Case Number: 2302640/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE C HYDE**

MEMBERS: **MS L GRAYSON**
MS V STANSFIELD

BETWEEN:

Claimant

MRS J C CRUTTENDEN

AND

Respondent

PLUMPTON COLLEGE

ON: **2, 3, 4 and 5 September 2019**
and in chambers on 6 January 2020

APPEARANCES:
For the Claimant: **In Person accompanied by her Mother**
For the Respondent: **Mr J Heard, Counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that: -

1. The complaints of disability discrimination under the Equality Act 2010 were not well founded and were dismissed; and
2. The complaint of constructive unfair dismissal under the Employment Rights Act 1996 was not well founded and was dismissed.

For the avoidance of doubt, it is recorded that no notice pay claim was brought by the Claimant.

REASONS

1. Written reasons are provided for the above Judgment because it was reserved. The reasons are set out only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost. Further, they are set out only to the extent that it is proportionate to do so.

2. All findings of fact were reached on the balance of probabilities.

Preliminaries

3. Mrs Cruttenden had commenced employment with the Respondent ("the college") on 4 April 2016 in the role of Student Services Manager and resigned with immediate effect on 9 April 2018, having been continuously absent on sick leave from 2 August 2017.

4. By a claim form presented on 14 July 2018, she complained of unfair dismissal and disability discrimination. In due course, these were said to arise under the Employment Rights Act 1996 ("the 1996 Act") and under the Equality Act 2010 ("the 2010 Act").

5. In a response and grounds of resistance submitted on 7 September 2018, the college set out its intention to resist the complaints, and the grounds on which it intended to do so (pp 16 – 27). The grounds of resistance also included references to aspects of the Claimant's case which the Respondent considered had not been adequately set out.

6. On 22 October 2018, a closed preliminary hearing took place before Employment Judge Williams QC, at which she made various directions for the preparation of the claim, including confirmation of the date of the final hearing from 2 to 5 September 2019. In accordance with those directions, a further document headed "Further and better Particulars of Claim" was submitted by the Claimant on 4 December 2018 (pp28 – 32), in which the Claimant provided more detail of her complaints. These were identified separately as a failure to make reasonable adjustments, discriminatory conduct, and constructive dismissal (pp 30 – 32). The separate category of complaint about discriminatory conduct was not pursued in the event, as appears in the list of Issues below. Also incorporated into that document, was the information which the Claimant had been directed to provide about the effect of her disability on her – a 'disability impact statement'. The draft statement, apparently prepared by her in answer to questions from her solicitors, was produced by her during the final hearing (pp32 a-g). The Respondent provided amended grounds of resistance on 18 January 2019 (pp33 – 40), also as directed by EJ Williams QC.

7. On 8 April 2019, a further closed preliminary hearing took place before Employment Judge Freer, by telephone at which more directions were made, including for the preparation of a final list of issues. EJ Freer also

recorded (at para 5 of his Order) that the Respondent admitted that the Claimant was a disabled person at the material times with regard to the conditions of Joint Hypermobility Syndrome and Fibromyalgia. The Claimant, who had previously been legally represented, appeared in person at this hearing.

Evidence Adduced

8. At the commencement of the hearing the Tribunal was provided with an agreed bundle of documents which was marked [R1] which consisted of approximately 300 pages. During the hearing, by agreement, further documents were added to the bundle. Mr Heard provided a chronology of events which the Tribunal marked [R2] which included entries which the Claimant had asked to be added to it. Finally, the Respondent also produced a list of issues marked [R3] which had been submitted to the Claimant in accordance with the order of Employment Judge Freer following the closed preliminary hearing in April 2019. In addition, the Tribunal had the list of issues which contained the Claimant's comments [C4] in accordance with the order of Employment Judge Freer. The Claimant's additions were recorded in track change boxes. The Tribunal discussed that list of issues with the parties and made some amendments. Thus, the reference to a notice pay claim was deleted because it was agreed that no notice pay was payable.

9. Further, at the conclusion of the case, Mr Heard included in his written submissions, the agreed list of issues set out with the text which had been in track change boxes, in red font in context. This is reproduced below with the red font in italics.

10. The Claimant gave her evidence first and relied on a witness statement marked [C1]. In addition, the Claimant relied on two witness statements of a former colleague, Donald Naylor, and these statements were marked respectively [C2] and [C3].

11. The Tribunal was given two statements, one clearly appeared to be a draft of the more finished witness statement of Mr Donald Naylor. However, neither the finished statement nor the draft was signed. The Tribunal asked the Claimant if she could produce at least the covering email and email exchanges which led to the draft statement being provided to her in order to verify that these were Mr Naylor's views. Unfortunately, this document was not forthcoming during the hearing, but the Claimant subsequently sent in a signed copy of the statement.

12. On about the second day, the Claimant produced a document which she relied on as additional information about the impact of her disability on her, to address the Tribunal's enquiries on the first day about the effects of her disability on her, for the purposes of the failure to make reasonable adjustments complaint. The document which was marked [C5] in effect

supplemented the list of issues.

13. On behalf of the Respondent the following witnesses gave evidence namely:
    Mr James Hibbert, Deputy Principal of the Respondent and former first line-manager of the Claimant;

    Ms Sarah Jeffers, Head of Human Resources and friend of the Claimant at work;

    Ms Liz Moyle, Conferencing and Events Manager, of the Respondent and former friend of the Claimant at work;

    Dr David Stokes, Vice Principal of the Respondent and the Manager who dealt with the determination of the Claimant's grievance;

    Mr Jeremy Kerswell, Principal of the Respondent and the manager who dealt with the Claimant's grievance appeal and signed off the original occupational health report.

14. The witness statements on which all these witnesses relied in their evidence in chief were marked respectively [R4-R8].

15. Finally, Mr Heard submitted his closing submissions in writing in a document marked [R9]. He also handed in copies of a number of cases and extracts of the Equality Act 2010. These are listed separately in the section of these reasons relating to the relevant law.

The Issues

16. These are set out below, knitted together by the Tribunal from various sources. The text of the agreed list [C4], (containing the Claimant's annotations in italic font) is in the quoted text, and including the issues in [C5]. Where the Tribunal has made grammatical or typographical corrections, or annotations to assist with clarification of the issues, these are in **bold text**. The original paragraph numbers used have been retained.

    "Constructive Dismissal (section 95(1)(c) **E**mployment **R**ights **A**ct 1996)

    1. Did the Claimant resign from her employment in circumstances in which she was entitled to terminate her contract of employment without notice by reason of the Respondent's conduct, such that she is properly regarded as having been dismissed by the Respondent within the meaning of section 95(1)(c) ERA?

    2. The Claimant relies on the following cumulative acts to establish a fundamental breach of the implied term of trust and confidence of her

employment contract: -

a. Working excessive hours which led to her becoming stressed and exacerbated her health conditions;

b. Being advised on 26 July 2017 that there were capability issues with her performance *which were not previously* raised;

c. Her grievance not being upheld. *The grievance was not properly investigated and that there was no right to respond to any of the college's statements, not that it was not upheld*;

d. During a meeting on 22 March 2018, being advised that the Respondent had re-employed an ex colleague and placed them on the Claimant's team. The Claimant asse**r**ts that managing the colleague would have been untenable. *Not just an ex-colleague but an employee within the department that C managed whole C had failed their probation. She was employed in the team in a less responsible role. Reemployment was to a more responsible role and was not discussed with me at any point prior to her employment to this role or her start date with the team and managing her would have been untenable*;

e. During the same meeting, being informed by James Hibbert that there were no changes to her job description. *James Hibbert was not present at this meeting. This information was provided subsequently and consecutively with a letter from the principal that stated that the job description would be addressed*;

f. **The Claimant alleged that the 'last straw' was b**eing sent a letter **(dated 29 March 2018 and received on 5 April 2018)** inviting her to a meeting with the Principal **(to take place on 11 April 2018)**. *Instead of the agreed action of mediation with James Hibbert as promised;*

g. *Also, the change in attitude from James Hibbert following directly from reporting to him that* **the** *stress of the role was affecting my health.*

3. If, it is found that there w**ere** such breaches, did the breach detailed at 2f constitute the final straw; did the Claimant resign in response to that breach and not for some other unconnected reason?

4. Did the Claimant by her conduct waive any of the breaches detailed at 2a-f?

5. Did the Claimant delay for too long before resigning in response to any breach that she might establish, such that she ought properly to

be deemed to have waived the breach?

6. If the Claimant was constructively dismissed, was that dismissal unfair, having regard to section 98(4) ERA 1996?

Disability

The Respondent having conceded that the Claimant was a disabled person at the material times with regard to the conditions of Joint Hypermobility Syndrome and Fibromyalgia;
And given the evidence indicating that this caused fatigue:

7. Did the Respondent have the requisite knowledge of the Claimant's disability at the material time?

8. Did/ought the Respondent have**/to have had** constructive knowledge of the Claimant's di**s**ability?

Duty to make adjustments (section 20 of the Equality Act 2010) and failure to comply with that duty (section 21 of the Equality Act 2010) **See [C5 and as set out in the reasons below]**

9. Did the Respondent apply a PCP of X
The Claimant to confirm what the PCP is that she is relying upon as this is not set out in the Further and Better Particulars. Management of stress in the workplace.

10. If so, did the PCP put the Claimant, as a disabled person, at a substantial disadvantage in comparison with persons who were not disabled?

11. The Claimant contends that the substantial disadvantage suffered is X
The Claimant to confirm the substantial disadvantage suffered. High levels of unmanaged stress impacted on my disability causing severe symptoms.

12. If so, did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage at which the PCP placed the Claimant?

13. Did the Respondent fail to comply with their duty to make reasonable adjustments? The Claimant contends that the following would have been reasonable adjustments: -

a. Completion of a stress management assessment **(May/June 2017 onwards)**

b. Discussing concerns regarding the Claimant's performance with her face to face **(prior to her line manager Mr Hibbert sending the email dated 26 July 2017)**

c. Obtaining an Occupational Health assessment

d. Providing the Claimant with admin support

Remedy

15. If the Claimant succeeds in the aforementioned claims, what sums, if any, should be awarded to the Claimant by way of compensation?"

17. Although these were not included in the agreed list of issues set out above, it was agreed that time/jurisdiction points fell to be determined in relation to the disability discrimination complaint under section 123 of the Equality Act 2010. The Claimant tendered her resignation on 9 April 2018. The early conciliation period ran from 14 April to 28 May 2018 (one month and fourteen days or 44 days). The claim form was presented on 14 July 2018. The earliest date on which events could have happened which were of right in time therefore was 2 March 2018. This was relevant only for the discrimination claims.

Relevant Law

18. In relation to the failure to make reasonable adjustments, the applicable law was set out in sections 20 and 21, of the 2010 Act. Further, paragraph 20 of part 3 of schedule 8 to the 2010 Act sets out the provisions in relation to lack of knowledge of disability.

19. Finally, the Tribunal had regard to section 123 of the 2010 Act which sets out the provisions in relation to time limits particularly in respect of omissions or failures to act. The relevant sub-paragraphs were (3)(b) and (4). This provision effectively codified decision of the Court of Appeal in the case of *Matuszowicz v Kingston-upon-Hull City Council* [2009] EWCA Civ 22.

20. The other relevant authorities were the cases of *Watkins v HSBC Bank plc* [2018] IRLR 1015 at paragraphs 24 and 30; *Tarbuck v Sainsbury's Supermarkets Limited* [2006] IRLR 664, EAT at paragraphs 70-71; and finally, in relation to the issue of time limits and extension of time in discrimination cases, the case of *Rathakrishan v Pizza Express (Restaurants) Limited* [UKEAT/0073/15] EAT. This last case was cited by Mr Heard in support of the proposition that a failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused. In the Judgment, His Honour Judge

Peter Clark reviewed some of the relevant authorities and in particular the authorities permitting the use of the various considerations in section 33 of the Limitation Act 1980 when dealing with the question of whether to exercise our discretion to extend time. He also noted that the exercise of this discretion involves a multi-factoral approach and that no single factor was determinative: para 14. Finally, the Tribunal noted that following the case of *London Borough of Southwark v Afolabi* [2003] IRLR 220 Court of Appeal, it is sufficient that all relevant factors in the case before it are considered by the Tribunal. The Tribunal is not required to consider all the factors in either the authorities, the Limitation Act 1980 or the civil procedural rules.

21. In relation to the constructive unfair dismissal complaint, Mr Heard placed before the Tribunal the now well-established authority of *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35, Court of Appeal. This is now the established authority for considering the final straw. As succinctly captured in the headnote, it is now well-established that in order to result in a breach of the implied term of trust and confidence, a "final straw" not in itself a breach of contract must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant so long as it is not utterly trivial. Thus, if an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign and affirms the contract, he cannot subsequently rely on those acts to justify a constructive dismissal if the final straw is entirely innocuous and not capable of contributing to that series of earlier acts.

22. It was further held that the final straw, viewed in isolation, need not be unreasonable or blame-worthy conduct. Thus, the mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

Findings of Fact and Conclusions

23. The outline chronology was largely not in dispute.

24. The Respondent is a higher education institution in the East of Sussex. It

had about 3500 students at the relevant time and the Respondent provided residential accommodation for some of them on the premises. The college offers courses in a variety of part-time and full-time land-based, and related subjects. The college employs approximately 320 staff.

25. The Claimant commenced employment with the Respondent on 4 April 2016 in the position of Student Services Manager. She tendered her resignation on 9 April 2018 with immediate effect (pp241 – 242).

26. Her line-manager throughout was James Hibbert, who held the position of Deputy Principal of the college and had been in that position since July 2015. His job had also included the roles of Student Services Manager and Student Services Director at various points. The Tribunal was satisfied however that the job that the Claimant carried out had a narrower scope than that carried out by Mr Hibbert when he held the post albeit with the same name. The job description covering the post performed by the Claimant, to which she was recruited was at pp 52 - 53. The purpose was to be responsible for key services provided to students at the main College site and to support academic staff across all sites in student welfare matters.

27. Her employment was subject to a six-month probation which she successfully completed in October 2016 (pp103 – 108). Her first annual appraisal was due to take place in April 2017.

28. On 26 July 2017 Mr Hibbert sent an email to the Claimant (p121) in which he detailed areas of concern and areas of success to be discussed at the forth-coming appraisal meeting with her. The appraisal meeting was due to have taken place in April 2017 but had been delayed because the Claimant had not completed her preparation for it. The Claimant had a strong adverse reaction to the email and was absent from work with sickness on 27 and 28 July 2017. She returned to work for one day but then was signed off again from 2 August 2017 and remained off sick until her resignation on 9 April 2018.

29. The Claimant relied on a number of matters which she said had occurred from about May 2017 through to 29 March 2018 as constituting the evidence of the breach of the implied term of mutual trust and confidence in support of her constructive unfair dismissal complaint and also as failures to make reasonable adjustments under her Equality Act 2010 claim. There was very little reference to anything which had taken place between her confirmation in post in October 2016 at the end of her probation period, and May 2017.

30. It was not in dispute that the Respondent used a very thorough recruitment process when the Claimant was appointed to her position. Further it was not in dispute that the Head of Human Resources who also

gave evidence to the Tribunal, Ms Jeffers, commenced her employment at the same time as the Claimant in April 2016. Ms Jeffers was charged with, amongst other things, bringing in procedures and processes which were more suited to meeting the legal responsibilities of the college. They had a good relationship at work. The Claimant relied on conversations that she had had with Ms Jeffers and others in support of her contention that the Respondent had the requisite knowledge of her disability and its effects (Issue 7). The Tribunal therefore considered all the relevant evidence on this aspect.

31. As part of the recruitment process, the Claimant completed a medical questionnaire on 4 February 2016. In that document pp 87-90) she stated the following:

(a) That her employment had never been terminated on the grounds of ill-health;

(b) That she was not currently suffering from and had never suffered from, among other matters, severe stress reaction or depression/anxiety;

(c) That she was suffering or had suffered from stomach/bowel troubles; joint problems/arthritis; back/neck problems; surgical operation; and mobility problems;

(d) In the space in which she was given the opportunity to set out further details of her answers in the affirmative, and under the text which explained that the information would enable the Respondent to identify what, if any 'reasonable adjustments' could be made, the Claimant provided the following further information: that she had IBS and Asthma, but not seriously and it did not affect her from day to day.

(e) In 2001 she developed a joint condition called Diastasis Synphosis Pubis. It was not in dispute that this was a condition related to pregnancy/childbirth.

(f) In 2002 she had a pelvic fusion operation and that she was considered to be disabled for a period of approximately five years during which she used a wheelchair. This disability, she stated, had now been identified as part of the Hyper-Mobility Syndrome.

(g) She stated that she had recovered a hundred per cent of her mobility but that she had a chair and a desk which allowed her to stand and work if required that would need to be transported from her previous employment.

(h) In September 2013 she had some back problems and was diagnosed with Hyper-Mobility Syndrome and Fibromyalgia in February 2015.

(i) She also declared that she had since been prescribed medication for this

condition.

(j) She concluded by saying that since May 2015 she had had four days off work and that she was happy to discuss this further if required.

32. The final substantive part of the form asked three specific questions of prospective employees. The Claimant provided the following responses:

(a) That she did not have any other on-going physical or mental impairment not already discussed above which may affect her employment with Plumpton College.

(b) That she normally enjoyed good health.

(c) That there was nothing else in her medical history or circumstances which might affect her employment with Plumpton College.

33. The process at the time was that this document was reviewed by the Human Resources Manager and by the Principal of the college. Mr Kerswell, the Principal, signed off the document on 23 February 2016. The Respondent took no further action in relation to reviewing what the Claimant's needs might be, if any. We considered that this was an appropriate response by the Respondent at the time in the light of the information available to it.

34. There was a section of the form for recording whether there was any work modification/advice. This was blank. In fact, it was not in dispute that the Respondent had readily complied with the Claimant's request for her desk and chair to be transferred from her previous employment.

35. By April 2019 the Respondent had formally accepted that the Claimant was a disabled person at the relevant times under the Equality Act 2010 having reviewed the information available both from the claim form, from the further and better particulars provided to them by the Claimant (pp28-32), and the medical information which was attached to it as appendix 1 (pp264-284). There was no challenge during the hearing to the information provided by the Claimant as to the effects of her disability on her.

36. It is most convenient to summarise the evidence of the effects from the information provided by the Claimant in her claim form. We thus found that Fibromyalgia is a condition that is substantial and has a long-term adverse effect on the sufferer's ability to carry out normal day-to-day activities. It causes widespread pain and fatigue and problems with mental processes when it is at its worst. Stress is known to exacerbate the symptoms. It is a fluctuating condition. There is a risk of a perceived attitude of others in not understanding the fluctuating nature of the condition and they may believe that the sufferer is lazy, unfocussed or not doing work to the time

constraints set in place.

37. The Claimant asserted that stress was a known cause of a flare-up of Fibromyalgia and as this was not contradicted, the Tribunal accepted this assertion.

38. In the claim form the Claimant did not provide any further detail of the effect on her of the Joint Hyper-Mobility Syndrome ("JHS"). However, in her Further and Better Particulars (at paragraph 6 on page 28), the Claimant stated that the effects of Fibromyalgia and JHS varied on a daily basis. On good days she was able to function normally but on days when the effects were severe she would find it difficult to undertake normal tasks such as going to work, doing normal household jobs and shopping. The Claimant could previously manage her way through the bad days and on the rare occasions that she felt that she needed to, she would take a day off. In the event, she did not take such time off.

39. The Tribunal had to decide whether the Respondent had what is commonly referred to as, 'constructive' knowledge of the Claimant's disability and the substantial adverse effects on her.

40. The Tribunal considered that given that the Claimant had been open with the Respondent and had identified the conditions that she had and also the fact that she was on medication for her conditions and also that before the conditions were diagnosed that she had had some quite serious physical effects, the Claimant had provided ample information which should have put the Respondent on notice that they needed to make further enquiries and acquaint themselves with what if any adjustments needed to be made.

41. The next question was what adjustments it was likely that they would have concluded were necessary, apart from the physical adjustments in relation to the desk and the chair which were not in dispute. The Tribunal also had to determine in relation to constructive knowledge whether the Respondent had the requisite knowledge of the effects which the Claimant argued for. This is dealt with below.

42. Mr Hibbert was on the selection panel that made the decision finally to select the Claimant for the position and the Tribunal accepted his evidence that he was enthusiastic about recruiting the Claimant. This was not contradicted by the Claimant and was corroborated by the unsigned statement of her witness, Mr Naylor.

43. The Respondent also had in place a very structured approach to reviewing performance. In the very early stages they had informal reviews after week one followed by a similar exercise at the end of the sixth week, and finally there was a review after twenty-four weeks which would, in the normal case, be the end of the six-month probationary period. These took

place in the Claimant's case on 20 April, 1 June, 13 July and 5 October 2016. Those were the formal review dates agreed and noted at the beginning of the Claimant's employment and it appeared from the documents available to the Tribunal that the Respondent held those reviews certainly within a week or so of the expected dates. Further the six-month probation review (week twenty-four) identified the date for the next review which was the one-year appraisal as being April 2017. The Tribunal accepted the evidence of Mr Hibbert which was not contradicted to the effect that the Respondent also maintained the dates for appraisals generally across the staff body. It was not in dispute that in this case Mr Hibbert was pressing the Claimant for her appraisal form but that by the time she went off sick at the end of July/beginning of August 2017, the form had not yet been completed by her.

44. There was no dispute in relation to the reviews and the probation sign-off completed in the first six months of her employment, that the Claimant performed very well in that time frame.

45. Among other matters, in his October 2016 review (p105), Mr Hibbert noted that it was easy to underestimate the range of skills required to successfully undertake the role of Student Services Manager within a structure such as the Respondent's. He noted that although the Claimant had arrived at the college with very little experience of many aspects of the role, through a combination of learning on the job, guidance and proactivity, she had performed exceptionally well across the range of tasks expected of her. He noted that this period had certainly been a challenge for the Claimant but that she should feel assured that in going through the same period in the following year, things would be easier. He noted the Claimant's excellent blend of strategic thinking, delegation, ability and hands-on working. This was a skill set which, he said, had been thoroughly tested during the previous six months and that she had more than demonstrated her suitability to progress beyond her probationary period. There were some matters which he highlighted in particular, as areas which needed improvement, such as the Claimant's approach when dealing with key contractors. However, he was also very positive, in noting that he believed that she was now much clearer on the processes that she should follow in producing the same information the following year. He concluded that paragraph by stating that like many aspects of this role, experience was the key.

46. Looking forward, he anticipated that the following six months should present a more settled period for the Claimant and give her the opportunity to consolidate what she had learnt since April 2016 to undertake a full self-assessment of the Respondent's residential provision. This was in the area of operations in which Mr Hibbert noted that there were many areas of improvement possible and that the assessment would lead to an agreement on a quality improvement plan to bolster what was already an area of excellence within the college.

47. He continued:

> "Aside from our core daily business in which Jo excels, she will also have to deliver against other projects such as Open Days and the enhancement of our Summer business. Such activities come around fast and she should begin to plan for these now.
>
> Managing a team will always present challenges and a key objective for Jo going forwards will be to ensure the full contribution from all members of her own team.
>
> Jo's impact has been felt across the college and she is very well respected by her peers and students. She embodies all that Plumpton College expects of its staff and I am delighted to have her as part of my team."

48. It was also not in dispute that the Claimant and her line-manager in accordance with the general practice within the Respondent had regular one-to-one meetings usually weekly or fortnightly. Mr Hibbert made very short bullet-point type digital notes of most of them which were available to the Tribunal (pp109 - 113). Unfortunately, the Claimant did not have access to her notes of the meetings due to her extended absence from the Respondent during her sickness absence.

49. The parties agreed, after closing submissions, that it was appropriate to add to the bundle the documents on the Respondent's database which gave guidance to line-managers about appraisals. It was also accessible to members of staff on the Respondent's intranet. It was submitted by email sent on 5 September 2019 copied to the Claimant also. The document which was well written in ordinary English highlighted that the purpose of a formal appraisal system included providing an opportunity for the employee and the line-manager to consider what the employee was doing, whether they were happy doing it and whether the employee had abilities which were not being used or whether they were being asked to do things outside their immediate capabilities.

50. The appraisal guide emphasised the importance of preparation for the appraisal meeting by both the employee and the line-manager and identified the matters which should be considered beforehand. Further it stated in terms that the appraisal meeting was intended to provide for a full and frank discussion of performance and the employee's feelings about their job and to discuss their ambitions and any problems they may be experiencing.

51. The Tribunal also accepted Mr Hibbert's point that the Claimant had started in April at an unusual time of year in the academic cycle which meant that the work that she had done in the first six months whilst very

busy and extensive was different or did not contain all the elements of the tasks that she was required to do throughout the full twelve months. Thus, there was some new and large tasks as identified in his overall summary for the twenty-four weeks probation report. The Tribunal did not consider that this undermined his comments about the Claimant's performance in the first half year of her employment.

Constructive Unfair Dismissal

52. In relation to the constructive dismissal complaint, Mrs Cruttenden complained that she had been required to work excessive hours which led to her becoming stressed and that this exacerbated her health conditions.

53. The Claimant complained about Mr Hibbert's reply to her request by email sent on 19 February 2017 (p114) for time off to attend her sister-in-law's funeral. The email correspondence showed that Mr Hibbert responded extremely promptly and positively to the Claimant's request. He expressed himself in sympathetic and supportive terms, and offered to help her in any way he could. There was no adequate evidential basis for the Claimant's complaint about this issue.

54. One of the 17 main duties specified in the Claimant's job description was organising the college Open Day. The Open Day usually took place in May. One consequence of the grievance brought by Mrs Cruttenden in October 2017 was that the report dated 1 December 2017 recommended, among other things, that the work required of the Student Services Manager in this regard be reviewed, and any appropriate adjustments be made to her job description (p159).

55. The Claimant and Liz Moyle, the Conferencing and Events Manager had a good working relationship. They used to discuss work and how the Claimant was getting on regularly and around December 2016 they discussed the Open Day. The Claimant said that she had not done anything like it before and Ms Moyle said that she would guide the Claimant through the process [R6 para 9]. In early February 2017 the Claimant was struggling with the organisation of the Open Day and Ms Moyle explained to her what was needed [R6 para 10].

56. In late February/March 2017, Ms Moyle met with the Claimant to discuss how the Claimant was getting on. Ms Moyle then took over some of the Claimant's responsibilities to help her out. At that time Ms Moyle noticed that Mrs Cruttenden was not coping generally and so she suggested that the Claimant could delegate. Mrs Cruttenden's response was that it was not possible to do so. Ms Moyle also suggested that the Claimant should speak to James Hibbert, her line manager. Mrs Cruttenden replied that she had, and that Mr Hibbert had said that it was not difficult and that he had explained how to do it [R6 para 10]. Ms Moyle suggested ways of breaking down the work, such as delegation of tasks to her team and

offered advice on which parts to prioritise. The Claimant felt unable to delegate as suggested. Ms Moyle also took the Claimant's list to Mr Hibbert for it to be prioritised. The Claimant said she could not talk to Mr Hibbert because she was too emotional and Mr Hibbert suggested that she email him instead. Mr Hibbert subsequently agreed to take on extra staff.

57. Ahead of the Claimant's sickness absence, she was aware of, and was involved in, the recruitment of two members of staff as a consequence of her suggestion to have the structure of the department varied. The roles would have supported the Claimant and lightened her duties:

    a. Student Services Co-ordinator – new recruit (TT) started in August 2017; and

    b. Residential Co-ordination – new recruit (NW) started in August 2017.

    Further, it was not in dispute that the salaries for these two roles were increased so that the new recruits would take on more responsibility.

58. The Claimant's witness statement commenced with the May/Jun 2017 period as the period in which she alleges she raised issues with Mr Hibbert that she was stressed due to her workload and that no help or support was offered. She alleged for the first time in her statement [C1 p3] that she "begged" Mr Hibbert for help. Her allegation up to that point was that she raised workload issues and received no help/support at all. However, the documentary evidence, and the Claimant's answers in cross-examination, demonstrated that Mr Hibbert had indeed supported and helped her.

59. The Tribunal agreed with Mr Heard's submission that Mr Hibbert was ideally placed to provide support to the Claimant because he had performed the Student Services Manager role previously – albeit with additional duties. He therefore had valuable insight into the efficient performance of the role. Sadly, it appeared to the Tribunal, that on the Claimant's own account, she resisted following Mr Hibbert's suggestions for the efficient performance of the role: para 15 of Further and better Particulars of Claim. Her stated case was that Mr Hibbert had not offered her coaching during their 1:1 sessions, but that: " Although *ongoing work was discussed, the sessions consisted of James Hibbert insisting the Claimant followed the methods he had used when he had held the Claimant's role prior to her being appointed*."

60. The Tribunal further accepted that in May 2017, Mr Hibbert and the Claimant had regular 1:1 meetings, ordinarily on a Friday when the college was quieter [R4 para 7]. The Claimant accepted in cross-examination that these meetings were almost invariably weekly and would last at least one

hour. At a 1:1 after the Open Day, the Claimant became emotional and struggled with prioritising her tasks [R4 para 7]. Mr Hibbert spent a considerable amount of time discussing exactly what needed to be completed and in what order. Many of the tasks were routine. At the time, the Claimant acknowledged that Mr Hibbert's clarity had helped her assessment of the workload [R4 para 7].

61. The Claimant again reported to Mr Hibbert, on 6 June 17, that she was struggling with her workload. They continued to meet on a 1:1 basis as a means of supporting and assisting the Claimant [R4 para 8]. Mr Hibbert did not add tasks to the Claimant's role. On the contrary, as part of the support provided by him, the Claimant was relieved of some work such as the residential action plan [R4 para 8].

62. Prior to the Claimant going off sick, Mr Hibbert increased his contact with her and focused on finding solutions to the Claimant's perceived problems, e.g., helping her put together the Bucksmore Summer Programme. When Mr Hibbert and the Claimant met, Mr Hibbert would either take on aspects of the Claimant's role himself or coach the Claimant to enable her to perform the tasks. Mr Hibbert elaborated on the coaching that he provided to the Claimant in his oral evidence. He explained that he wanted the Claimant to experience success (an 'easy win') with a particular task so as to help her realise that the task was easier than she had thought it was.

63. Further, Mr Hibbert regularly offered professional administrative support following RK's departure on 16 June 2017, but the Claimant refused this [R4 para 8]. The Tribunal gained the impression from the Claimant's evidence primarily, that she wanted to do things 'her way'. This was relevant to our finding about the Claimant rejecting the administrative support that Mr Hibbert offered, but arranging for her sister to attend to help her instead, and to the Claimant's own account in the Further and Better Particulars (para 15, p 29) cited above.

64. Mr Hibbert also put in place a number of additional supportive measures including taking on the physical checks of student files and hostel maintenance inspections.

65. At the beginning of July 2017, the Claimant told Mr Hibbert that she was stressed and worried about the then outstanding tasks. Mr Hibbert coached the Claimant through this [R4 para 9]. His Onenote entry for the 1:1 meeting on 14 July 17 records that he would be supporting the Claimant by helping her with the residential allocation task by coming in to work with her at the weekend to deal with this task [p113]. After working together on that Saturday, the Claimant told Mr Hibbert that it had been exceptionally helpful and that she recognised the task was basic and that it was her anxiety over the task which prevented her from tackling it head on.

66. Further, the Tribunal accepted as credible, the detailed written evidence of the support Mr Hibbert provided to the Claimant as documented in the annexes to the grievance investigation report by Dr Stokes, and in particular in annexes 11a (pp179 – 181); 11b (pp 182 – 183); 12 (p184); and in his comments on the minutes of the Claimant's grievance hearing (pp144a-j); and the minutes of his own meeting with Dr Stokes (pp185-190).

67. The Tribunal reached the following findings and conclusions in relation to the constructive unfair dismissal complaint. As the list of alleged breaches of contract in the list of issues was not in chronological order, they are dealt with here in broadly chronological order.

68. The first matter which was relied on as constituting a breach of the implied term of mutual trust and confidence, was that the Claimant was required to work excessive hours which led to her becoming stressed and exacerbated her health conditions: **Allegation 2a**.

69. The Tribunal accepted Ms Jeffers' oral evidence that as part of the Claimant's induction she was made aware of the Respondent's policies and had access to them on the shared drive. The Claimant certainly accepted that she was aware of the Sickness Absence Policy. Further, the Claimant was responsible for the management of her staff, therefore it was most unlikely that she was not aware of or able to access these policies, otherwise one would have expected the Claimant or possibly her manager to have flagged that up.

70. The relevant policies in the context of this case were:

    a. Grievance policy (pp59a-c) (updated Oct 17 [60-62]);

    b. Sickness Management and Sickness Absence Policy (pp62a-62ad) (updated 3 Oct 17 [63-80];

    c. Mental Health and Stress in the Workplace [80a-e] (updated Sep 17 (pp81-84)).

71. Further, clauses 8.1 - 8.2 of the Claimant's contract of employment (pp41-51) provided that the Claimant had a normal working week of a minimum of 37 hours and from time to time she would be required to work on a Saturday or Sunday, in respect of which she would be entitled to take time off in lieu (p42).

72. Clause 23 refers to grievances and the Claimant's entitlement to invoke the Respondent's grievance policy (p47). The Claimant accepted in cross-examination that she was aware of the concept of raising a grievance from her previous employment history.

73. The Claimant was not required to work excessive hours by the Respondent. Whenever the Claimant went to Mr Hibbert with a work-related issue, he supported and helped her with it. On occasion she would be overwhelmed by her tasks and required help to prioritise and manage those tasks, which Mr Hibbert provided.

74. The Tribunal found that Mr Hibbert was a professional, responsible and supportive manager who helped the Claimant when he became aware of the problems that she was experiencing. The Claimant herself said in cross-examination that she thought that he was a "good guy". Further, we were satisfied that Mr Hibbert acted entirely reasonably towards the Claimant in respect of the capability issues that she raised with him. Our findings were informed not just by the positive evidence referred to above, but also by the absence of contemporaneous complaints from the Claimant about the level of support from Mr Hibbert; or the use of the appraisal process to set out any problems she faced.

75. The Tribunal did not accept that the Claimant had established on the balance of probabilities, the matters which she relied on in support of that first alleged breach of contract.

76. Chronologically the next breach of contract allegation was at para 2g of the list of issues. The Respondent contended that this had not been part of the Claimant's case prior to the beginning of the hearing but the Claimant had added this complaint in the comments that she made which are contained in [C4]. Without prejudice to its objection to this point being considered, the Respondent dealt with this issue in evidence and in submissions. The Tribunal considered that it was in accordance with the overriding objective and justice to make a determination on this allegation, treating it, in effect, as an amendment.

77. The allegation was that there was a change in attitude towards the Claimant by Mr Hibbert directly after the Claimant reported to him that the stress of the role was affecting her health. The Claimant's contention was that Mr Hibbert ignored her on a subsequent occasion after the 14 July 2017 meeting. (Mr Hibbert's note of this is at page 113). It emerged during the evidence that the Claimant was talking about an occasion on 26 July 2017.

78. We accepted the submissions made by the Respondent as to the unreliability of this allegation as listed by Mr Heard in paragraph 34 of his closing submissions, and as set out below:

"*34. There was no change of attitude (C did not challenge JH on this in XX). The evidence that C seeks to rely on to support that assertion is her allegation that JH ignored her on a subsequent occasion after the 14 Jul meeting. As to that allegation, C says (now) that JH ignored her on 26 Jul*

17. C's evidence is unreliable:

a. It is implausible that JH acted in this out of character way. The 14 Jul meeting was not the first 1-1 meeting where C's stress and performance were discussed. At those previous meeting JH's approach was a supportive one. It is inconsistent and very unlikely that all of a sudden following the 14 Jul meeting that JH changed his response to the same issues that were being raised by C;

b. C's "Further and better Particulars of disability" document is silent about JH ignoring her on 26 July and actually alleges that JH ignored her on 31 Jul 16;

c. C made no reference to JH ignoring her (at any time) in her grievance;

d. C mentioned for the first time that JH looked [at] her on 26 Jul and ignored her during her XX. If that happened then one would expect the allegation to have been aired much earlier;

e. JH's 26 Jul 17 email is supportive and positive in tone, as were JH's emails sent to C during her sickness absence on 11 Aug 17 [125] and 4 Sep 17 [126];

f. *JH disputed the allegation at the time in his reply to C's written grievance [140]*."

79. In all the circumstances therefore and on the balance of probabilities, the Tribunal rejected the contention that the facts that the Claimant wished to rely on were made out. Specifically, there was no adequate evidence that Mr Hibbert had ignored her as she alleged on 26 July or indeed on some earlier or other dates. The Tribunal also considered that it was inconsistent with the other evidence before the Tribunal as to how Mr Hibbert dealt with the Claimant.

80. The next alleged breach of contract was that the Claimant was advised on 26 July 2017 that there were capability issues with her performance which had not been raised previously: **Allegation 2b**.

81. In evidence the Claimant was taken through the various points which were set out in her line-manager's email and acknowledged that some of these had been raised with her previously. The Tribunal also accepted the Respondent's case that various other matters had also been raised with the Claimant in advance. The Tribunal accepted that these issues had not been set out in writing in this way to the Claimant prior to this date but the Tribunal considered that at some point it is perfectly appropriate for a

manager to raise issues with someone for the first time. The context was also that they were set out that way in anticipation of the forthcoming appraisal. It appeared to the Tribunal therefore to be appropriate for a manager to provide information like this to the Claimant so that she could consider the position in advance of her now much-delayed appraisal meeting.

82. The Claimant was concerned that Mr Hibbert had not been available to discuss the issues with her after sending the email because he had gone on holiday. The Tribunal did not consider that this was a valid criticism because, as noted above, the Claimant still had to complete her preparation of the appraisal meeting and Mr Hibbert's absence was a provision of extra time for her to address these issues. There was no suggestion that she could not have raised them with him on his return to work.

83. The Tribunal also considered that Mr Hibbert had expressed the issues appropriately as a manager and his email was balanced. He had set out twelve concerns but had then balanced that by setting out ten successes that he had identified that the Claimant had achieved during 2016/2017. He also prefaced the discussion about the concerns with a clear statement of the reason why he was sending the email namely to clarify for the Claimant the likely content of the appraisal discussion. He said: "I do not want to approach the appraisal with any uncertainty." He later continued: "I want the appraisal to focus very much on objectives and clear direction to address these concerns. I do believe that there is a capability issue present on your behalf but I also believe that you can succeed which is the intent within this email to you."

84. In the light of the evidence, the Tribunal accepted the Respondent's submission that Mr Hibbert's email was supportive and genuine, written in good faith and in preparation for the Claimant's appraisal meeting which was by then overdue. Mr Heard's submission in paras 36-38 were also accepted.

85. The Tribunal therefore concluded that the Claimant had not established that being advised in the email of 26 July 2017 that there were capability issues with her performance constituted a fundamental breach of the implied term of mutual trust or confidence or could, taken with other matters, amount to such.

86. The next alleged breach of contract was **allegation 2c**, namely that the Claimant's grievance was not upheld, not properly investigated and that the Claimant was not given the right to respond.

87. On 29 October 2017 the Claimant raised a grievance by way of a short email to Ms Jeffers (p131). She stated:

> "Hi Sarah,
>
> After taking some advice about the current situation and my concerns moving forward, please see attached. I would be grateful if we could continue to communicate via email as I still find phone conversations difficult."

The document referred to was a two-page statement of her grievance (pp132-133). In summary, the grievance was about the Claimant's workload being unmanageable and about the capability issues which were being raised being unfair.

88. Dr David Stokes, then Vice-Principal of the College, was appointed as the investigating officer on 31 October 2017. He had no prior knowledge of the issues. Dr Stokes met with the Claimant on 7 November 2017 to discuss the grievance (pp135-144). In addition, the Tribunal considered the version of the notes of that grievance meeting which included the annotations made by the Claimant (pp144a-144j).

89. As those page references indicate, there was a detailed and thorough meeting with the Claimant to understand her grievance. Dr Stokes concluded his investigation and prepared a report dated 1 December 2017 (pp150-159) with 17 annexes attached (pp160 – 198). At the outset of the report, he listed the various meetings which had taken place between himself and other relevant witnesses namely Mr Hibbert, and with Liz Moyle and Sarah Jeffers on 23 November 2017. In his report he went through each of the allegations the Claimant had made and set out his findings in relation to each and the investigations. His findings were well evidenced.

90. Thus, in relation to the allegation that her workload was unmanageable/impossible, he found that the college did not consider that the Claimant's workload was unmanageable or impossible and he set out in eighteen separate paragraphs the factual basis for his findings. For example, he dealt specifically with the point that the Claimant had made about a comparison with the role performed by her predecessor (Mr Hibbert) and that he had had to work long hours to do the job. The Tribunal accepted the Respondent's evidence that a number of the major parts of the Student Services Manager's role had been removed from the original role which existed prior to the Claimant's appointment. He gave specific examples of this namely management of the college catering arrangements and the vehicle fleet.

91. It was also relevant that the previous post-holder was Mr Hibbert and therefore the investigating manager was able to obtain direct information from her comparator.

92. The second head of complaint in the grievance was that the Claimant had been employed in full knowledge of her Fibromyalgia and that the

workload caused a flare-up of the condition. The Tribunal understood this to be in the context of the Claimant complaining generally that she had not been given adequate support or that she had been overworked. Dr Stokes referred back in summary to the answers provided by the Claimant at the outset of her employment in the health medical questionnaire and as have been set out in more detail earlier in these reasons. He recorded that adjustments were made where these were asked for in relation to the desk and the chair from the previous employer. He cited the application of the College Policy to provide support and encouraged adjustments to working environment to staff and the fact that the college had made an occupational health referral. The Tribunal noted that the Claimant was not actually saying anything specific that the Respondent had done in this context or failed to do which constituted a breach.

93. The next head of complaint was that there was no support structure put in place to cope with the Claimant's workload. This complaint overlapped to a certain extent with the points already dealt with above. Dr Stokes itemised the process of the induction and the staff reviews which the Tribunal has also made findings about and set out above. He made findings about the Claimant having been provided with constant coaching by and instruction from Mr Hibbert. The Claimant had also attended the Management Development Programme and various other relevant training as well as monthly external supervision funded by the college (p155, para h). Indeed, he recorded occasions on which the Claimant acknowledged that having asked for help from Mr Hibbert, he had provided it, such as the occasion on which Mr Hibbert had come in on a Saturday to support the Claimant and to demonstrate how to get things done (p155, para o).

94. Also in this context, he considered the suggestion that Mr Hibbert had ignored the Claimant. He rejected that allegation. He also included findings about various responsibilities which Mr Hibbert had constantly told the Claimant to remove herself from if her workload did not allow it but that she continued to engage with such groups which he did not in any event consider to be the best use of her time (p156, para s).

95. The fourth head of complaint in the grievance was about the email from Mr Hibbert sent on 26 July 2017. In his considerations he reached the same findings as the Tribunal has about it above. It was clear that he conducted a detailed and appropriate consideration of her grievance on this.

96. The fifth head of complaint was that a member of staff in Student Services (RK) left and was not replaced, thereby increasing the workload on the Claimant. He found that the member of staff had left on 16 June 2017. He did not find, however, that this had led to an increase in workload for the reasons which he set out. Thus, he relied on the Claimant's own account of the extra support that she was given in advance of going off sick to address outstanding tasks (p158 para 5a). Thus, the Claimant's case was that Liz Moyle had been extremely helpful to her in this context.

The Claimant relied on the fact that her sister came into the premises to help her and that Mr Naylor also helped her out. The Tribunal considered that Dr Stokes had a good basis for rejecting the argument that these arrangements were necessary. He found that Mr Hibbert had offered agency administrative support, which the Claimant had not availed herself of, reporting to Mr Hibbert shortly after having brought her sister in to help, that it was working well: p158 para 5e.

97. Finally, the sixth head of complaint was that the Claimant had been discriminated against under the Equality Act 2010. This was effectively the Claimant contending that the lack of support constituted disability discrimination. Once again, it was clear that Dr Stokes gave careful consideration to this issue which overlapped with the earlier findings and that he had good grounds for reaching the conclusion that he did namely that the Claimant had not been discriminated against on grounds of disability (p158). This was relevant in terms of the constructive dismissal allegation.

98. Dr Stokes concluded his report by making various recommendations and inviting the college to consider taking certain actions. The content of the recommendations and the proposed considerations confirmed once again that Dr Stokes had given careful consideration to the issues that the Claimant had raised and to what steps, if any, could be taken by the college to ameliorate the situation. They did not indicate that there had been a breach of contract up to that point.

99. On the balance of probabilities therefore the Tribunal rejected the contention that the fact that the Claimant's grievance was not upheld constituted a breach of contract. Nor did the Tribunal find that the Claimant had established on the balance of probabilities that her grievance was not properly investigated.

100. The Tribunal further rejected the third limb of this allegation namely that the Claimant was not given the right to respond. The Claimant was informed that she had the right to appeal against Dr Stokes' decision (p200). This was contained in the letter sent to the Claimant by Dr Stokes informing her of the outcome of her formal grievance and dated 1 December 2017. The Tribunal also noted as was recorded in Dr Stokes' letter to the Claimant that she was given the opportunity to be accompanied by a work colleague or an accredited trade union official of her choice, which she declined, but that her mother kindly supported her at the end of the meeting.

101. The Claimant was informed that if she wished to appeal against the decision she should address the appeal in writing to Jeremy Kerswell, the Principal, within ten working days of receipt of that letter, stating the grounds of her appeal. The Claimant took up that opportunity by letter dated 11 December 2017 (pp201-202). The appeal hearing was fixed for

11 January 2019, and the Claimant was notified of this. She sent an email to Ms Jeffers (p207) on 10 January informing her that she would not be attending the hearing "on medical advice". She offered to forward a letter from her GP, on whose advice she was relying confirming this, as soon as she got it. She also confirmed in the email that she had no further information to provide in support of her appeal and that she would like the appeal to proceed on the basis of the grounds set out in her appeal letter. She asked to receive a copy of any notes of the appeal.

102. Ms Jeffers responded within 20 minutes on the same day, acknowledging receipt and providing confirmation that she understood the Claimant's request. In an appropriately sympathetically and sensitively worded message, she invited the Claimant to contact her if there was anything Ms Jeffers could do to help. She also proposed meeting the Claimant after the appeal had been dealt with if the Claimant "felt up to it", to try to agree next steps and any useful support for the Claimant from the college. She noted that the stress risk assessment had not yet been conducted, but explained that this was something the college did when an employee was ready to return to work. She invited the Claimant's view however on whether there was value in doing this earlier.

103. Ms Jeffers took notes of the appeal hearing on 11 January 2018 (pp211 – 214) before Mr Kerswell, the Principal. She also attended as HR representative. The notes record that despite the Claimant's absence, once again appropriate consideration was given to the points she had raised in her appeal letter. Dr Stokes was present and he was questioned by Mr Kerswell.

104. Mr Kerswell's decision to reject the appeal and an explanation for this was set out in a letter to the Claimant dated 16 January 2018 (pp215 – 216). The Tribunal found that his reasons more than adequately justified his decision.

105. In the circumstances, it was not completely clear what was the basis of the Claimant's contention that she was not given a right to respond. In her appeal letter she talked about wanting to have had an extra working day to provide further information on her job description (p201). Further, in the Respondent's closing submissions Mr Heard referred to the Claimant's assertion that she should have been given a right to respond following Mr Hibbert's responses and before Dr Stokes came to his conclusions. These were all matters which related to the initial decision by Dr Stokes. It appeared to the Tribunal that as the Claimant was given the opportunity to appeal against Dr Stokes' decision, she had ample opportunity to either make further comments on her job description or to set out her representations in response to Mr Hibbert's answers during the appeal.

106. This alleged breach of contract was not established on its facts.

107. The next matter which was said to have constituted a fundamental breach of contract was **allegation 2d** – that managing the female employee RK would have been untenable. This related to a discussion at the meeting on 22 March 2018. The Claimant was still on sick leave, with no return to work date in prospect at that point. It was not in dispute that RK had been re-employed in the previous autumn. The Claimant's contention was that RK had been working in a less responsible role at the time that the Claimant had judged that she had failed her probation. She was dissatisfied with the fact that RK was then re-employed to a more responsible role and that this had not been discussed with the Claimant at any point prior to RK's employment to this role or her start date.

108. RK was employed initially as Student Services Co-ordinator in September 2016 (SJ's statement, para 25). The position to which RK was appointed on the second occasion was Student Services Officer. RK had previously been a student at the college and had been employed in many casual roles since 2011. The Claimant concluded that her probation should not be passed in the Spring of 2017 owing to poor time keeping, an unpresentable office and unresponsiveness to requests. RK resigned with effect from 16 June 2017 from the position of Student Services Co-ordinator prior to being dismissed on the ground of not passing her probation period. However, she remained employed by the college in a secondary position of part-time Bank Warden.

109. In October 2017 whilst the Claimant was off sick, RK applied for the role of Student Services Officer. Her application met the short-listing criteria and she was invited to interview. Following a robust selection process involving many selection activities, RK was the preferred candidate and was appointed to the full-time permanent position on 23 October 2017. The Tribunal accepted the Respondent's contention that as RK had successfully been assessed during the recruitment process, it would have been wrong and unfair to her not to appoint her to this position.

110. In relation to the contention that if the Claimant had returned to work and had to manage RK, the situation would not have been tenable, the Tribunal accepted that there was no personal falling out or anything of that nature between RK and the Claimant; and that acting professionally as both parties would be expected to, it would not be untenable for RK and the Claimant to work together.

111. Further, it was reasonable and proper for the Respondent not to have included the Claimant in the recruitment process for the role or to have sought her opinion during her sickness absence. They applied their recruitment process to the candidates and while the Claimant was off sick, it was appropriate that she should not be involved in that.

112. The Claimant also relied on the argument that the untenability of the management situation arose from the fact that RK had called the Claimant

'dishonest'. The Claimant took this from the content of RK's email in July 2017 sent to Mr Hibbert which Mr Hibbert referred to in the grievance process. However, at the point of the meeting in March 2018 and the Claimant's resignation shortly afterwards, she had not seen that email. It can therefore not have been a matter which contributed to her perception that there had been a breach of the implied term of mutual trust and confidence.

113. The Tribunal also took into account that this was not a matter referred to by the Claimant in her resignation letter and also took into account that the Claimant contended that mediation was appropriate at the end of march/beginning of April 2018. This undermined her contention that there had been a fundamental breach of contract by the Respondent.

114. In all the circumstances, therefore, the Claimant had failed to establish the facts on which she relied to argue that there had been, in relation to allegation 2d, a breach of the implied term of mutual trust and confidence.

115. The next allegation (**allegation 2e**) was that during the same meeting on 22 March 2018 the Claimant was informed by James Hibbert that there were no changes to her job description.

116. It became clear in cross-examination that the Claimant had misunderstood what was recorded in the notes of the meeting. It was clear that it said that the Claimant's job description needed to be amended not that it did not need to be amended (p235). Moreover, there was no evidential basis for finding that the Respondent had led the Claimant to that mistaken understanding.

117. In those circumstances, therefore, the Claimant had not established that she had been told that there were no changes to her job description. In all the circumstances, therefore, allegation 2e was not established.

118. Finally, in **allegation 2f**, the Claimant complained that she was sent a letter dated 29 March 2018 (pp236-237) from Ms Jeffers, Head of HR, instead of the agreed action of mediation with Mr Hibbert as promised. The Claimant relied on this letter as the final straw and she resigned by letter dated 9 April 2018 (pp241-242).

119. In this letter Ms Jeffers invited the Claimant to a meeting on 11 April 2018 at the college with the Principal. She explained that the meeting was being held under the college's Sickness Management Policy and enclosed a copy of the policy. She also indicated that she would be present to support the process and take notes. There was no suggestion that the Respondent's actions or proposed actions were inconsistent with the application of the Sickness Management Policy. By then the Claimant had been signed off from work since 2 August 2017 and had indicated at the meeting on 22 March 2018 that she anticipated that her earliest return

date would be no sooner than ten months' time. Ms Jeffers further explained why there would be no further referral to Occupational Health in advance of the meeting because the Claimant had indicated at the meeting on 22 March that nothing had changed medically since the last referral.

120. The letter went on to set out in four bullet-points various changes that had been made in relation to the Claimant's role, three of which involved the provision of extra support.

121. Further, the Respondent enclosed a summary of the adjustments made in relation to the Claimant's current role and the priority for the next twelve months. Ms Jeffers indicated that the further discussion at the meeting would be with a view to also up-dating the job description to reflect this.

122. She then also set out in five bullet-points the various things that would be discussed at the forthcoming meeting. Amongst these was "whether there is any additional support we can reasonably offer" and "whether there is anything that the college could do which would assist you and enable you to return to your role (or to another role) sooner".

123. The Claimant complained that what she expected was a mediation meeting. It did not appear to the Tribunal that there was anything inconsistent with inviting the Claimant to this meeting and possibly pursuing the course of mediation. Further, the Tribunal accepted the evidence of Ms Jeffers that mediation was something that had been talked about at the previous meeting but it had not been decided upon as a definite course of action. The Tribunal noted also that there had been no request by the Claimant for mediation albeit in the short time since that meeting on 22 March.

124. The Claimant did not agree that the Respondent's notes of the meeting of 22 March were accurate and prepared alternative notes (p240). In those notes she referred to mediation being in place but this was in the context of how things would work when she returned to be managed by Mr Hibbert. It goes without saying that this was not an imminent prospect as of the date of the letter of 29 March 2018.

125. The Tribunal therefore considered first that there was nothing in the content of the letter read on its own or with the Claimant's notes of the meeting of 22 March 2018 which could suggest that there was anything negative towards the Claimant or to be criticised in terms of the content of that letter. There was nothing unreasonable or inappropriate about it and there was no suggestion that it was not consistent with the Respondent's Sickness Management Policy.

126. As set out in the statement of relevant law above, in order for a matter to constitute a final straw, it has in itself to be a breach of contract even

though it does not necessarily need to be a fundamental breach. The Tribunal did not consider that there was any possibility that the letter or its contents could amount to a breach of contract. It was fully consistent with the Respondent's policy and was appropriately worded. As Mr Heard stated in his written submissions at paragraph 58, the sending of the letter of 29 March was innocuous and did not rule out anything going forward (such as mediation).

127. In all the circumstances, therefore, the Tribunal was satisfied either that the Claimant had not established the facts on which she relied in contending that there had been a fundamental or fundamental breach of her contract or that those matters which she had established did not amount to a breach of contract either fundamental or otherwise taken singularly or together.

128. The constructive unfair dismissal complaint was therefore not well founded and was dismissed.

Disability Discrimination Complaints – Failure to Make Reasonable Adjustments

129. In respect of the PCPs relied on, paragraph 9 of the list of issues including the Claimant's annotations is set out in full above. Along with this the Tribunal considered the contents of [C5], the relevant parts of which are referred to below in context. The Claimant stated three PCPs in [C5]. The four respects in which she alleged that the Respondent had failed to make reasonable adjustments were set out in paragraph 13 of the list of issues above.

130. The Tribunal first had to decide whether the evidence substantiated the contention that it was a PCP that staff were required to carry out their roles 'without additional support or adequate support': [C5] para 2. The Tribunal took the reference to adequate support as being less support than additional support although neither could objectively be defined in the Tribunal's view. However, in the health questionnaire at the beginning of employment, the employees were invited to set out anything in their medical history or circumstances which might affect their employment with the college and to set out whether there was any work modification or advice which could be given. Further, as part of the appraisal documentation as set out above it was stated that the meeting was intended to provide for full and frank discussion of performance and the employee's feelings about their job and "to discuss their ambitions and any problems they may be experiencing" (emphasis added).

131. In addition, the Tribunal had the evidence that was accepted and itemised very carefully in Dr Stokes' report about the additional support that was actually given to the Claimant. Against that there was no evidence from the Claimant about the general expectation being that individuals should carry out their role without either adequate or additional support. On the

balance of probabilities therefore the Tribunal considered that the Claimant had not established the existence of that PCP.

132. Even if the Tribunal had found that such a PCP existed, the evidence in this case did not support a contention that the Claimant had been expected to carry out her role without either adequate or additional support given the findings above.

133. The second matter which could be taken to be an assertion of a PCP by the Claimant was in the third paragraph of [C5]. In this the Claimant stated that there was an expectation that a member of staff would be required to be fit for work before a stress risk assessment was completed.

134. In the first Occupational Health report dated 14 September 2017 (pp127-130 at p129), the following was stated as a recommendation: "Although she remains medically unfit for work, the key issue in facilitating a return to work is likely to be a resolution to Mrs Cruttenden's perceived work issues. A formal stress risk assessment is recommended to investigate and where appropriate address her perceived work stress issues. She should be able to co-operate with this while absent from work." As has been recorded above, shortly after this the Claimant presented a grievance in October 2017 which was investigated by Dr Stokes. It appeared to the Tribunal that, albeit by a different process, this was the Respondent's attempt to resolve the Claimant's perceived work issues. Importantly also, there was no suggestion in this report as to a timeframe for a stress risk assessment. The Tribunal considered, however, that it was somewhat redundant as a proposal once the grievance had been investigated (1 December 2017) and had been the subject of an appeal.

135. In the second report dated 16 November 2017 which was done whilst the grievance investigation was underway, the Occupational Health advisor stated: "Mrs Cruttenden remains unfit for work due to the on-going symptoms of her Fibromyalgia, with additional anxiety/depression symptoms a complicating factor. It is difficult to provide a return to work time scale as her progress clinically has been relatively slow, but in any event, this is unlikely to be achieved before the grievance procedure is resolved and any relevant action taken following the recommended stress risk assessment." The Occupational Health advisor appeared to be suggesting that the stress risk assessment should be undertaken prior to a return to work, after the grievance was resolved. As set out above, this was offered to the Claimant in early January 2018.

136. The Tribunal considered whether the Respondent's failure to undertake a stress risk assessment at any point prior to the resignation by the Claimant in April 2018 was a failure to make a reasonable adjustment allegation in time. The Respondent argued that the Claimant was implicitly asserting that the latest that a stress risk assessment should have been done was by the date of the second Occupational Health report

on 16 November 2017 - cf para 5 of [C5] in which the Claimant says that the time frames during which a stress risk assessment could have been completed would have been when stress was reported to Sarah Jeffers or James Hibbert, or when it was recommended by Occupational Health (both points in time were relied on).

137. The references to stress being reported to Sarah Jeffers or James Hibbert pre-dated the recommendation by Occupational Health. The Claimant's case was that this took place prior to her absence on sick leave. If there was a failure to conduct a stress risk assessment then it follows therefore that that was on-going from the date of the report to Sarah Jeffers or James Hibbert and the early Summer 2017.

138. The law in relation to when time runs in relation to failures to take action under the Equality Act 2010 is set out above. The Tribunal has also set out the relevant dates in terms of assessing whether matters are out of time elsewhere in these reasons. The relevant date before which complaints about actions or omissions would be on their face out of time was 2 March 2018, taking into account the date of presentation of the claim on 14 July 2018, and the early conciliation dates. Even if the Claimant is given the benefit of relying on the latest possible date, i.e. from the date of the second Occupational Health report in November 2017, time would have expired a considerable time before the relevant date of 2 March 2018. There were no considerations put forward by the Claimant as to why it would be just and equitable to extend time in relation to this matter. Complaint about this would in any event have been out of time and outside the Tribunal's jurisdiction.

139. In any event, there was evidence which the Tribunal accepted that the Respondent had earlier tried to conduct a stress risk assessment with the Claimant (Ms Jeffers) and moreover, the Tribunal considered that the path of trying to address the Claimant's underlying concerns work by way of the careful consideration of her grievance and the appeal were reasonable responses and reasonable ways of dealing with these concerns. This is also confirmed by the fact that at the end of his investigation report, Dr Stokes came up with recommendations and matters for the college to consider in terms of assisting the Claimant at work going forward. These included, for example, under recommendations: "(d) a clear return to work plan be devised to present a phased return to work against the original/revised job description." and "(b) the stress risk assessment recommended by occupational health to be arranged when the college receives notification that the JC is fit to return to work."

140. As has been found above, it was not in dispute that the Claimant indicated to the Respondent at the meeting on 22 March 2018 that she believed that she was at least ten months off a return to work. In all those circumstances, therefore, it cannot have been reasonable for the Respondent to take more action in terms of assessing the risk than they

did up to the date of the Claimant's resignation.

141. Here also, the evidence before the Tribunal did not support a finding that there was a PCP requiring a member of staff to be fit for work before a stress risk assessment was completed. The Tribunal only had evidence about the way in which this was dealt with in the Claimant's case and this was an insufficient basis for the Tribunal to reach a finding on the balance of probabilities about a PCP to this effect.

142. Third, the Claimant relied on a PCP [C5, para 4] to the effect that there was an expectation for a member of staff to formally report stress and the assumption that staff would be aware of the process for this. This was, in any event, a new formulation of a PCP over and above the points that the Claimant had made up to that point in setting out her case. The Tribunal understood this to be formulated in response to the evidence from Ms Jeffers that she had had informal discussions with the Claimant as a friend at work and that she had not understood the Claimant was formally reporting stress.

143. Beyond the evidence about what happened in the Claimant's case, the Tribunal had no evidence of how this matter was or was likely to have been dealt with in other cases. It was thus not appropriate on the balance of probabilities to draw the conclusion that this was a PCP.

144. The Tribunal noted, in any event, that under the Respondent's Policy on Mental Health and Stress in the Workplace, it was expressly stated that responsibility for the effective management of stress rested at all levels of the organisation and that it was the responsibility of each employee to seek assistance as early as possible if she or he was manifesting symptoms of stress; para 5.4(iv) at p80c.

145. Further, the discussion in this policy document of stress at section 6 (pp80c and d) undermined the Claimant's contention above that there was a PCP that staff would carry on work or be expected to work without adequate or additional support.

146. In all the circumstances, therefore, the Tribunal rejected the disability discrimination complaint on the basis that the Claimant had not established that there were PCPs in the terms that she stated. In the alternative even if those PCPs existed, the completion of a stress risk assessment was not a reasonable adjustment in the time frame between the Summer of 2017 and the date of the resignation in April 2018 given that the Claimant was, even at the later date, some ten months from a possible return to work.

147. The Claimant also formulated in [C5] three further adjustments which she believed were reasonable and should have been made. The first has been dealt with in relation to the completion of a stress risk assessment.

Further adjustments b, c and d were as follows:

b Discussing concerns regarding the Claimant's performance with her face to face;
c Obtaining an occupational health assessment;
d Providing the Claimant with admin support.

148. The Tribunal considered that the facts relating to these had been dealt with above in the context of the constructive unfair dismissal complaint. The Tribunal found that it was not inappropriate and indeed was good management to give the Claimant written notice of the issues that the Respondent wanted to discuss with her at the forthcoming appraisal especially as this matter was already delayed by some three months. Nor indeed was there any reason for the Respondent to have believed that setting matters out like this clearly in writing to the Claimant in advance was likely to increase stress. Arguably raising these concerns with the Claimant at the meeting without giving her any prior warning and time to consider her position, might reasonably have been considered more difficult for the Claimant to deal with.

149. In relation to the occupational health assessment, the Tribunal considered that the referrals to Occupational Health were made on a timely basis. The Tribunal has already noted that there were two Occupational Health referrals in September and November 2017 and that a further referral was considered by the Respondent but rejected properly, in the Tribunal's view, on the basis that the Claimant reported that medically nothing had changed. It was also apparent from the text cited above from Ms Jeffers' letter that the Respondent did not rule out a further Occupational Health referral should this be appropriate. So even if the Claimant had been able to establish the PCP she suggested, the Tribunal did not consider that she would have established that there had been a failure to refer to occupational health or to obtain an occupational health assessment as a reasonable adjustment.

150. Finally, in relation to the complaint about not having adequate administrative support, the Tribunal's findings on this are set out in the unfair constructive dismissal complaint. The Tribunal was satisfied that the Respondent had, in any event, provided appropriate support to the Claimant at all stages of her employment.

151. The complaint of disability discrimination therefore in relation to failure to make adjustments under sections 20 and 21 of the Equality Act 2010 was not well founded and was dismissed.

<u>Notice Pay/ Unpaid Wages</u>

152. Finally, there was an issue about whether the Claimant had brought a

claim for notice pay. Although she had not ticked the box in her claim form in section 8, under the description of what remedy she sought, she had included a claim for one month's notice. In their amended response the Respondent addressed this. As set out above it was agreed that in fact this was not a claim that had been brought. As the Claimant was not constructively dismissed or constructively wrongfully dismissed, she is not entitled to her notice money. She resigned. In those circumstances, therefore, the claim for notice pay was also not well founded and was dismissed.

153. The Tribunal also noted that in her claim form the Claimant had sought, as a remedy, payment for a period of employment prior to her resignation. In fact, this was not a matter that was pursued at the hearing and the Tribunal considered that this was consistent with the evidence that the periods to which she was entitled to be paid for sickness absence, had expired prior to her resignation.

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Employment Judge Hyde

Dated: 16 April 2020