rarely has access to a car of her own) the respondent was prepared to grant her the right to work in Livingston for the majority of the week.

246. Following a team SWOT analysis in December 2015, one of the issues raised by the team itself was that of communication, and in particular the need to improve communication on a face to face basis. Ed Machin considered that it was important to bring the team more closely together,

and so asked both the claimant and Employee B to increase their time at County Buildings Annexe to the majority of their working week.

247. He spoke to the claimant to explain this on 2 and 10 March 2016. There is a divergence between the evidence of Mr Machin and the claimant on what was said by each of them in these conversations. Mr Machin, supported by contemporaneous notes, explained carefully the reasons for the change, and discussed them with the claimant, whose response was to put forward business and logistical reasons as to why it would not be suitable for her to increase her hours at County Buildings Annexe. He says she mentioned nothing about her medical condition or the need to be close to toilets, or the inadequacy of the toilet facilities in the County Buildings Annexe.

248. The claimant maintained that when she asked why she was being asked to move, Mr Machin had something along the lines of "because I say so", and that she did protest that this would be detrimental to her medical condition.

249. The Tribunal did not find it difficult to resolve this divergence. We found Mr Machin to be a very straightforward and honest witness, and his insistence that she made no reference to her medical condition was entirely convincing. It was supported by his handwritten notes of the conversations, and his reasoning by the SWOT analysis. In addition, the claimant said nothing in her subsequent emails protesting the change which would have given the respondent any indication that she was making a point in relation to her medical condition. By contrast, the claimant's evidence was not believable. Given the difficulties which we have found in believing the claimant's evidence as a whole, we found it a straightforward matter to prefer the evidence of Mr Machin, and to accept that throughout this discussion the claimant made no reference to her medical condition.

250. Further, the claimant herself said that she would be prepared to work for 2 days a week at the County Buildings Annexe. That proposal was

accepted by Mr Machin as an interim measure, but again for logistical rather than medical reasons, which did not form part of the discussion.

251. We found the claimant's position on this puzzling. She objected very strongly to working at the County Buildings Annexe, yet was accustomed to doing so for one day a week, and was prepared to increase that to two days per week. She required to work away from the office for a considerable amount of time, and yet never expressed any concern to her employer about the problems to which this might give rise as a result of her urgent need from time to time to use a toilet. When the issue of her disability was raised (at a much later stage, following several grievance hearings), we were not surprised that the respondent found her position to be difficult to understand. She refused to work more often in a building where she was already partly based due to the lack of toilet facilities near by, where in reality there was a single use toilet on each floor of the building, and at worst she would require to go down two flights of stairs in order to find a toilet to use; and yet by her own account she had to travel around West Lothian by car in circumstances where she may require an urgent visit to a toilet, but did not find that difficult. She said she knew where all the public toilets were located in the area, but that does not overcome the implausibility of her position that such a situation was entirely acceptable when working in the County Buildings Annexe was not.

252. There was another contradiction in the claimant's position. She said that she could manage her attendance at the County Buildings Annexe if she was aware that there was a risk of a flare up; but she also sought to convey strongly to the respondent and to the Tribunal that on many occasions she did not know when her condition would flare up, and therefore had to be closer to a toilet in case that situation arose. The respondent took the view that she could either anticipate a flare up or she could not, but both positions could not be correct.

253. Overall, we considered that the respondent did not treat the claimant less favourably than they would have treated any non-disabled individual by requesting that she increase her working days at the County Buildings

Annexe from 1 to 3. We did in fact have a comparator readily available, in the form of Employee B, who, working 3 days a week but only 1 at County Buildings Annexe, was asked to move there for 2 days a week, so that he, like the claimant, would be working there for the majority of his working days. Employee B does not share the claimant's protected characteristic of disability, and he was treated in the same way as she was.

254. In any event, due to the claimant's protestations and subsequent long term absence on sick leave, she never actually required to implement this requirement, and never did work more than 1 day a week at County Buildings Annexe. As a result, the claimant was not subjected to discriminatory treatment in this process.

255. Further, Mr Smith, in dealing with the claimant's sickness absence review meetings, assured her in February 2017 that when she returned to work it would not be to the County Buildings Annexe. That made clear that when she returned from her long term absence, she would not be required to make the adjustment to her work location about which she had protested.

256. One further point arises. The claimant consistently suggested that she was going to be asked to move from 1 to 3 days, and then to 5 days, at County Buildings Annexe. She had no basis for saying that that was the intention of management at the time in March 2016, nor was there any evidence that anyone in management had given her to understand that. The claimant translated a suspicion in her own mind into an assertion of fact before the Tribunal which was simply unsupportable.

257. The Tribunal therefore finds that the claimant's claim of direct discrimination fails, and is dismissed.

3. Did the respondent fail to make reasonable adjustments in respect of the claimant under section 20 and 21 of the Equality Act 2010?

258. Ms Mannion helpfully directed the Tribunal to the judgment of Langstaff J in **Environment Agency v Rowan [2008] IRLR 20**, in which the

Employment Appeal Tribunal set out what an Employment Tribunal should consider when deciding when there was a failure to make a reasonable adjustment. The Tribunal must therefore identify:

i. The PCP or relevant physical feature of the premises;

ii. The identity of the non-disabled comparators where appropriate;

iii. The nature and extent of the substantial disadvantage suffered by the claimant when compared with non-disabled comparators.

259. At R36/7 and R157, the claimant's further particulars of claim set out the complaint that the respondent failed to make reasonable adjustments in relation to the claimant, based on the recommendations made by OH. In particular, at R37, the claimant states that *"Occupational Health recommended the reasonable adjustment of working in a building with sufficient bathroom and toilet facilities. This was ignored."*

260. It is necessary, then, for the Tribunal to identify the PCP relied upon by the claimant. Although this was not clearly specified in this claim, the Tribunal understands that the claimant's assertion is that the respondent required her to work 3 days a week in County Buildings Annexe, a building with inadequate toilet facilities (in her view), in March 2016, as part of a more general policy applied across the team that all would have to work more than half their working days at the County Buildings Annexe.

261. She maintains then that the substantial disadvantage at which this placed her was that she was placed in a very difficult position as the County Buildings Annexe had insufficient toilet provision for her "health need".

262. What she then argues is that the reasonable adjustment which the respondent should have put in place was for her not to be requested to move to work for 3 days a week at County Buildings Annexe.

263. In our judgment, it is correct to say that the respondent did apply a PCP in this case which required all staff in the EHTS team to be asked to work more than half of their working days alongside the rest of the team in County Buildings Annexe.

264. However, the claimant has to demonstrate that this placed her at a substantial disadvantage in comparison with those not sharing her protected characteristic. The nature of the PCP which was applied here, which in this case amounted to a request by her employer in March 2016 which was, in fact, never implemented, was no more than a request. The claimant protested about it and therefore it is clear that she was very unhappy about the request, but she never complied with the request, and the respondent did not require her to work at the County Buildings Annexe for more than 1 day per week after making the request.

265. The Tribunal has reviewed all of the evidence in relation to this matter. It is clear, in our judgment, that not only did the claimant not have to work more than 1 day a week at the County Buildings Annexe after the request was made, but also that at the point where her long term sickness absence was due to come to an end, Craig Smith assured her that she would not be required to return to that building at all. While the primary reason for that was that she had expressed concern about returning to work in a small team environment with managers against whom she had raised allegations of bullying and harassment, the effect was that the adjustment which she relies upon in these proceedings was promised to her by Mr Smith. She would not have to return to County Buildings Annexe on her return to work in 2017.

266. Accordingly, it is our judgment that this claim must fail. The claimant seeks a finding that the respondent failed to make the reasonable adjustment of withdrawing its requirement to work more than 1 day a week at County Buildings Annexe, but the Tribunal cannot make such a finding in face of the evidence of Mr Smith, confirmed in his letter in February 2017, that she would not have to work there.

267. We were not, in any event, persuaded that such a PCP, had it been applied, would have placed the claimant at a substantial disadvantage owing to her medical condition. The claimant complained at some length about the perceived inadequacy of the toilet facilities in County Buildings Annexe, but she was able to manage her condition not only while out of the office travelling to site visits, but also on the day when she worked there one day a week. The claimant was not being required to work there 5 days a week. She still had some flexibility in her week if she was feeling particularly unwell at the start of a day. Mr Smith confirmed that he was considering the possibility of redesignating the male toilet on the floor on which her desk was located in that building as a female or unisex toilet, but in addition there were other toilets, one on the floor below and two unisex toilets on the ground floor, which were available to the claimant.

268. We appreciate that the claimant's condition is a troublesome one which has caused her great difficulty over the years, and nothing we say should be taken as seeking to minimise her illness. However, the extent to which it affected her on a day to day basis is very difficult to assess, given her ability to manage it while out of the office, and on the one day a week when she was based there.

269. In addition, we were not persuaded that OH had in fact recommended that it would be a reasonable adjustment for her not to be asked to work in that building. There is no evidence that the OH Consultant actually visited the building, and she speaks in general terms in her report when she stated that the respondent should consider placing her in a building with adequate toilet facilities.

270. We do not accept, in any event, that the claimant raised with the respondent the issue of toilet facilities in the course of any of the discussions about whether or not she should be asked to move to the County Buildings Annexe 3 days a week. In particular, we have already set out our view that Mr Machin's evidence of their conversations, in which he said he was "100% sure" that the claimant had not mentioned her medical condition or the sufficiency of the toilets, was the accurate version, and that

the claimant did not make reference to this issue at the time, either in person or in writing.

271. In her grievance, both at the informal and formal stages, the claimant again spent considerable time resisting the notion that she should move to County Buildings Annexe 3 days a week, but did not mention the toilet facilities nor her disability (R320, R321 and R335). Her case was, as she put it at R335, a "business case".

272. The reason for the rejection of her arguments was not that she was suffering from a disability nor that there was a failure to make reasonable adjustments but that the respondent considered, from the SWOT analysis, that the team needed to spend more time together. The claimant did not want to change her working arrangements for reasons relating to her own circumstances, but at the time did not say that it was because of her disability and the inadequacy of the toilet facilities at County Buildings Annexe.

273. The claimant suggested in evidence that the reason why she did not raise this matter as an issue until late in the day was because the respondent already knew that she had the condition, and that she was reticent about speaking about these matters in the workplace. We do not accept that either of these reasons are correct, but in any event, the reason why she withheld her views is less important than that she did. It would be grossly unfair to the respondent to hold them responsible for failing to take into account a factor which the claimant, who was well capable of setting out very forthright views to her employer, had not raised with them.

274. Finally, under this heading, the purpose of a reasonable adjustment is to assist the claimant in circumstances where they are looking to return to work when they have been unable to do so.

275. Two points arise here. Firstly, the claimant was not on long term sickness absence due to her disability, but due to "work-related stress", which had a psychological impact upon her. Any adjustments being made

were not addressed to her disability, nor did they need to be, since that was not the reason for her absence.

276. Secondly, the claimant made it abundantly clear throughout her absence, supported by OH, that what would assist her in returning to work would be the resolution of her grievance. It appeared to us that only a resolution of her grievance which was satisfactory to her would be acceptable as a basis for her return to work, but whether that is correct or not, it is clear that until she had an outcome from her grievance process she saw herself as unable to return to work. No reasonable adjustment relating to the PCP would have addressed that issue, and it cannot properly be said that there was therefore a failure to make a reasonable adjustment to assist her to return to work which was in any way related to her disability.

277. Accordingly, it is our judgment that the respondent did not fail to make any reasonable adjustment in respect of the claimant, and this claim must fail.

4. Did the respondent constructively unfairly dismiss the claimant from her employment?

278. The claimant relies upon a number of acts on the part of the respondent which she regards as individually and collectively amounting to breaches of contract repudiatory of the terms of that contract.

279. The letter of resignation which she submitted is the primary source of her complaints, although Ms Mannion helpfully outlined and summarised the points made in addition in the ET1. The Tribunal requires to analyse carefully the points which have been raised, but in our judgment it is necessary to consider the reasons which the claimant expressly gave at the time of her resignation, before looking at any other reasons now put forward.

280. At the start of her letter, the claimant said that she could not return to work for two managers who had “constantly ignored me, undermined me and for whom I have lost all confidence, and trust not to mention respect”. It

is clear that the claimant was referring, in these remarks, to Mr Machin and particularly Mr Blake.

281. She then identified a number of issues.

282. First, she said that she had watched members of the TS team abuse the systems in place, and in particular the pool car and flexi time systems. Her concerns were related to Employee A and Employee B. She raised a protected disclosure in 2011 about similar issues, but in 2016 made a protected disclosure about her concerns to the respondent. Of itself, it is not clear how this could be said to amount to a breach of the claimant's contract of employment. That the respondent did not take what she regarded as satisfactory action against the alleged misconduct of other staff does not mean, in our judgment, that the respondent has breached the implied term of trust and confidence inherent in her contract.

283. The fact that certain disciplinary actions may or may not have been taken against the objects of her criticism does not, again, amount to a breach of the claimant's contract. It is clear that following her allegations an investigation was carried out, which was, to some extent, supportive of her complaints. What followed thereafter was confidential between the respondent and other employees, and the Tribunal did not receive any evidence about what decisions were taken in relation to Employee B (other than the fact that he was not dismissed). The claimant is not in a position to explain why that decision by the respondent was taken, and therefore it cannot amount to a breach of her contract that others were guilty of misconduct and not punished in the way that she deemed appropriate.

284. Second, she said that the 2011 protected disclosure resulted in the relevant Trading Standards Officer, understood to be Employee A, being exonerated either by managers lying on his behalf, the council being loath to take action or an incompetent investigation. Again, this relates to action or decisions in relation to a third party, and the Tribunal heard no evidence which would allow us to draw any conclusion that the respondent's decisions or actions in 2011 were in any way relevant to the claimant's

contract of employment or amounted to a breach of that contract. In any event, it is quite plain that having heard the outcome of the 2011 investigation the claimant took no steps to resign, and we therefore consider that it played no serious part in her decision to resign in February 2017.

285. Third, she said she was subjected then to a series of bullying and discriminatory incidents. What followed, as we understand it, was the exemplification of those incidents.

286. Fourth, then, she complaint that in January 2016 she was informed that she was having her job title changed to bring her into line with two other officers in the team, from Senior Enforcement Officer to Fair Trading Officer.

287. This was set out by the claimant as a breach of her contract, and a fundamental one at that. We did not agree. While the claimant placed a great deal of emphasis on the "Senior" in her job title, and clearly regarded her two colleagues as both less experienced and less well-qualified to work at the same level as she did, there was no evidence that there was any other change to her duties or to the contract of employment at that time, January 2016. Her duties did not alter; her pay and grading remained the same; her hours of work and other related terms and conditions were unchanged.

288. We do not say that a change of job title can never amount to a breach of contract, but in this case, we do not accept that this change was in material breach of her contract. The claimant herself was, before us, unable to articulate why she was so concerned about this change, other than, in our judgment, to cast some aspersions upon the colleagues with whom she was now to share a job title. In reality, they had been employed on the same grade for some time, and therefore, whatever their titles, they were regarded within the organisation as carrying out very similar roles.

289. Mr Blake explained, persuasively, that the reason for doing this was to avoid isolating the claimant in a role which was unique, at a time when savings are constantly demanded of the respondent. He was concerned that if the claimant remained in a single role rather than as part of a team it

would risk the loss of her role to the team. The claimant clearly either did not understand or would not accept this explanation, but the Tribunal found his views convincing. In any event, the change to her job was only related to her job title. The use of the word "Senior" was seen to be inappropriate anyway, since the claimant did not have management or budgetary responsibilities. There was no demotion. It is well within the experience of the Tribunal that organisations such as the respondent regularly seek to rationalise their structures in order to protect their existing services, and it is that which we found the respondent to be doing in this case.

290. In any event, we accepted that there were discussions with the claimant before the change was made. The claimant's assertion that there required to be 30 days' minimum consultation before such a change was made would only apply where a change to terms and conditions was being envisaged, but that was not the case here.

291. The claimant made a great deal of the authorisation cards, and the dates upon them (C41). The Tribunal found her position on this very difficult to follow, partly because it was rarely clear whether she accepted that the pictures she was referring to were separate rather than two sides of the same card. Since the claimant was not the only member of staff affected by the need for new authorisation cards, we simply did not accept that any issue arising from this amounted to a breach of contract, or evidence of some predetermined intention on the part of the respondent to change her role without telling her or obtaining her consent.

292. Finally, on this point, the claimant's greatest difficulty here is that having had her job title changed, she continued to work with the respondent for at least a year before she resigned. The Tribunal concludes that by remaining in employment (albeit that she was largely off on sick leave during that period), she must be taken to have affirmed any breach of contract. However, in our judgment, there was no such breach.

293. Fifth, in February 2016, the claimant "was told that I was to work in County Building Annex for 3 days a week". She regarded this change as a

fundamental breach of her contract of employment, and her evidence was that she did not accept it.

294. We found the claimant's position on this to be very confused. She asserted that Mr Machin told her that the reason why she had to move to work 3 days a week there was "because I say so". We reject that assertion, and prefer the evidence of Mr Machin that he explained that following the SWOT analysis it was considered important for the improvement of communication within the team that she should work for the majority of the week in the office where the team was based.

295. What was confused about the claimant's position was that before us she asserted that she refused to increase her hours at County Buildings Annex but at the same time accepted that at the time she tried to agree a compromise that, for a time at least, she would work for 2 days a week there. She also accepted the change but "under duress". Her acceptance may have been under duress but that also suggests that she was prepared to accept it.

296. As it turned out, however, that change was never implemented. When the claimant absented herself from work in April 2016, due to illness, she had not commenced the new arrangement, having submitted a grievance against the decision to the respondent. Although she never returned to work, she was assured by Mr Smith, who carried out her absence review process, that she would not have to return to work in the County Buildings Annex following her recovery from illness. As a result, at the point she resigned, what she said amounted to a fundamental breach of contract was no longer in place. Indeed, as we understood the evidence, she would not, if she returned to work, have to work at the County Buildings Annex at all, owing to the issues arising from the bullying and harassment complaint which she had submitted.

297. Accordingly, we do not accept that, at the time of resignation by the claimant, there was any breach of her contract of employment in relation to

her place of work, partly because the change was never implemented and partly because the change was then withdrawn by Mr Smith.

298. Sixth, the claimant refers to the fact that she submitted a protected disclosure in March 2016. This is a statement of fact but not the assertion, in itself, of a breach of contract.

299. Seventh, she confirmed that she submitted a grievance to the respondent in March 2016, on the basis that she complained of bullying and harassment, sex discrimination and disability discrimination. Again, this is a statement of fact, though it leads to the next paragraph.

300. Eighth, the claimant complained about the grievance procedure in a number of respects. She complained that Mr McCorriston had heard both the informal stage and stage one of the formal grievance procedure. She also complained that stage three of the procedure, that is, the appeal to the councillors' committee, was not scheduled to be heard until 2 December 2016. Essentially, she complained that one year after having submitted her grievance the process was still not complete.

301. Ninth, she pointed out that it was not until September that she was informed that the bullying and harassment complaint should be treated as a separate matter under a different procedure, and the outcome of that was not made known to her until 7 February 2017.

302. Tenth, she complained that she was not allowed to take a copy of the report following the bullying and harassment complaint, and that it did not, as she expected, uphold her complaints. She considered that the failure of the respondent to conduct the grievance procedures in a timely and correct manner was a factor in causing her stress-related illness. She also suggested that Mr Blake and Mr Machin had collaborated on their responses to the investigation.

303. It appeared to us that the points made at paragraphs 8, 9 and 10 of the letter of resignation were all related to the same matter, and we considered them together.

304. While it is true that Mr McCorriston heard both the informal and stage one of the formal grievance, the Tribunal was not presented with any evidence to the effect that this amounted to a breach of the procedure. Indeed, Mr Grierson, the HR manager, confirmed that this was not such a breach. It seemed to us that Mr McCorriston was performing different roles in the two stages. At the informal stage, he was not seeking to make a decision, but to act as a mediator between the claimant and her managers, in order to explore with the claimant whether a solution would be possible at that stage. When it was clear that that was not possible, Mr McCorriston became the decision-maker at stage one, and in our judgment, he handled that objectively and fairly in that role. We see no conflict between the two roles, nor do we consider that this amounted to a breach of contract in relation to the claimant.

305. Ms Mannion submitted to the Tribunal that the claimant's fundamental difficulty with the grievance process was that it did not result in the outcome which she wanted. While that may be true, her complaint before us is that the respondent failed to follow its own procedure, and that that amounted to a breach of her contract. In this regard, while the respondent seeks to argue that the procedure is itself not contractual, the Tribunal considers that if a grievance is handled inappropriately by an employer, that may have an impact on the implied term of trust and confidence between employer and employee.

306. It is quite true that the respondent took a very long time to separate the bullying and harassment complaint from the remainder of the grievance, that is, from April until September 2016. In addition, there was a long period over which the grievance was being considered. We therefore had to determine whether the respondent's handling of the grievance amounted to a fundamental breach of contract.

307. We came to the conclusion that it did not. It was clear to us from the evidence that not all of the delays lay in the hands of the respondent, and that part of the reason for the length of time which the investigations took was both the complexity and number of the complaints but also that the

claimant was absent due to illness and, from time to time, on lengthy holidays abroad, a feature of her working life, and as a result it was necessary for hearings to be delayed partly because she was not available.

308. In any event, given the claimant's absence from work, we considered that while the length of time taken over the grievances was undesirably protracted, the respondent did carry out very detailed and comprehensive investigations in order to ingather the necessary evidence to allow full consideration of her complaints to take place, and as a result, and in light of the fact that the procedure does not affix a specific timescale for the handling of employee grievances, we do not conclude that the respondent has breached the claimant's contract of employment in its handling of the grievance.

309. As to the allegation that Mr Machin and Mr Blake were in collusion about the terms of their statements, we found no basis upon which to uphold this. The claimant clearly relied upon strong suspicion in making this allegation, but in reality had no factual basis upon which to rely in doing so. Both Mr Machin and Mr Blake denied the allegation when it was put to them, and we were prepared, as we have already found, to accept their evidence as credible and reliable.

310. Eleventh, the claimant said that her absent review meetings were handled at a later stage by Craig Smith, not her own manager. She criticised the respondent for not having permitted her to be managed in this regard by Mr Machin, following confirmation that the bullying and harassment complaint had been rejected.

311. We found this allegation incomprehensible. The claimant seemed to be suggesting that she would have found it acceptable for the manager with whom she maintained she could no longer work, due to the reaction caused by the behaviour she characterised as bullying, to have been restored to the position of managing her absence review. We rejected this contention as entirely disingenuous. We concluded that it was quite appropriate for the respondent to leave Mr Smith in charge of the absence review meetings;

and that if they had proposed to her that she meet with Mr Machin again, she would have protested in the strongest terms.

312. Mr Smith emerged from his evidence as a sympathetic and helpful manager who sought to resolve the issues which were presented to him. He attempted to resolve the difficulties to which the claimant was exposed, by assuring her that she would not have to return to County Buildings Annexe, and by advising her that he would seek to identify suitable redeployment opportunities for her. The claimant appears to have either ignored or disregarded these assurances by Mr Smith, but we were in no doubt that his handling of the absence review process was above reproach, and was genuinely intended to resolve the outstanding issues which the claimant said she had.

313. We found that the respondent took her grievances seriously, and investigated them all in considerable detail. We did not find that they prejudged the complaints made, and they subjected the managers to detailed questioning in order to reach their conclusions. That they did not uphold the claimant's grievances did not amount to a breach of contract, but in our judgment a conclusion which they were entitled to reach.

314. The claimant also referred to her protected disclosure of 2016, and to the fact that the outcome of the investigation into that disclosure had upheld her allegations. She considered this to be a vindication of her allegations over the previous 6 years, but also felt that the outcome did not properly address her concerns about her managers and the way they had, as she felt, covered up for the officers involved. On the evidence we heard, the disclosure was fully and impartially investigated, and it was quite clear that the investigation had reached the conclusion that the managers were not guilty of having colluded about these matters.

315. It was clearly of considerable importance to the claimant that a few days before resigning she had had an encounter with Employee B who had given her a look of disgust and then completely ignored her. She said she had lost confidence in being able to return to work with those against whom

she had made allegations of bullying and also with Employee B following this encounter, and therefore considered that it was necessary for her to resign.

316. We did not find that the outcome of the protected disclosure investigation amounted to a breach of the claimant's contract in any way. Indeed, we were of the clear view that the outcome demonstrated that a detailed and objective investigation had taken place and had upheld her complaints in part. It was not clear whether the decision of that investigation was considered by the claimant to be, of itself, a breach of contract.

317. However, it was clear that the claimant believed that Employee B should have been dismissed following the upholding of her disclosure complaint, having been found guilty of gross misconduct, which would automatically result in his dismissal.

318. We were unable to sustain this assertion by the claimant. Firstly, even if an individual is found guilty of gross misconduct, it is not inevitable nor automatic that dismissal follows. There may be mitigation put forward on his behalf at the disciplinary hearing which persuades the hearing officer not to dismiss him. The detail of the allegations made against Employee B in the disciplinary process which followed the disclosure are not the subject of evidence before us, and accordingly we can make no findings as to whether or not the respondent acted without justification in not dismissing him. The process involving Employee B was necessarily a confidential one, and the claimant herself did not and could not know the respondent's rationale in taking the decisions it did.

319. In any event, that disciplinary process does not in any way reflect on the relationship between the respondent and the claimant, and cannot be seen to be in breach of her contract of employment.

320. The claimant appears to think that she was entitled to receive the outcome she wished from each of the investigations in which she was involved, and to regard any divergence from her own views about the

outcomes as in breach of her contract. Whether that is her case before this Tribunal or not, there is simply no basis for that assertion, and we do not sustain it.

321. In our judgment, then, the claimant has failed to demonstrate that the reasons for her resignation, as set out primarily in her letter of resignation, but as expanded in her claim before us, justify the conclusion that her contract of employment was breached in any way, nor in a fundamental way justifying her resignation without notice from her employment.

322. It is important in our thinking that the claimant was not being required to return to work with those whose company she would have found unacceptable, nor in the place of work which was so undesirable to her, following the decisions of Mr Smith.

323. Accordingly, the claimant's claim of constructive unfair dismissal fails, and is dismissed.

5. Did the respondent subject the claimant to a detriment or detriments on the grounds of having made a protected disclosure in March 2016?

324. Ms Mannion's submission was that the claimant failed to plead any detriment to which she was subjected on the grounds of having made a protected disclosure in March 2016.

325. The Tribunal was inclined to agree with this submission. Mr Bonelle submitted that the detriments to which the claimant was subjected were the disability discrimination and the bullying and harassment. However, as we have found, we have not upheld the claimant's claims under this heading and therefore we do not find these fairly vague and general assertions by the claimant to have been demonstrated by the evidence.

326. However, there is another important aspect to this. In order for the claimant to have been subjected to detriments on the grounds of having made a protected disclosure in March 2016, those whom she accused of having done so must have been aware that she had done so. It is

impossible to subject someone to detriments because they have lodged a protected disclosure if it is not known that she was the person who made the disclosure.

327. In this case, there is no evidence that the respondent's managers were aware that she was the source of the disclosure in March 2016. The claimant clearly suspected that they knew, but Mr Saunders, who was responsible for receiving and handling the disclosure, confirmed in his evidence that it was submitted anonymously, and that none of those involved were told that the claimant was the person who had done so. We accepted the evidence of the respondent's managers that they were not aware, until after the claimant's resignation, that she had been the source of the disclosure. Accordingly, the claimant's claim that she was subjected to detriments on the grounds of having made a protected disclosure must fall, and is therefore dismissed.

6. If the claimant's claims, or any of them, are upheld, what remedy should be awarded to her?

328. On the basis that none of the claimant's claims have been upheld, this issue falls.

329. Accordingly, the Tribunal's unanimous judgment is that the claimant's claims all fall and are dismissed.

Employment Judge: Macleod
Date of Judgment: 03 December 2018
Entered Into the Register: 05 December 2018
and Copied to Parties