EMPLOYMENT TRIBUNALS

Claimant: Mrs L.M. Carter

Respondent: Commissioners for Her Majesty's Revenue & Customs

HELD AT: Liverpool **ON:** 30 and 31 October and 1,2, 5, 6, 7, 9, 12-15 November 2018 (and in the absence of the parties on 29 October and 16 and 19 November 2018)

BEFORE: Employment Judge Horne
Members: Mr M Gelling
Mrs J Fletcher

REPRESENTATION:

Claimant: in person
Respondent: Mr. Lewis, counsel

RESERVED JUDGMENT

(In this judgment, "the February CMO" means the case management order following the preliminary hearing on 16 February 2018.)

1. The claimant's complaints of direct disability discrimination contained at paragraphs 8.1.2, 8.1.7, 8.1.8, 8.1.9 and 8.1.11 of the February CMO are dismissed following withdrawal by the claimant.
2. With regard to the remaining allegations, the respondent did not discriminate against the claimant because of disability.
3. The respondent did not discriminate against the claimant arising from her disability as set out in Allegations (1) to (12) below.

4. The remaining allegations of discrimination arising from disability are dismissed following withdrawal by the claimant.
5. The tribunal does not have jurisdiction to consider the claimant's complaints of harassment set out at paragraphs 10.1.1, 10.1.2 and 10.1.4 of the February CMO.
6. With regard to the remaining allegations, the respondent did not harass the claimant.
7. The respondent did not breach the duty to make adjustments.
8. The complaint of victimisation (as identified in the February CMO) is dismissed following withdrawal by the claimant.
9. The proposed additional complaints of victimisation require an amendment which is refused.
10. The claimant was not unfairly dismissed.
11. The respondent did not breach the claimant's contract of employment.

REASONS

Introduction

1. This is our reserved judgment following 15 days of hearing, of which 12 were attended by the parties. We were well assisted by Mr Lewis, counsel for the respondent, whose fair-minded approach was rightly praised by the claimant at the conclusion of the hearing. The claimant represented herself throughout with dignity, tenacity and courtesy.
2. Mindful of the ease with which the public may search this document online, we have decided to protect the identity of some of the individuals mentioned in the judgment. We did not apply a hard and fast rule to deciding whose identity to anonymise. Generally speaking, we decided on anonymity where a person was not called to give oral evidence and our judgment exposed some criticism or sensitive personal information.

Procedural history

3. Before describing what this claim is all about, it is necessary to set out some of the procedural history. It explains how and why we set about identifying the issues and should help the reader to understand how we eventually decided the claimant's application to amend the claim.
4. By a claim form presented on 7 July 2017, the claimant raised numerous complaints under the Equality Act 2010 ("EqA"). Her complaints were set out in a list of bare headings, one of which simply stated, "victimisation". There followed a passage of brief narrative. Looking at the claim form as a whole, there was very little to indicate which events were said to have amounted to which forms of prohibited conduct.

5. Some time after the claim form was presented, the claimant was dismissed. She then amended her claim to include a complaint of unfair dismissal and a claim for damages for breach of contract.

6. On 31 October 2017, a preliminary hearing took place before Employment Judge Vincent Ryan. It is not altogether clear how much discussion took place about the detail of the claim. At any rate, following the hearing, the employment judge recorded the claimant's complaints as he understood them to be. Victimisation was not one of them. The claimant was ordered to provide further information about her claim in writing. This she did, following which another preliminary hearing took place on 16 February 2018. This time the hearing was conducted by Employment Judge Tom Ryan, who went into considerable depth to try and understand the way in which the claimant wished to pursue her claim. Based on what the claimant told him, the employment judge prepared a case management order ("the February CMO"), which included a long list of issues. Unlike EJ Vincent Ryan's order, the February CMO included a complaint of victimisation. Under that heading, there was one allegation of detriment, as to which EJ Tom Ryan framed the issue as follows:

> "Has the respondent by AM or NH or both of them subjected the claimant to detriment by reason of the protected act in reporting the fact that the claimant had alleged those members of staff made racially stereotypical comments to others?"

7. In correspondence that followed the hearing, the claimant indicated to the respondent's solicitors that she was content with the list of issues and saw no reason to change it.

8. The parties exchanged witness statements in preparation for the final hearing. The respondents' witness statements were tailored towards, and adopted the language of, the issues set out in the February CMO.

Our approach to the issues

9. Although the list of issues in the February CMO was lengthy, detailed, and of considerable assistance to us, it still left parts of the claim to be clarified. Under the heading of failure to make adjustments, for example, there was a comprehensive list of the adjustments that should have been made, but there was no explanation of how the duty to make those adjustments had allegedly arisen. Likewise, the complaint of discrimination arising from disability helpfully itemised the occasions on which the claimant had (in her view) been unfavourably treated, but it did not identify the reason (or "something") for the treatment, nor did it explain how the claimant contended that the reason arose in consequence of her disability.

10. Mindful of these gaps, but also aware of the claimant's anxiety and the desirability of completing the claimant's evidence at an early stage of the hearing, the tribunal decided to start hearing the evidence and to ask the claimant to clarify her claim periodically during the hearing. At the conclusion of the oral evidence, our employment judge prepared a draft revised list of issues and gave it to the parties to consider overnight. The parties agreed the list subject to a handful of points about which they made oral submissions. Having heard those submissions, the employment judge proposed to make amendments to the list,

which he announced out loud. There was no objection. The finalised version now appears as the Schedule to this order. By and large it retains the format of the February CMO. Changes made by the tribunal are indicated by underlining or changing the multi-level list format. The additional amendments following the parties' submissions are shown in *italics.*

Amendment disputes

11. At times during the hearing the claimant told us that she wished to pursue aspects of her claim in a way that was substantially different from the formulation set out in the February CMO. She accepted that she would need to amend her claim in order to do so. With the consent of the parties, and in an attempt to avoid interrupting the evidence, we agreed to decide all amendment disputes at the same time as we determined the issues on their merits. The respondent did not object to the claimant putting questions in cross-examination that were relevant to the proposed amended claim.

Evidence

12. We considered a bundle that ran to three volumes. At the back of the second volume we inserted some additional pages, some printed web pages (which we marked "C1", a copy contract of employment ("R1") and some guidance on notice periods ("R2"). We did not read every page of these documents. Rather, we concentrated on the documents to which the parties had drawn our attention, either in witness statements or orally during the course of the hearing.

13. The claimant gave oral evidence on her own behalf and called Mr Boothroyd and Mr Darlington as witnesses. Thirteen witnesses appeared for the respondent: Ms Holland, Mrs Thomas, Mr Blackmore, Mr Peters, Miss Hayes, Mrs Muchmore, Mr Hughes, Mrs Smith, Mrs McKinnell, Miss O'Rourke, Miss Everett, Mr Bland and Mrs Beresford. All witnesses confirmed the truth of their written statements and answered questions.

14. This is convenient opportunity for us to record, briefly, our impressions of the witnesses:

    14.1. First, the claimant. She gave evidence in a confident and composed manner, which was broadly consistent with statements she had made at earlier stages of the proceedings. We had to bear in mind that her support worker reported on 24 May 2016 that she struggled with her short-term and long-term memory. In relation to disputes about things said at meetings, we had to take into account the fact that the claimant did not take contemporaneous notes. Her rival notes of meetings were prepared many weeks afterwards. Where there were disputes about matters of impression (such as the manner in which a person had spoken), we thought it important to assess how objectively the claimant was able to form those impressions. We did find that the claimant lacked objectivity at times. One example related to the evidence that she gave about which managers should have had a "full handover" about her. She maintained that Mrs McKinnell, who was responsible for some 320 staff, should have had a full handover specifically about the claimant. Another example related to the claimant's evidence about fit notes and occupational health reports. The claimant maintained that she did not need a new fit note or report after December 2016 to explain her absence from April 2017 onwards because her

circumstances had not changed. We thought that her circumstances had changed, not least because in the meantime she had been taken from her workplace by paramedics and spent 6 weeks as an inpatient in a psychiatric hospital.

14.2. Mr Boothroyd struck us as a relatively straightforward witness. He gave evidence candidly, sometimes in ways that would tend to harm the claimant's case rather than support it.

14.3. Mr Darlington, we thought, was doing his best to help us. He did, however, at times, appear to be looking back on events through the eyes of a personal friend and someone who had a long history of speaking up for her. He had not made contemporaneous notes and was not able to rely on his own notes to assist his memory. His oral evidence in relation to the meeting on 20 September 2016 contradicted his oral evidence in a significant respect.

14.4. Ms Holland's evidence was not greatly tested in cross-examination and we found it generally reliable.

14.5. Mr Blackmore was, in our view, honestly doing his best to recall what happened, but his ability to give a reliable account was significantly hampered by the fact that he had prepared his witness statement without reference to any of the contemporaneous documents.

14.6. In our view, Mrs Thomas struck us an impressive witness. She answered questions simply and, in our view, truthfully. Much of her evidence was based on recollection. We did have to take into account that she was being asked to recall events over two years old and that her memory might have faded.

14.7. Mr Peters gave evidence in a way that appeared sure of himself. Other than the passage of time, there was little to put his reliability into question. Making allowances for the unnatural atmosphere of the tribunal room, it did occur to us that the claimant might have taken his manner as being arrogant.

14.8. Miss Hayes struck us as a robust witness whose evidence stood up to prolonged questioning. We were able to place a good deal of reliance on what she said.

14.9. Mrs Muchmore also seemed to be a credible witness to us.

14.10. Mrs McKinnell started off a little evasively (with answers such as "those were not my words" when the question was obviously about the gist of what she had said) but quickly adapted to answering direct questions and did so convincingly.

14.11. We found Miss O'Rourke's, Miss Everett's and Mr Bland's evidence to be straightforward.

14.12. The final witness to give oral evidence was Mrs Beresford. She found it difficult to answer relatively simple questions in a way that made sense to us. We had to be cautious about accepting what she told us. Generally speaking we found her contemporaneous notes to be a more reliable indicator of her thought processes than her oral evidence.

15. In addition to the oral evidence, the respondent asked us to consider a written witness statement from a member of the claimant's team to whom we shall refer

as “Mr I”. We read the statement and took it into account where his evidence appeared uncontroversial. Where it was disputed by the claimant we were unable to give the statement significant weight. This was partly because Mr Ingram’s evidence could not be tested by cross-examination. This was important because we would have been interested to know the extent to which his memory of events had survived the passage of time. The reliability of his evidence was also affected by the fact that he he had given subtly different versions of events at different times.

Facts

16. For many years, the respondent has been responsible, amongst other things, for administering tax credits. For this purpose the respondent has a number of office buildings, one of which is Graeme House in Liverpool. The respondent occupies Floors 3 to 6 of the building, where about 320 of its employees work. The Graeme House operation is overseen by a Grade 7 Manager, whose office is based on the 5th floor. On each floor there is a group of about 100 employees, overseen by a Group Manager, or “Floor Manager”, of Higher Officer grade. Each group is divided into teams of about 10 employees, each of whom reported to a Team Leader at Officer grade, who was sometimes known as a “Front Line Manager”.

17. The claimant began her career as a civil servant on 10 October 1993. She was employed by the respondent from 17 May 1999 until 25 January 2018 as an Administrative Officer, based at Graeme House.

18. The claimant completed her training at the same time as Mrs Jacki McKinnell. For many years, they followed separate career paths. Events brought them back together from April 2016.

19. At all times with which we are concerned, the claimant’s role was essentially to investigate tax credit claims. She has a long-standing disability with the mental impairments of depression and anxiety disorder. Her anxiety disorder was diagnosed in 2002.

20. The claimant has a long-standing partner, Mr Boothroyd, whom she describes as her “significant other”. Mr Boothroyd was also a long-standing employee of the respondent.

21. Whilst her claim relates to events beginning in mid-2015, it is necessary to describe briefly some of the history of her employment with the respondent:

    21.1. The quality of the claimant’s work was never in doubt. In successive appraisals the claimant’s performance rating was always “Achieved”.

    21.2. In 2009 the claimant complained about 4 managers at different levels of seniority. Part of the dispute related to the claimant having been moved three times in the course of the same week. In relation to that part of the dispute, a subsequent grievance investigation found that the claimant had not been appropriately managed. Details of her grievance were kept on her personal sub-file in a confidential sealed envelope, but were deliberately preserved. Otherwise they would have been weeded out, as information more than 12 months old was generally not retained.

    21.3. The claimant had a further dispute with managers in 2012.

21.4. For a number of years the respondent made adjustments to working practices to accommodate her mental health. These were set out in a document called a Workplace Adjustments Passport ("WAP"). Whilst there may be some uncertainty over whether the document had been formally approved, it was treated by successive managers a reference point for what adjustments should be made.

21.5. In about September 2012, the claimant joined Team 6 in Group 3. From that time until June 2016 her Team Leader was Mr Barry Blackmore.

21.6. In 2014 the claimant complained about the behaviour of a Mr X. Her line manager, Mr Blackmore, believed that Mr X had been "clearly in the wrong". Management action was taken by Mrs Anne Muchmore, who at that time was serving in a temporary promotion to Higher Officer. She was not at that time responsible for the claimant's group. In order to manage the situation Mrs Muchmore had to familiarise herself with the claimant's health issues. A solution was found which included Mr X being moved to a different team.

21.7. In December 2014, Mr Gavin Peters joined Team 6. Initially there were no problems in his working relationship with the claimant.

22. Part of the adjustments complaint (Adjustment 11.1.2) relates to an alleged failure to hold Keeping In Touch (KIT) meetings from mid-2015 onwards at times when the claimant was attending work but feeling vulnerable. We heard no evidence about the frequency or otherwise of KIT meetings between the claimant and Mr Blackmore prior to April 2016. Nor did we hear about any particular times prior to April 2016 when the claimant was feeling vulnerable, or any disadvantage she suffered as a result of Mr Blackmore not being on hand to deal with problems at the moment they arose.

23. In October 2015 Mrs Muchmore became the Higher Officer responsible for Group 3. At that time the group comprised about 120 members of staff. She had a general handover, which did not involved discussing specific Administrative Officer staff members in detail. At that time there were no particular management issues concerning the claimant, who believed that the adjustments in her WAP were being met.

24. As a tool for monitoring workload, Mr Blackmore kept a spreadsheet which kept track of the work distributed to each member of the team. To make an otherwise dull spreadsheet more interesting, some team members agreed to have photographs of well-known personalities inserted next to their names. For example, Mr Peters, who is bald, was represented by a photograph of the comedian, Lee Hurst, who bore some resemblance to him. Next to Mr I's name was a well known sitcom character. His only similarity with Mr I was the name of the actor. Mrs Thomas was given a photograph of a female character (played by a man) in a children's television programme. They looked similar but had little else in common. At some point, the claimant asked for a photograph of her own. Shortly afterwards, in about March or April 2016, three different photographs appeared next to the claimant's name at different times. One was a character from the American television comedy show, *Big Bang Theory.* The other two were Medusa, the Gorgon of Ancient Greek Mythology, and the actor, Kathy Bates, in her role in the film, *Misery.* There was a well-known connection between the claimant and Medusa arising from a comment that the claimant

made on arrival at work one day. It had been raining and the claimant said that her hair looked like the "snakes of Medusa". Before us there was some debate about whether the claimant looked like Kathy Bates. It is hard for us to draw any conclusion.

25. The claimant did not raise any comment about these photographs in her subsequent ACC1 form and did not complain about it in writing until her grievance. We have not seen the photographs themselves or the metadata that might show when they inserted and who inserted them. The respondent's explanation, which is uncontradicted, is that this data is no longer available because it was erased after a period of time. Owing to the passage of time it has been difficult to resolve the clashes of oral evidence.

26. On 8 April 2016 the claimant was in the shared Team 6 work area, mentoring a colleague, Colleague TH. She showed Colleague TH a tax credit application which included some apparent inconsistencies relating to which benefits the customer was claiming. She pointed out those inconsistencies, but there is a dispute about precisely what she said. The respondent's case is that she said, "So you can tell [the customer] is lying." The claimant's evidence to us is that she said, "the customer appears to be lying". At any rate, Mr Peters overheard the conversation. He thought that the claimant was overstepping her responsibility as an investigator: it was not her role to decide whether a benefit applicant was lying or not. Rather than ask the claimant for a quiet word, or speak to Mr Blackmore, he chose to challenge the claimant there and then in front of the mentee. He said to the claimant, "You're being judgmental". The claimant noticed that, in saying this word, Mr Peters put the stress on the second syllable, "-ment-". (Importantly, it is alleged by the claimant that he also separated out the words, "judge" and "mental". We return to this dispute later.) The claimant did not say anything immediately to suggest that she had taken offence, although she did maintain that she had not made any decision that the customer had been lying. At some later time, the claimant told Mr Blackmore that she would rather not act as a mentor. It was agreed that if Colleague TH raised any further queries, those queries should be referred to a Task Support Officer (TSO) on the team.

27. On 20 April 2016, the claimant raised a concern with colleagues on her team and with Mr Blackmore. The issue related to leaflets that were intended to accompany a particular outgoing letter. We have no doubt that the claimant's concerns were genuine and we have no reason to think that they were unreasonable. She was anxious and pacing about the shared work area. Mr Peters was present on the same bank of desks and listened into the conversation. He was about to go on holiday to Venice and was finding it hard to take his work seriously. As the claimant was voicing her opinion about the issue, Mr Peters leaned back in his chair and said to the claimant words along the lines of "I don't care, I'm going on holiday, so don't go pushing your worries onto me". The evidence is confused as to whether Mr Peters laughed or not as he said these words, but we are sure that he meant his comment to be light-hearted. He was trying to defuse the tension in the room and at the same time boast about his own carefree attitude. He did not mean to violate the claimant's dignity or create an unpleasant environment for her. Unfortunately, the claimant did not take it that way. She immediately stood up. She said, in a raised voice, "I'm not putting up with this," and walked over to where Mr Blackmore was sitting. At this point she

was shaking and red-faced. Owing to her hypertension, she often had some reddening of her face, but she was observed to be more red-faced than usual.

28. This exchange took place in front of the entire team. They were unperturbed by Mr Peters' comment, but shocked by the claimant's reaction to it.

29. The claimant went to the kitchen for a short break. When she returned, she was still visibly upset. She stood close Mr Blackmore, who was still sitting at his desk, and told him that she was going to speak to her trade union. As she said these words she turned round and walked away. Those present in the room described her manner as "storming off". As the claimant left, Mr Blackmore replied by dismissively saying, "Whatever". Soon afterwards, Mr Blackmore acknowledged that his reply had not been ideal.

30. Later the same day, the claimant completed an online accident report form known as "ACC1". In the field headed, "Details of what happened", the claimant stated, amongst other things:

> "I had expressed concerns recently to my line manager about inappropriate behaviour/comments from a member of my team, Gavin Peters, my team concerning my condition, as I perceived his comments as misogynistic, and disparaging about personal work and technical abilities-this occurred whilst I was mentoring new colleague on the task. I found this condescending and upsetting and unwarranted."

31. The printed version of the ACC1 that appears in our bundle does not contain the full text that the claimant entered into this field. It is likely, bearing in mind the timing of this document, that the text went on to describe the comment that Mr Peters had only just made that day. What is clear, however, is that in the passage we have quoted the claimant was describing Mr Peters' "judgemental" remark that he had made 12 days previously. The thing that the claimant appeared to have found most objectionable about the remark was that Mr Peters was disparaging her work. The claimant did not state that Mr Peters had deliberately made an offensive comment about her mental health by separating the words "judge" and "mental".

32. On 28 April 2016 Mr Blackmore met informally with the claimant. She said that she was still upset and finding it hard to perform task duties. Mr Blackmore confirmed that he was content for the claimant to produce less output provided it was to the required standard. They discussed the "judgmental" comment. Again, the thrust of the claimant's criticism was that Mr Peters had undermined her in front of a new colleague and not that he had made any offensive comment about her mental health. The claimant then mentioned that she had approached the organisation Remploy for assistance. She asked Mr Blackmore to interact with Remploy, who would suggest solutions for the claimant, Mr Blackmore and the department as a whole. They agreed that the claimant could have time off work to attend individual meetings with Remploy. The claimant said that if she could not resolve matters informally she might raise a grievance or even bring a claim to a tribunal.

33. A thread that runs through much of this claim is a dispute about whether the respondent should have allowed Remploy, or some other external provider funded by Access to Work, to provide on-site training for managers or members of the team about the claimant's mental health condition, with a view to improving

their behaviour and their management of the claimant. For convenience we refer to such training as "outsourced awareness training". At no point in this meeting did the claimant say that Remploy had offered to provide or fund outsourced awareness training.

34. We pause here to consider harassment allegation 10.1.2. It requires us to make a finding of fact about the precise manner in which Mr Peters pronounced the word "judgemental". If pushed to make a finding, we would tend towards the view that there was nothing about Mr Peters pronunciation of the word that could reasonably have been understood to relate to the claimant's mental health. Part of the claimant's belief to the contrary stems from the fact that Mr Peters placed stress on the second syllable ("-ment-"), but this emphasis is perfectly consistent with the ordinary pronunciation of the word. We also think that the claimant would have made a specific reference in her ACC1 to Mr Peters separating "judge" from "mental" had he done so. We do not, however, commit ourselves to a positive finding of fact either way. In our view, the real problem is that memories of subtle differences in pronunciation are likely to become distorted over time. The lack of contemporaneous complaint and the passage of the years has made resolution of this factual dispute very difficult.

35. Mr Blackmore discussed the claimant's allegations with Mr Peters. They agreed that Mr Peters should be careful in his comments around the claimant.

36. By May 2016, Mrs McKinnell had reached Grade 7 through a series of promotions. She returned to Graeme House as the new Grade 7 manager and took on responsibility for managing the 320 or so employees. She received a handover from the outgoing manager. Unsurprisingly the handover did not cover the circumstances of individual administrative officers. The claimant was not mentioned.

37. At around this time Mr Blackmore rearranged the seating plan for the team. The claimant raised a concern about the new seating plan at a meeting with Mr Blackmore and Mrs Muchmore on 6 May 2016. Her anxiety stemmed from the proposal that a new team member would be sitting next to her. The claimant might be expected to support her colleague. Mr Blackmore agreed to swap the desks around to avoid this happening, and to enable the claimant to sit next to him so he could support her. Mrs Muchmore advised Mr Blackmore to seek advice from Civil Service Human Resources (CSHR) about how to deal with Remploy.

38. On 9 May 2016 Mr Blackmore met again with the claimant to discuss revisions to her WAP. The proposed adjustments were agreed in principle, subject to the claimant's final agreement after consulting with her trade union. The adjustments included:

    38.1. "New manager to have full handover from existing manager"

    38.2. "… to have if necessary weekly KITs with manager"

    38.3. "Buddy Manager in place – Ann Everett"

    38.4. During periods where the claimant was affected by her mental health condition, "manager to allow... opportunity to arrange [trade union]/companion for informal chats"

38.5. "DRSA [Disability-related sickness absence] to be considered in relation to absences due to condition"

38.6. "… to be seated by the window is natural light helps manage condition"

38.7. "specialist chair, footrest, fan"

38.8. Hotdesking not applicable [due] to condition likely to be covered by [EqA].

39. The Buddy Manager, Miss Everett, whom the WAP named, was a Front Line Manager (Team Leader). Like the claimant, Miss Everett suffered from anxiety and depression. She was chosen because the claimant felt comfortable to speak to Miss Everett about issues relating to those conditions.

40. Remploy helped the claimant to obtain assistance from Access to Work. On 24 May 2016 the claimant and a support worker from Access to Work's Mental Health Support Service signed a written support plan. The document recorded that the claimant struggled with her short-term and long-term memory. It concluded with an outline of the agreed support. There was nothing in the outline to suggest that Access to Work would fund or provide outsourced awareness training.

41. On 16 May 2016 Mr Blackmore e-mailed CSHR for advice. Shortly afterwards, he commenced a short period of paternity leave. By that time he had not spoken to anyone at Remploy and had not received any offer of outsourced awareness training.

42. Beside the meetings on 28 April, 6 May and 9 May 2016, we did not hear about any specific KIT meeting between the claimant and Mr Blackmore. The claimant accepted in general terms that Mr Blackmore had lengthy meetings with her.

43. During Mr Blackmore's absence, Mrs Muchmore continued to meet with the claimant. She suggested to the claimant the possibility of moving to a different team managed by Miss Natalie Hayes. Mrs Muchmore was concerned that Mr Blackmore was struggling to manage the claimant and that the responsibility for doing so was affecting his welfare. The claimant declined to move teams. On hearing the claimant's response, Mrs Muchmore decided that, instead of moving the claimant, she would move the managers. Mr Blackmore was moved to a new team and the line management of Team 6 was taken over by Miss Hayes on 23 June 2016.

44. On 1 June 2016 Remploy wrote to the claimant with an Access to Work support plan. It did not provide for outsourced awareness training. It left open the possibility of a review and further support after 6 months.

45. By mid-June 2016, Mr Blackmore had returned from paternity leave. He had a handover meeting with Miss Hayes in preparation for the line management switchover the following week. They discussed the claimant's circumstances in detail. In particular Mr Blackmore told her about the new WAP, the ACC1 form, the claimant's complaint about Mr Peters and the engagement with Remploy. He passed Miss Hayes the claimant's sub-file, which still contained the sealed envelope with its confidential information about the claimant's previous disputes with management. Miss Hayes read the sub-file, but did not open the envelope. There was no discussion of the contents, as Mr Blackmore had not opened the envelope either.

46. Miss Hayes' first few weeks in charge of Team 6 were relatively uneventful. She had regular KIT meetings with the claimant. She made contact with Mr Barry McGrath of Remploy and discuss potential support. Mr McGrath did not mention outsourced awareness training as an option. Nor did the claimant. The claimant did not experience any particular problems in her interaction with colleagues. She did, however, continue to mention her ongoing anxiety about Mr Peters' behaviour in the past. On 12 July 2016 Miss Hayes suggested that the claimant and Mr Peters might wish to consider mediation facilitated by CSHR. The claimant refused mediation and informed Miss Hayes of her decision at an informal meeting the following day. Her explanation now is that any mediator supplied by CSHR could not be independent. If that was the claimant's thinking at the time, it was unreasonable. The size of the respondent's organisation and its CSHR function meant that if the mediator was not locally-based, there was only a small chance that the mediator would have any past or future dealings with the claimant. It was not clear where, geographically, the CSHR mediator would come from. The claimant did not try to find out.

47. On 29 July 2016 the claimant made some notes at home about things that had happened at work which she thought were affecting her health. These included a note that Mr Peters had mentioned that somebody should have been in a "straight jacket" and that "there was someone else more suitable candidate". This incident forms allegation 10.1.3 of harassment. It has not been easy for us to find out what actually happened or when it took place. Without being able to rely significantly on Mr I's account, we are left essentially with the claimant's word against that of Mr Peters. The delay in bringing the claim and the delay in raising a formal grievance have no doubt affected both witnesses' ability to recall accurately. There is an additional reason to be cautious. The claimant has given two different versions of when the incident happened. When interviewed as part of her grievance, the claimant said that it happened moments before another comment about black people (see below). She told the grievance investigators that she had reported that comment after thinking about it over the weekend. But that cannot be right. As is clear from the next paragraph, the claimant did not report the comment about black people until 9 August 2016, yet the claimant's note was dated 29 July 2016. Much more than a weekend had elapsed between the alleged comment and the claimant reporting it.

48. By 9 August 2016, the claimant was doubtful about whether she was well enough to work. Nonetheless she went into the office. Her main reason was to attend a workshop on bullying and harassment. By this time the claimant had sought advice from ACAS who had advised her to show her 29 July 2016 note to her manager. On arrival at work she tried to speak Mrs McKevitt, but was told that she was in a meeting. She spoke to Ms Sue Twigg, the designated Mental Health Advocate. She then approached Miss Hayes for a 5-minute informal "chat". She did not try to take a trade union representative into the meeting with her and did not ask for Miss Hayes to find one. She was noticeably upset. In the meeting the claimant told Miss Hayes that her health was suffering. She showed her the handwritten note she had made on 29 July. In addition to her description of the "straightjacket" comment, the note stated,

> "Making sarcastic comments [Mr Peters, Mr I, and Mrs Thomas] about black people whilst colleague on team, who would have been offended but had probably not heard them due to having a missing hearing aid"

49. The claimant did not add any more detail. In this respect we prefer Miss Hayes' evidence over that of the claimant, which appeared to evolve during the course of cross-examination.

50. Miss Hayes sought the claimant's permission to show the note to Mrs Muchmore and the claimant agreed.

51. Once the meeting was over, the claimant went onto the team floor to collect some of her belongings to take into the bullying workshop. Whilst she was there, Colleague TH asked the claimant for some help with a task. The reader will remember that the claimant and Mr Blackmore had agreed that the claimant would no longer be expected to mentor Colleague TH and that she should be given support from a TSO. It is common ground that the claimant replied, "I'm not a TSO" and walked away abruptly. Some accounts also mention that the claimant added, "I'm too busy to help you". Although the claimant does not accept that she used those words, they were clearly implied even without saying them out loud. The claimant's behaviour did not offend Colleague TH (who later said, "I've heard worse"), but it did cause a disturbance as it was witnessed by the whole team. The claimant then went into the workshop, where she remained until about lunchtime. Meanwhile, Mr I helped Colleague TH with the task. He then approached Miss Hayes and told her what had happened with Colleague TH.

52. After the workshop, the claimant was about to leave the building for her lunch break when Mrs Muchmore suggested that they could have a meeting to discuss her note. The claimant agreed. By this time the claimant had made some effort to find a trade union representative and had been told that most of them were in a meeting. She did not ask for the meeting to be rearranged, and did not ask Mrs Muchmore to find her a trade union representative. At the start of the meeting, everyone involved thought that the meeting was going to be informal. As the meeting progressed, the claimant noticed that Miss Hayes was taking notes and started to think that the meeting was more formal than she had first imagined. She may at that point have begun to think that it would be preferable to have a union representative to accompany her. Even at that point she did not ask for union representation.

53. There is a dispute over what happened at the start of the meeting. Contrary to allegations 8.1.4 and 10.1.5, we find that Mrs Muchmore did not accuse the claimant of being aggressive. The conversation started with a discussion of the claimant's note, as Mrs Muchmore had told her it would. Again, the claimant did not provide any detail beyond what she had written. The claimant stated a number of times that she wanted management to support her. Miss Hayes explained her contact with Remploy and reminded the claimant of the offer of a team move and mediation. Mrs Muchmore asked the claimant what she wanted them to do to support her. The only suggestion that the claimant made was that that Miss Hayes should meet with her every day to ask how she was. On this point we prefer the contemporaneous note over the claimant's recollection, which was that she only asked for weekly meetings. Miss Hayes and Mrs Muchmore said that daily meetings could not be managed. At this point the claimant stood up and said that she was leaving. Miss Hayes and Mrs Muchmore persuaded her to stay and try to talk the matter through.

54. Shortly after this part of the meeting, Miss Hayes brought up the recent incident with Colleague TH. She did not say that the claimant had behaved aggressively, but she did say that the claimant had "snapped at" Colleague TH and spoken rudely to her. The claimant was affronted and told Miss Hayes that she was deflecting things on to the claimant. Miss Hayes reminded the claimant that she had recently asked Mr I for help. She asked, rhetorically, how the claimant would have felt if Mr I had responded to her as she had responded to Colleague TH.

55. An ingredient of Allegation 8.1.4 is that Miss Hayes' description of the claimant's behaviour towards Colleague TH was "false". On that question it is hard for us to make a finding either way. The claimant's subjective impression of her own speaking manner was not always reliable. We have not heard from Colleague TH or Mr I. On our findings at paragraph 51, the claimant was certainly unhelpful, but we do not know whether she was snapping or rude.

56. Allegation 8.1.4 also requires us to examine the reason why Miss Hayes brought up the subject of the claimant's behaviour towards Colleague TH. Despite the passage of time we were able to make a positive finding. Miss Hayes had heard Mr I's description of the incident earlier that day and saw no reason to disbelieve it. She thought that she needed to challenge the claimant as her behaviour, as described, would have a disruptive impact on the team. In hindsight it would have been better if she had waited until the meeting had been concluded, Mrs Muchmore had left the room, and the claimant had had some time to calm down. It would also have been preferable for her to have learned Colleague TH's version of the event before broaching the subject with the claimant. But the reason was nothing to do with the claimant's mental health conditions.

57. The meeting with Mrs Muchmore concluded with the claimant leaving the room, saying that she would speak to the "Grade 7". Mrs McKinnell, the Grade 7 manager, happened to be working at a nearby desk on the open-plan floor whilst her office was in use. She saw the claimant leave in a visibly upset state and could tell that the meeting had not gone well. At the claimant's request she agreed to meet with the claimant and Ms Twigg, the mental health advocate. At no point did she require or instruct the claimant to participate in this meeting, either with or without a trade union representative.

58. During the course of a long discussion:

    58.1. Mrs McKinnell did not accuse the claimant of behaving aggressively. She asked the claimant what had upset her during the previous meeting. The claimant described how she had been challenged over the incident involving Colleague TH and then related the actual incident in her own words. (The claimant's version given at the meeting was substantially the same as the version we have found actually happened.) Mrs McKinnell asked the claimant how she would feel if someone had spoken to her in that way.

    58.2. Mrs McKinnell reiterated the offer of a team move or mediation, both of which the claimant again declined. Her reason for not wanting to move was that she had been moved several times in the past and did not want to be seen as a "freak" or a "troublemaker".

    58.3. The conversation moved on to Remploy. The claimant made a suggestion of Remploy providing outsourced awareness training. Mrs McKinnell did not refuse, but did say that she was not aware of such training

having been offered. (Indeed, our finding is that it had not been offered). She added that she would have to make sure that there were no commercial supply implications. Mrs McKinnell knew that training provision had already been contracted out to an organisation called Workplace Wellness.

58.4. Towards the end of the meeting, Mrs McKinnell took the initiative in asking Ms Twigg to find a trade union representative for the claimant. A little while later, as a result of Ms Twigg's efforts, Ms Sue Jameson, a trade union representative, joined the meeting. The claimant and Ms Jameson then had a private discussion following which the claimant decided that it would be best to go home.

59. Mrs McKinnell's proactive efforts in finding trade union assistance for the claimant helped us reach our finding that she did not require the claimant to attend a meeting without a union representative. Her actions were not those of a manager who was seeking to exclude the trade union from the process.

60. The claimant then began a long period of sick leave. She remained off work until 31 March 2017. Initially she submitted a general practitioner fit note stating that she would be unfit to work until 12 September 2016 because of a "mild depressive episode". Her absence was recorded as "sickness absence" under the sickness absence policy then in force. The policy recognised a category of absence called "disability-related sickness absence" or "DRSA" for short. Such absences were not to be taken into account for various attendance-management purposes. Initially at least, Miss Hayes could have treated this absence as DRSA. Section 15 discrimination Allegation (8) requires us to ask why Miss Hayes did not do this. Was it because Miss Hayes thought that the claimant was to blame for her own absence? In our view there are no facts from which we could reach this conclusion.

61. On 10 August 2016, Miss Hayes telephoned the claimant to maintain contact. This was the first in a long series of regular KIT conversations she had with the claimant.

62. In the meantime, somehow, rumours began to spread about the claimant having complained of a racially offensive comment from people on her team. We were unable to make any finding about how this information came to be leaked or who was responsible. It was not put to either Miss Hayes or Mrs Muchmore that they were the source of the rumours.

63. The same day, Mr I approached Miss Hayes. He told her that he had heard rumours that the claimant was accusing him and his team of being racist. Miss Hayes invited Mr Peters into the room. She told them that the claimant was not accusing them of being *racist,* but that the claimant had raised a concern that Mr Peters and Mr I had made comments about black people that the claimant had found offensive. Miss Hayes knew that, by confirming that the claimant had been the one to raise the concern, she was going beyond what she had specifically sought the claimant's permission to disclose.

64. Miss Hayes rang the claimant for a further KIT conversation on 17 August 2016. The claimant said that she was worried about returning to a "hostile environment". Miss Hayes said that she had spoken to Mr McGrath at Remploy. The claimant did not suggest that Remploy provide outsourced awareness

training. The next day, Miss Hayes made a concerted effort to try and find a trade union representative who would make contact with the claimant.

65. Further KIT conversations took place on 23 and 27 August 2016. During the second of these telephone calls, Miss Hayes provided an update on her contact with Remploy. The claimant stated again that she could not return to a hostile environment. Mrs McKinnell suggested on 30 August 2016 that Miss Hayes should speak to Mr Paul Darlington, the claimant's trade union representative and friend.

66. On 7 September 2016 Miss Hayes spoke to Mr McGrath at Remploy. He did not offer outsourced awareness training. Rather, he said that it was now up to the claimant to make an informed choice about how she wished to proceed. Miss Hayes asked whether Mr McGrath could make any suggestions, within the bounds of confidentiality, about how the respondent could support the claimant. Mr McGrath's only suggestion was to provide some literature on mental health. When Miss Hayes received the written material, she read it.

67. By 7 September 2016 there were only a few days to go until the expiry of the claimant's fit note and the claimant had not yet submitted a new one. Mr Peters, Mr I and Mrs Thomas thought that the claimant might be imminently returning to work and were apprehensive. They made a concerted effort to put their feelings on record at what they perceived as a malicious accusation on the claimant's part. Their strength of feeling was based partly on having formed the belief that they were accused of being racist. The word "racist" is highly emotive. It is conceptually distinct from the actual concern that the claimant had raised: it is possible for a person who is not racist (in the commonly-understood sense of the word) to make a comment about race that another person can find offensive. None of these three individuals appears to have given much thought to this distinction. Despite Miss Hayes' reassurance, they took the rumours that they had heard and equated them with being accused of racism. All three e-mailed on 7 September 2017 to complain. Mr I's and Mrs Thomas' emails used the phrase, "formal complaint". Mr I implied that the claimant herself may have been the source of the rumours.

68. Later that day, Mrs McKinnell, Mrs Mutchmore, Miss Hayes and the three individuals all met together to discuss the complaints. Mr I, who had a mental health condition of his own, raised concerns about how the claimant's accusations (as he saw them) were affecting his own health. He did not think that the team could function if the claimant returned. As for the remainder of the meeting, we found it hard to establish exactly what was said. This was partly due to the passage of time.

69. Mrs McKinnell met again with the three team members on 9 September 2017. There are no notes of the meeting. Some of the details of what was discussed have been obscured by the passage of time and by the lack of record-keeping. Nevertheless we accept that, in broad terms, Mr Peters, Mr I and Mrs Thomas told Mrs McKinnell that they were content for the matter to be resolved informally. It would be sufficient, they said, for a manager to inform the claimant of the strength of their feelings and the impact that her accusations were having on them.

70. Miss Hayes sought advice from CSHR. By e-mail on 16 September 2016 she was advised to raise the subject of the three complaints with the claimant. They

also suggested that the claimant could be offered a temporary move to a different group or team.

71. By this time the claimant had been off work for over a month. In line with the respondent's absence management policy, the claimant was invited to a "month one" absence review meeting chaired by Miss Hayes. The claimant attended and was accompanied by Mr Darlington. Also present, in the role of note-taker, was Miss Everett, the Buddy Manager named in the claimant's WAP.

72. Shortly after the meeting began, Miss Hayes offered the claimant the opportunity to have a break or to consult with Mr Darlington at any time. She was seeking to involve Mr Darlington rather than exclude him. Miss Hayes asked the claimant if she could support the claimant's return to work with a phased return and stress reduction plan. She suggested an occupational health referral. Although the claimant was initially reluctant to consult with occupational health, Mr Darlington persuaded her to consent. Miss Hayes also suggested that the claimant contact Workplace Wellness, who provided employee counselling. The claimant replied that she thought that other agencies such as Remploy were better suited to the complexity of the issues.

73. The conversation turned to the concern that the claimant had raised on 9 August 2016 about the racial comment that had offended her. It quickly became clear that Mr Darlington did not know what they were talking about. He was given time for the claimant to bring him up to speed in private. When the meeting resumed, Miss Hayes said that the three team members (Mr Peters, Mr I and Mrs Thomas) had heard that the claimant had accused them of being "racist" and that they were very unhappy. This, of course, was the action that the three individuals had asked for as an informal resolution to their once-formal complaints.

74. What happened next is disputed, but the dispute is largely a matter of impression. Undoubtedly the claimant became distressed and said that she was being harassed. We find that the claimant raised her voice, as she had a tendency to do when she was upset. Miss Everett believed that the claimant was shouting. We were not in the room and cannot say whether we would have described the claimant as shouting had we been there. What we do find is that her voice became noticeably louder to the point where it was uncomfortable for a small group of people sitting in a private office. Miss Everett put her arm around the claimant to comfort her. Mr Darlington said that it was inappropriate for Miss Hayes to bring up this subject at a meeting that had been convened for a different purpose. Miss Hayes tried to continue talking. Mr Darlington then stood up, opened the door and asked for a first-aider. The meeting temporarily broke up whilst someone went to fetch Ms Twigg. By this time, Miss Hayes was also crying. Eventually, once everyone had calmed down, the participants all agreed to resume the meeting.

75. The conversation continued for some time. As advised by CSHR, Miss Hayes suggested a temporary team or group move. Mr Darlington told the claimant that occupational health might also suggest a move of team or group to help support her. The claimant declined. Instead, she said, she wanted a supportive manager who would not "criticise her disability" and a team that worked together. The claimant became upset again. Toward the end of the meeting, Mr Darlington asked Miss Hayes to send him a summary of the possible resolutions that Miss

Hayes had in mind. Either at this meeting or near to this time, Mr Darlington asked if he could participate in case conferences concerning the claimant.

76. Once the meeting was over, Miss Everett set about typing her notes. She did so almost certainly on the same afternoon. As an aide-memoire she used some handwritten notes that she had taken during the meeting itself. Describing the commotion shortly before the break, Miss Everett typed,

> "[The claimant] begun to get increasingly upset and was shouting that she was being harassed."

77. Our task, when considering Allegation 8.1.5 of direct discrimination and Allegation (4) of section 15 discrimination, is to examine the reason why Miss Everett described the claimant as "shouting" in this part of her note. We find that Miss Everett was simply describing the behaviour that she had observed. Her use of the word, "shouting" was not influenced in any way, consciously or subconsciously, by stereotypical notions of mental health. She understood what it was like to suffer from anxiety and depression. There is no evidence to suggest that she harboured any lazy generalised view that anxiety or depressive conditions provoke shouting. Miss Everett believed that the claimant was shouting because she had raised her voice in a way that was uncomfortable for those around her.

78. Allegation (4) of section 15 discrimination also raises the question of whether the claimant's raised voice during the meeting arose in consequence of her disability. There is no medical evidence specifically addressing this issue, but we think it is probable that her mental health did contribute to her behaviour. The claimant was absent from work due to depression. Her manner was of a similar nature, although less extreme, to the manner she displayed on 6 April 2017, just before she was admitted to a psychiatric ward.

79. As promised, Miss Hayes e-mailed Mr Darlington after the meeting with a list of possible ways to resolve the situation. These were:

    79.1. Mediation;

    79.2. A "temporary" move,

    79.3. An option to move to a different group with the optimum solution being a move to Group 4 (but other kinds of move were also suggested); or

    79.4. For the claimant to raise a formal grievance.

80. This was the first time that anyone, be it claimant, union or management, had referred in writing to the possibility of a formal grievance. The initiative was taken by Miss Hayes.

81. After the meeting, and during October and November 2016, the claimant and Miss Hayes exchanged regular instant messages. The thread shows that Miss Hayes often tried to telephone the claimant as well. Some of these calls resulted in effective conversations, such as a long KIT call on 30 September 2016.

82. During the claimant's sickness absence, the respondent was in a process of updating its sickness absence policies. It is sufficient for our purposes to note that there was an old policy and a new policy. Under the transitional provisions, continued sickness absences after 26 September 2016 were to be governed by

the new policy. The essential differences between the two policies were, so far as they are relevant:

82.1. Under the new policy, DRSA was abolished. Absences for ill-health caused by disability were counted as sickness absence, but in the event of such an absence, the new policy provided for trigger points for management action to be relaxed.

82.2. The old policy made provision for a "case conference" to be held once an employee had been absent for two months. There was no such provision in the new policy.

83. We were taken to written management guidance (HR27015) on case conferencing. When read as a whole, it is clear that the guidance envisaged that a case conference would be multi-disciplinary in nature. It involved seeking advice from sources outside the line management chain, such as occupational health or human resources. The final sentence of the guidance stated that the job-holder would not be involved in the meeting, but should be informed of the outcome.

84. We are now in a position to consider Allegation (8) of section 15 discrimination, so far as it concerns the period after 26 September 2016. We must look for the reason why the claimant's absence was categorised as sickness absence, as opposed to DRSA. It was not that Miss Hayes thought that the claimant was to blame, but because she had no other choice under the new policy.

85. On 5 October 2016, Miss Hayes, Mrs Muchmore and Mrs McKinnell met to discuss ways to support the claimant's return to work. At this meeting they decided that, even though the claimant was resistant to moving from her team, she should be moved from Group 3 and return to work in Group 4. The ultimate authority to make this decision rested with Mrs McKinnell, but the actual decision was a joint one. As they saw it, the claimant would not be able to return to her existing team. She was describing the environment as "hostile", complaining that members of her team were harassing her, and implying that the team leader, Miss Hayes, was unsupportive. The claimant had rejected the alternatives of raising a formal grievance or entering into mediation. CSHR had advised exploring a move. In the three managers' opinion, Group 4 would be the best group for her to join, because it would be a newly-formed group. The claimant would be just one new face amongst many, so her colleagues would be less likely to question why the claimant had joined their group. The claimant would therefore have less reason to fear being seen as a "troublemaker". Mrs Muchmore suggested that the claimant should be informed of their decision before she went to see her GP, so she could discuss the implications before obtaining a new fit note.

86. The three managers considered, as an alternative to moving the claimant, that they might move Mr Peters, Mr I and Mrs Thomas. In their view, this alternative was not practicable. If these three individuals were to move to other teams, three colleagues would have to be 86ed out to make way for them. They were worried that this would disrupt the functioning of other teams.

87. Mr Darlington did not ask to be invited to this meeting. Nor did the three managers think to invite him. These facts bring us to Allegation 8.1.3 of direct discrimination and Allegation (2) of section 15 discrimination. Although nobody

refused Mr Darlington's participation in the meeting (he did not ask), it may be necessary for us to look at the reason for the *omission* to invite him. Was it because the claimant had a mental health disability? Was it because the three managers feared that Mr Darlington would complain that the proposed move was discriminatory? We were able to make a positive finding that their thinking was not at all influenced by either of these considerations, whether consciously or subconsciously. They did not think that Mr Darlington wanted to join in. It was not a "case conference", either within the meaning of HR27015 or the new sickness absence policy. It was a discussion amongst the claimant's line management chain in what they thought was a safe space. Even if it ought properly to have been considered a case conference, the guidance made clear that the affected employee was not expected to participate. What is more, they had no reason to think that, if invited to the meeting, Mr Darlington would complain that a team move would be discriminatory. His observation at the 20 September 2016 meeting was that this was a measure that occupational health might positively recommend. Mrs McKinnell and Miss Hayes in particular were keen to reach out to Mr Darlington at every stage of the process and had no wish to exclude him.

88. We are also in a position to make a finding for the purposes of the proposed Victimisation Allegation (1). We are satisfied that Mrs McKinnell, Mrs Muchmore and Miss Hayes' motivation, when deciding upon the move to Group 4, was entirely free from conscious or subconscious thoughts about the claimant having made an allegation of harassment related to race. The claimant's concerns about the comment made by Mr Peters, Mr I and Mrs Thomas were part of the *history*: had she not raised the concern in the first place, the three individuals might not themselves have complained and the claimant might not have been as upset at the meeting on 20 September 2016. But that is not the same as saying that it was part of the *reason* in the three managers' minds when they made their decision. Their reasoning is as we have described it above.

89. Miss Hayes informed the claimant on 5 October 2016 of the decision to move her to Group 4. Afterwards, Miss Hayes e-mailed Mr Darlington and asked him to speak to the claimant about it. The claimant discussed the decision with her GP and, on 6 October 2016, obtained a fit note stating that she would be unfit for another month. The following day, Mr Darlington spoke to Mrs McKinnell and expressed the view that a move to Group 4 would be best for the claimant. He was anxious for the claimant to return to work if possible.

90. By 12 October 2016 (possibly before), Miss Hayes had submitted a referral to the respondent's occupational health provider, OH Assist. Because of the complexity of the situation, Miss Hayes requested an enhanced service called OH Plus. Managers making an OH Plus referral could expect to speak personally to the occupational health adviser and brief them ahead of the consultation with the affected employee.

91. The claimant was unhappy about being moved. On 17 October 2016 she wrote a long letter to Mrs McKinnell. In her letter she complained that the move to Group 4 would be "detrimental and likely to cause further injury". She reiterated her request for outsourced awareness training. She also raised the concern that there were documents relating to her condition that were missing from her personal sub-file. Mrs McKinnell replied on 19 October 2016 explaining the rationale for the move. She found the confidential envelope in the sub-file and

sought the claimant's consent to send the contents of the envelope to Mr Darlington.

92. On 19 October 2016, Miss Hayes spoke to Mr McGrath of Remploy. By this time, the initial 6-month period of assistance was drawing to an end. Miss Hayes made a typed note shortly after the conversation. The claimant challenged Miss Hayes' account, saying that documents she had obtained from Remploy made no mention of certain comments that Miss Hayes attributed to Mr McGrath. We were not shown those documents, nor any statement from Mr McGrath, and Mr McGrath was not called as a witness. We find that the conversation happened as Miss Hayes noted it. Mr McGrath told Miss Hayes that the respondent appeared to be doing everything it could as an employer and that the 6-month support period was unlikely to be extended because the claimant was not willing to compromise. He suggested asking the claimant to reconsider mediation and to try the redeployment to another group, subject to a review after 3 months. He did not mention outsourced awareness training.

93. A further review meeting took place on 21 October 2016 to discuss the claimant's absence. There was another discussion of outsourced awareness training, with Miss Hayes saying that Remploy had not offered to provide such a service. The claimant expressed dissatisfaction with the minutes of the 20 September 2016 meeting and was invited to submit proposed amendments. The claimant did not propose any amendments for a further two months. Following the meeting, Miss Hayes decided to continue supporting the claimant's absence for the time being.

94. On 25 October 2016, the claimant raised a formal grievance. Her letter ran to 19 pages of single-spaced type. It alleged various forms of disability discrimination and harassment arising out of the events we have described. One of the many allegations in the grievance was the inclusion of the Medusa and Kathy Bates photographs on the spreadsheet.

95. On 17 November 2016, Miss Hayes telephoned the Reasonable Adjustments Support Team (RAST), which was a subdivision of CSHR. The telephone call was described by Miss Hayes in her oral evidence as a "case conference". Mr Darlington was not invited to participate in the telephone call. By that time, he had asked to be involved in case conferences. The reason for not inviting him was nothing to do with the fact that the claimant had a mental health disability. Contrary to Allegation (3) of section 15 discrimination, we also find that Miss Hayes' omission to invite Mr Darlington was nothing to do with any fear (conscious or subconscious) on her part that Mr Darlington would complain of discrimination. It may be that, in attaching the "case conference" label to this conversation, Miss Hayes was using loose words. What was really happening, as the chain of e-mails on that day shows, was that Miss Hayes was seeking human resources advice. She had no reason to exclude Mr Darlington from the process of identifying reasonable adjustments that could help the claimant return to work. Up to that point, Mr Darlington had been relatively supportive of Miss Hayes' efforts. He had acknowledged that a move was in the claimant's interests and had been a valuable participant at the 20 September 2016 meeting. Seeking to shut out Mr Darlington would also be inconsistent with Miss Hayes' continuation of constructive dialogue with him the following week. On 23 November 2016, Miss Hayes volunteered to make arrangements to postpone the next monthly absence review meeting for Mr Darlington's convenience.

96. The same day as Miss Hayes spoke to RAST, the claimant attended a four-hour grievance meeting with Ms Wendy Porter and Ms Lorna Ralph, the grievance investigators. It was at this meeting that the claimant gave the timeline of comments that she had heard that appeared to us to contradict her own notes (see paragraph 47). There was a long discussion of many of the events that had happened since April 2016, and some of the background in 2009 and 2012. The claimant mentioned at this meeting that she could be "over-sensitive".

97. On 23 November 2016 the claimant attended a consultation meeting with Ms HF, one of OH Assist's occupational health advisers. Ms HF wrote her report the same day. Despite the referral having been under the OH Plus service, Ms HF did not discuss the case with Miss Hayes before writing her report. Consequently, Ms HF's only source of information was the written referral and what the claimant told her during the consultation. The report recommended, as an adjustment:

> "As suggested on grievance statement the mental health awareness training to team and management would be beneficial.
>
> To remain on current team (Group 3, Team 6)… where she is comfortable at work. The position on the floor is supportive towards her needs."

98. Ms HF added:

> "It is important for her mental well being that she is not moved in isolation as this would [increase] her symptoms".

99. Equipped with the occupational health report, the claimant returned to her GP and obtained a further fit note dated 3 November 2016. This time, the note stated that the claimant would be fit to return to work provided adjustments were made "as per occupational health advice to remain in current group (not in isolation)" and "reasonable adjustment passport to be applied".

100. When Miss Hayes saw the occupational health report she was unimpressed with the service that OH Assist had provided. She formally complained to OH Assist, who subsequently apologised, and the matter was escalated to Mrs McKinnell with a view to Ms HF reconsidering her report. In the meantime, the claimant's third monthly attendance review meeting took place on 30 November 2016. As with the previous two meetings it was minuted by Miss Everett. Unlike the first and fourth meetings, there is no specific complaint about the minutes of this meeting. The claimant handed Miss Hayes her latest fit note. There was a discussion about the implications of the advice that the claimant not be moved "in isolation". Miss Hayes asked whether the claimant could name any of her colleagues who she would like to move with her. The claimant did not name anyone, but instead stated that she did not want to move group at all. She became very agitated and Mr Darlington attempted to calm her down. Eventually the claimant agreed that Mr Darlington could speak on her behalf. He said that the claimant might be prepared to move team within Group 3, but did not want to move to a different group on a different floor. Following the meeting, Miss Hayes decided to continue supporting the claimant's absence, largely because of the unresolved grievance.

101. On 13 January 2017, Miss Hayes and Ms HF had the discussion that was supposed to have been part of the OH Plus referral. In the light of their discussion Ms HF produced a supplemental report the same day. It set out a list

of adjustments that she thought would be supportive. The list largely replicated the claimant's WAP, but left out the adjustment relating to hot-desking. Although Ms HF did not expressly retract her recommendation to keep the claimant in her existing team, she strongly implied that she had done so, by adding:

> "I now understand that there are other inter-professional issues on this floor relating to [racist] comments etc and that a move to another team may need to be considered by management. This is not within the OH remit."

102. Ms HF also qualified her opinion about whether any move should be in isolation, by stating:

> "I now understand that there are complex inter-professional relationships affected in this workplace and management must decide what is best for their own teams to allow for service delivery/workflow."

103. On 20 January 2017, Ms Porter and Ms Ralph submitted their grievance investigation report together with a large volume of supporting evidence. The report analysed in detail the evidence they had gathered in relation to the Medusa and Kathy Bates photographs. So far as this allegation was concerned, the report stated:

> "From the evidence and statements given, I am not able to identify who put the pictures on the spreadsheet. However all subjects have confirmed that pictures were put in place to improve morale and with full knowledge and consent of those concerned, including [the claimant]. Where it was deemed that this would not be taken as a joke by colleagues, these colleagues were not included."

104. Amongst the supporting evidence was records of interviews with Mr Blackmore, Mr Peters, Mr I and Mrs Thomas. The gist of those interviews was consistent with the investigators' observation.

105. In respect of this allegation and all the other allegations, the investigators' opinion was that there was insufficient evidence to substantiate the grievance.

106. The supporting material included an interview with Miss Hayes on 7 December 2016. In that interview, Miss Hayes had described two incidents in which the claimant's behaviour had been "unacceptable". She had added, "she has behaved like this for ten or twenty years and she has been told she is OK."

107. The grievance investigation report was then passed to a Decision-Maker.

108. Meanwhile the claimant had reached the fourth month of her sickness absence. A monthly review meeting took place on 31 January 2017. As usual, the claimant was accompanied by Mr Darlington and Miss Hayes was accompanied by Miss Everett taking notes. The meeting did not get off to a good start. Miss Hayes asked the claimant how she was. Although there is a dispute about precisely what the claimant replied (either "I don't think that is any of your business" or "my welfare does not appear to be of any concern to you"), it is not necessary to resolve the dispute: her reply was clearly hostile. Miss Everett believed that she said it in an aggressive manner and recorded her opinion in the meeting minutes. The claimant did not think she was behaving aggressively.

109. The meeting addressed a number of topics related to the claimant's ability to return to work. As usual, the sticking point appeared to be a lack of agreement

about the group to which the claimant should return. The claimant said that she would not be comfortable returning to Group 3 (her existing group), but also felt that her managers were discriminating against her by requiring her to move to Group 4. Mr Darlington said that he was taking legal advice. There was a discussion about what should happen whilst the claimant's grievance outcome was still pending. The claimant became upset. Both Mr Darlington and Miss Everett tried to calm the claimant down. It is not entirely clear what Miss Everett said, but everybody agrees that the claimant replied, "Why are you speaking anyway, you are only a minute taker". Mr Darlington brought the meeting to a conclusion by saying that the claimant would be prepared to move to a different team within Group 3.

110. We must now return to Allegation 8.1.5 (direct discrimination) and (4) (section 15 discrimination). Why did Miss Everett write in her note that the claimant's opening remark to Miss Hayes had been aggressive? As with the 20 September 2016 meeting, we positively find that Miss Everett's notes were motivated solely by her wish to record accurately the behaviour that she had observed. No stereotypical assumptions about mental health crept into her thoughts. The section 15 discrimination allegation also raises a further factual question, namely whether or not the claimant's remark to Miss Hayes arose in consequence of her disability. We have not seen any medical evidence on that point, but we think it likely that her depression and anxiety did materially impair the claimant's ability to measure her response to Miss Hayes' question and her ability to comprehend that Miss Hayes might actually have been genuinely interested in her welfare. The claimant had been off work for 4 months with depression and anxiety and had displayed signs of distress and agitation at various times during the meeting. Although we do not know for sure, it is probable in our view that she was suffering from the effects of her disability at that time.

111. Following an unavoidable change in personnel, the Decision-Maker responsibility for the claimant's grievance was passed to Ms Anne Holland. A meeting took place between the claimant and Ms Holland on 9 February 2017, following which Ms Holland set about reaching a decision. Her conclusion was set out in an outcome letter dated 1 March 2017. Her decision was that the grievance was not well-founded. In relation to the allegation about the photographs, Ms Holland did take into account, along with all the other circumstances, the observation of the investigators that all team members with photographs thought that the photographs would be taken as a joke. She did not carry out any further investigations before reaching that conclusion.

112. Ms Holland did not place any significant weight on Miss Hayes' comment about the length of time over which the claimant had supposedly behaved unacceptably.

113. This brings us to section 15 discrimination Allegation (10). The claimant's case is that Ms Holland rejected the claimant's grievance, at least in part, because of a failure to investigate Miss Hayes' comment and a failure to investigate the witnesses' accounts of photographs being taken as a joke. It was not entirely clear what further investigation the claimant was saying should have been done. During cross-examination of Ms Holland, the claimant suggested that Ms Holland should have applied the statutory definition of harassment to these facts and, in particular, asked herself whether the claimant would have perceived it as harassment. Assuming that Ms Holland should have undertaken this mental

exercise and failed to do so, we have asked ourselves what was the reason for such a failure. We have also looked at possible reasons why Ms Porter and Ms Ralph did not investigate further the witnesses' evidence about photographs being taken as a joke. The claimant has not identified any reason that arose in consequence of her disability. We could not find one, nor could we find any facts from which we could conclude that there was such a reason.

114. The claimant appealed against the grievance outcome by e-mail dated 3 March 2017.

115. The Month 5 review meeting took place on 21 March 2017. It was attended by the usual people, with the exception of Miss Everett, whom the claimant had asked to stand down as note-taker. The parties rehearsed what by now were familiar arguments about whether the claimant should move from Team 6. The claimant objected to the minutes of the meeting on 31 January 2017. She was invited to submit an amended version, but never did.

116. Miss Hayes tried to telephone the claimant on 23 March 2017, but the claimant asked for all communication to take place via a trade union representative. It is common ground that, by this time, the claimant had also asked not to speak with Mrs Muchmore without a trade union representative present. We were unable to pinpoint exactly when the claimant made this request. Mrs Muchmore understood the request only to apply for the duration of the claimant's sickness absence.

117. At around this time of the meeting, Mrs McKinnell entered into discussions with Mr John Smith, a salaried PCS union official with responsibility for Graeme House, with a view to trying to break the deadlock. Partly as a result of Mr Smith's intervention, Miss Hayes, Mrs Muchmore and Mrs McKinnell agreed, against their better judgment, to allow the claimant to return to work to Group 3 (her existing group). Instead of returning to Team 6, she would transfer to Team 8.

118. At this point it is necessary to describe in a little more detail the location and functioning of Team 8:

118.1. Teams 6 and 8 were both on the same floor, but Teams 8 and 9 were in a smaller open-plan room that was separate from the main floor area housing Team 6.

118.2. The Team 8/9 room was well lit with large glass windows running the length of one side of the room. The windows were fitted with blinds that could be opened and closed. Each team had its own bank of connecting desks.

118.3. At the time of making the decision to keep the claimant in Group 3, all the desks in the room were occupied.

118.4. One workstation on the Team 9 bank of desks was situated next to the window. This was the desk that was later identified as a workstation for the claimant. The suitability, or otherwise, of this desk for the claimant is in dispute. For convenience we refer to it as the "Window Desk".

118.5. The Window Desk was occupied by a Task Support Officer.

118.6. It was positioned somewhere between 2 and 3.5 metres away from the nearest desk on the Team 8 bank of desks. Those two desks were close

enough for a conversation in a normal speaking voice. In order to have a conversation with a person sitting at the far end of the Team 8 desks, a person sitting at the Window Desk would have to get out of their chair. That was equally true of someone sitting at one end of the Team 8 bank of desks.

118.7. All the windows, including the one next to the Window Desk, had manually-operated blinds. There were some filing cabinets between the Window Desk and the nearest window. These filing cabinets were not tall and would not have prevented the blinds being opened and closed.

118.8. During the course of the evidence, the claimant alleged that the window next to the Window Desk could not be opened. We did not make a finding about this, because it is not part of the claimant's claim that she needed fresh air from outside.

118.9. The desk next to the Window Desk was occupied by a friend of Mr Boothroyd, the claimant's partner.

118.10. Team 8 was line managed by Mr Craig Hughes, the Front Line Manager, who reported to Mrs Muchmore.

118.11. Teams 8 and 9 both worked on the same task.

118.12. Each team would meet regularly for "Board" meetings led by their Front Line Manager. At other times there was only limited need for team members to talk to each other in order to carry out their work.

118.13. A number of people in Teams 8 and 9 had desk fans requiring extension cables. Not all of them were in work at any one time.

119. On 24 March 2017, Miss Hayes e-mailed the claimant to inform her of the management U-turn and the proposal to place the claimant in Team 8. The e-mail alerted the claimant to the fact that the desks were occupied, "which means desk sharing will be required." She asked the claimant to make contact to discuss a return to work date. Miss Hayes proposed a phased return and stress reduction plan and informed the claimant that, on her return, her WAP would need to be reviewed. Over the course of the day several e-mails passed to and fro. The claimant objected to any amendment to her WAP and pointed out that hot-desking would not be appropriate for her medical issues. Miss Hayes observed that there was no occupational health recommendation against hot-desking and suggested another referral. In an effort to move the discussion forward, however, she told the claimant that it would be possible to move the Task Support Officer, freeing up the Window Desk for the claimant, so she would not need to hot-desk. The claimant welcomed the initiative as a "step in the right direction" but then took issue with being seated away from the rest of Team 8. She thought she would be isolated. At no point in this exchange did the claimant provide a return to work date or suggest a different solution that would enable her to return to work.

120. By mid-afternoon on 24 March 2017, Miss Hayes had run out of ideas. Her only option, as she saw it, was to refer the claimant to a Decision-Maker to decide whether or not to terminate the claimant's employment on the ground of unsustainable absence. Miss Hayes' referral decision was sent to the claimant by e-mailed letter on 28 March 2017. The letter warned the claimant that the consequences might include dismissal or demotion. The claimant immediately

complained by e-mail to Miss Hayes and to Mrs McKinnell. Her e-mail to Mrs McKinnell stated that she had been available for work since December 2016 and that she would be "progressing this along the legal route".

121. Over the next few days the claimant was in a state of panic. She could not sleep at night. Between 11.18 and 11.21pm on 30 March 2017 the claimant sent two e-mails to a wide distribution list including Miss Hayes, Mrs McKinnell and Mrs Muchmore. The e-mails announced that she would be returning to work at 9am the following day. They were followed by a text message to the same effect to Miss Hayes' phone at 11.23pm.

122. The claimant's late-night announcement caught the respondent's managers by surprise. There was no time for Miss Hayes to hand over to Mr Hughes and no time to make sure that the many adjustments on the claimant's WAP were in place in time for her arrival.

123. Mrs Muchmore telephoned Mrs McKinnell to break the news early on the morning of 31 March 2017. Mrs McKinnell was on her way to Preston, having allowed her office in Graeme House to be used for scheduled meetings. Mrs McKinnell abandoned her Preston trip and returned to Liverpool. She directed that the meetings be cancelled so that her office could be kept free for a meeting with the claimant. On arrival at Graeme House, Mrs McKinnell spoke to Mr Boothroyd, who was worried that something was going to "kick off". Mrs McKinnell decided to give the claimant Disability Adjustment Leave (DAL) so that the claimant was not required to attend work until they were ready for her. It would be best, thought Mrs McKinnell, to greet the claimant before she arrived on the team floor, so that she could escort the claimant to her office and then explain her decision to the claimant.

124. At about 9am, having had little or no sleep, the claimant arrived at the ground floor reception of Graeme House. Mrs McKinnell and Mr Boothroyd were there waiting for her. The claimant walked purposefully towards the lifts. Mrs McKinnell did not physically block the claimant's path, but did try to intercept her and ask to speak to her. The claimant did not reply, but carried on walking past Mrs McKinnell. Contrary to the claimant's evidence (and consistently with Mr Boothroyd's evidence), the claimant did not ask for a private meeting with Mrs McKinnell, but continued towards the lifts. At this point, Mrs McKinnell abandoned her idea of trying to hold a meeting in her office. She did not want the claimant going up to her group floor in her current state. The claimant still needed an explanation, so Mrs McKinnell told the claimant that she would be given DAL. The claimant then raised her voice so that everyone in reception could hear. She complained loudly that she was being refused entry, adding "You're all my witnesses," and then stormed out. Later that morning Mrs McKinnell send the claimant a measured e-mail confirming her DAL and asking her to attend work on 5 April 2017.

125. Pausing here, we are able to find positively that Mrs McKinnell had no intention, at any time during the morning of 31 March 2017, of violating the claimant's dignity or creating an adverse environment for the claimant. To the extent that Allegation 10.1.8 of harassment argues to the contrary, we disagree with it. Contrary to direct discrimination Allegation 8.1.6, we find that Mrs McKinnell's decision to place the claimant on DAL and to speak to the claimant in the reception area was not influenced in any way, consciously or subconsciously,

by the fact that the claimant suffered from depression and anxiety. A person without a mental health disability, who was returning by surprise after a long absence, would have been treated just the same.

126. Unable to see the situation from Mrs McKinnell's point of view, the claimant felt humiliated by having been denied entry to work and challenged by a senior manager in the public reception area. We return later to the question of whether it was reasonable for the claimant to perceive Mrs McKinnell's actions as having that effect.

127. On 3 April 2017, the claimant and Mrs McKinnell exchanged e-mails. Mrs McKinnell repeated the suggestion of a further occupational health referral to investigate the claimant's assertion that hot-desking would be detrimental to her health. The claimant requested "to only meet with yourself or any manager accompanied by [a trade union representative]."

128. In anticipation of the claimant's return, Miss Hayes met with Mr Hughes on 4 April 2017 for a detailed handover. They discussed the WAP. Mr Hughes made handwritten notes on the document of points to follow up with the claimant. They discussed possible immediate steps for the claimant's welfare, such as a phased return and stress reduction plan. They also identified further medical and human resources input that would be needed to identify reasonable adjustments looking forward. Together they tried to choose the most suitable desk for the claimant's workstation. They decided on the Window Desk. They did not discuss the contents of the sealed envelope on the claimant's sub-file. It will be remembered that, by this time, Mrs McKinnell had offered to send all the confidential material to Mr Darlington. After the meeting, Mr Hughes and Miss Hayes moved the claimant's personal items, including her specialist chair and fan, to the Window Desk.

129. Mrs Muchmore also briefed Mr Hughes in readiness. They discussed what should be the approach in the event that the claimant started talking about her grievance. They agreed that Mr Hughes should explain that he was unaware of the details and that they should concentrate on how Mr Hughes could support the claimant to "move on".

130. Proposed victimisation Allegation (3) focuses our mind on Mr Hughes' motivation for choosing the Window Desk. Was it because the claimant had raised a grievance alleging discrimination and was appealing against the outcome? We are satisfied that this consideration did not influence Mr Hughes at all, either consciously or subconsciously. The Team 8 bank of desks was already fully occupied. The claimant did not want to desk share. She needed a desk with natural light. The nearest desk to Team 8 that was by a window was the Window Desk. Mr Hughes did not consider giving up his own desk to make way for the claimant. He was the Front Line Manager who had other team members to support. Besides which, the claimant had not asked him to give up his desk.

131. In the meantime, Mrs McKinnell made arrangements directly with the claimant for her return the following day. Mrs McKinnell asked the claimant to meet with her on her arrival and told her that Mr Hughes would join them later.

132. The claimant arrived for work at about 9am on 5 April 2017. Instead of going to Mrs McKinnell's office, the claimant went onto the floor where Group 3 was based. She saw Mrs Muchmore in the corridor. There is a dispute about what

happened. We prefer Mrs Muchmore's version as being inherently more likely and supported by a contemporaneous note. Mrs Muchmore greeted the claimant, saying, "Good morning, welcome back. Do you know where your desk is?". She kept a comfortable social distance and was not (as the claimant contends) invading the claimant's personal space. The claimant raised her hand in a blocking gesture and said to Mrs Muchmore, "I am not speaking to you, I am in dispute with you". They both walked to the Team 8/9 room. Mrs Muchmore showed the claimant where her desk was. The claimant noticed that there was no extension lead for her fan. She told Mrs Muchmore that her desk was not good enough. Her voice was loud enough for colleagues around the room to hear. Mrs Muchmore thought the claimant's behaviour had been "strikingly aggressive".

133. We now turn to Allegation 10.1.9 of harassment. We are quite satisfied that Mrs Muchmore's intentions when greeting the claimant were entirely supportive. She was not trying to violate the claimant's dignity or create an adverse environment for her. The claimant felt intimidated, because she had specifically asked that any manager (including Mrs Muchmore) only "meet" with her in the presence of a trade union representative. We return later to whether that perception was reasonable.

134. After this encounter, Mrs Muchmore went to see Mrs McKinnell, who found her visibly upset and shaking. Mrs Muchmore told Mrs McKinnell what had happened. Though Mrs McKinnell did not specifically recall Mrs Muchmore using the word, "aggressive", it is likely that Mrs Muchmore did describe it as such, because that is what she believed. We must therefore ask ourselves, under Allegation 8.1.4 of direct discrimination, and Allegation 10.1.7 of harassment, why Mrs Muchmore described the claimant as being aggressive. The question almost answers itself. Mrs Muchmore believed the claimant's behaviour was aggressive because of the way the claimant had behaved, not in any way because of any conscious or subconscious stereotypical assumption about mental health.

135. Having listened to Mrs Muchmore's version of events, Mrs McKinnell asked Mr Darlington to bring the claimant in for their meeting. It lasted several hours. Appropriately in our view, Mrs McKinnell reminded the claimant of the importance of speaking professionally and courteously to her colleagues. The claimant complained about the Window Desk and Mrs McKinnell sought to reassure her. Mr Darlington went to find Mr Smith, the more senior union official, who spoke to the claimant at length. Mr Smith told the claimant that he thought management were being reasonable and that the claimant needed to give things a try. Mr Hughes arrived at about 12.30pm and joined in the discussion. He sought to reassure the claimant that she would be sitting next to people she knew. If she felt isolated at the Window Desk, she could sit at one of the desks on the Team 8 bank when they were free. He told her that he would seek an occupational health report to identify what further adjustments would be needed. Part of the claimant's anxiety was about having to take on a case load. Mr Hughes assured the claimant that she would not have to work on cases straight away and that, for the time being, she could catch up with her training. Gradually, the claimant became more settled and the meeting became more productive. The claimant apologised for her earlier behaviour and said she was looking forward to working with Mr Hughes. The time reached 1pm and they all agreed that the claimant could leave and return the following afternoon.

136. The next day, 6 April 2017, did not end so well. Shortly after the claimant's arrival she spoke to a trade union representative. Mr Hughes noticed that the claimant had arrived, but he was preoccupied with speaking to Human Resources. He wanted to let them know that the claimant had returned to work, so she could start being paid. Later on, Mr Hughes went to see the claimant. He found her sitting at her desk with her head in her hands. Seeing that she was unhappy, Mr Hughes took her into a private room for a talk.

137. Once in the room, the claimant pointed out that she was not happy with her desk. The extension cable for her fan was not yet in place and her screen needed adjusting. Mr Hughes apologised about the cable and explained about his priority being to contact Human Resources. The claimant became more and more agitated and her voice became louder. She reiterated that she felt isolated and spoke about her previous complaints with managers. Mr Hughes tried to reassure the claimant that the Window Desk was only temporary, but his impression was that the claimant was unable to move forward. Her behaviour reached the point where Mr Hughes believed it was aggressive. He said that he was going to speak to Mrs McKinnell about the claimant's behaviour. She then raised her voice and said to Mr Hughes, "You can't handle me". Her voice was loud enough to be heard by people outside the room.

138. By this time, Mr Hughes' optimism from the previous day had evaporated. He started having a panic attack. He told Mrs McKinnell about what had just happened, including his opinion that the claimant had behaved aggressively. No doubt his view of the claimant's conduct was shaped by his own feelings of anxiety and disappointment. But the question posed by Allegation 8.1.4 of direct discrimination is whether or not Mr Hughes saw the claimant's actions through a different prism altogether. Was he motivated in any sense (including subconsciously) by stereotypical views of mental health? We find that he was not. He was doing his best, in his emotional state, to describe the claimant's actions as he had seen them.

139. Mrs McKinnell then met with the claimant in her office with Mr Darlington present. She told the claimant that it was not appropriate for her to raise her voice at her manager or anyone else in the office as she had done with Mr Hughes. The claimant's evidence to us was that Mrs McKinnell threatened the claimant with disciplinary action, but we find that this did not happen.

140. Before we move on to what else happened in this meeting, we stop to touch briefly on Allegation 10.1.10. We were unsure as to whether the claimant actually perceived at the time of this meeting that her dignity had been violated or that Mrs McKinnell's challenge to her behaviour had created an intimidating environment. We are quite sure that Mrs McKinnell did not mean to do either of those things. She was genuinely and quite reasonably trying to set boundaries of acceptable behaviour.

141. The meeting continued. The claimant told Mrs McKinnell that she had not slept the night before. It seemed to Mrs McKinnell that the claimant was not only distressed but unwell. She told the claimant that she thought the claimant should not be in work. The claimant refused to leave and said that Mrs McKinnell would have to call the police. She added, "If I leave, you won't see me again." Mrs McKinnell took this comment to mean that the claimant was having thoughts of taking her own life. She was worried enough about the claimant to telephone the

emergency services. Contrary to harassment Allegation 10.1.11, she did not call the police or threaten to do so. Instead she called for an ambulance. She asked her personal assistant, Miss O'Rourke, to find out the details of the claimant's next of kin. We do not know Mrs McKinnell's precise words to Miss O'Rourke, but they led Miss O'Rourke to believe that the claimant was feeling suicidal.

142. Miss O'Rourke did as she was asked. She knew that next of kin details were held by the claimant's line manager. There had been a very recent handover so it was not entirely clear to her which manager to ask. As it happened, both Mr Hughes and Miss Hayes were in a management meeting with other O-grade managers in a room next door to Mrs McKinnell's office. There were no team members in the room. Miss O'Rourke went into the room and asked for the details. She said that the claimant was feeling suicidal. She did not say that the police were being called. The police were not being called. Paramedics were on their way. Miss Hayes provided Miss O'Rourke with the contact details for the claimant's sister.

143. Meanwhile, the claimant was still in Mrs McKinnell's office. She did not hear what Miss O'Rourke said to the O-grade managers and only found out about it much later. When she did, she was offended by what she saw as a breach of confidentiality. This brings us to allegation 10.1.12 of harassment. We are satisfied that at no time did Miss O'Rourke have any intention of violating the claimant's dignity or creating an adverse environment for her. Miss O'Rourke was doing her best to follow Mrs McKinnell's instructions urgently in a volatile situation.

144. The claimant left the building with the paramedics. She was admitted as a voluntary in-patient to the psychiatric ward at the Priory Hospital, where she remained for about 6 weeks.

145. Mrs McKinnell made contact with the claimant's sister and asked for updates on the claimant's progress. During the claimant's stay in hospital, Mrs McKinnell had regular conversations with Mr Darlington about the claimant's welfare. More often than not, these conversations were initiated by Mr Darlington as and when he had some news to pass on.

146. While the claimant was in hospital there remained the matter of the claimant's unresolved grievance appeal. The Decision-Maker appointed to deal with it was Mrs Ruth Smith. She had attempted to meet with the claimant prior to her failed return to work, but had been forced to postpone due to ill health. On looking at the claimant's grounds of appeal there did not appear to be any new evidence or any complaint of procedural error. Under the respondent's written procedures it would have been open to Mrs Smith to reject the appeal without convening a meeting. Mrs Smith thought it preferable to give the claimant an opportunity to explain her grounds of appeal before she made a decision. On the claimant's behalf, however, Mr Darlington asked Mrs Smith to proceed to a resolution of the appeal without waiting for the claimant's health to improve. Mrs Smith did so. She decided that the appeal was not well-founded.

147. The claimant was discharged from hospital on about 30 May 2017, but remained absent from work.

148. Mrs McKinnell maintained regular contact with the claimant by e-mail. She asked the claimant on 30 May 2017 to provide a medical certificate. The

claimant's stance was that she should not be expected to provide one. As the claimant saw it, she was already covered by her fit note of 3 November 2016. In her opinion she was fit to return to work on her original team, provided that her WAP adjustments were implemented and the respondent brought in outsourced awareness training. We have already commented that the claimant's standpoint was unrealistic. Much had changed since 3 November 2016, not least her prolonged stay as an inpatient on a psychiatric ward. The respondent could not safely assume that the claimant would be well enough to work, whatever adjustments were made.

149. On 3 August 2017, Mrs McKinnell met with the claimant and Mr Darlington. Mrs McKinnell asked the claimant about the possibility of another referral to occupational health, but the claimant said that there would be no point. At the conclusion of the meeting, Mrs McKinnell told the claimant that she would be referred to a Decision-Maker for consideration of whether her employment should continue. The Decision-Maker was to be Mr Simon Bland.

150. On 28 September 2017, Mr Bland met with the claimant and Mr Darlington. Notes were taken by Ms Denise Hayes. The meeting lasted about 2 hours. After the meeting the notes were sent to the claimant, who returned them with amendments. Mr Bland took the amended version as being the official record of the meeting for the purposes of his decision.

151. Essentially the claimant's argument at the meeting was that she was fit to return to work, provided the respondent made reasonable adjustments. She told Mr Bland that she had received inadequate management support. Remploy had offered outsourced awareness training, but Mrs McKinnell unreasonably refused it on the ground of cost. The failed return to work in April 2017 had been the result of being isolated from her team, and being provided with an unsuitable workstation. If these matters were rectified, the claimant said she would return to work.

152. The claimant described the Window Desk from her point of view. She said it was in a dark corner of the room and she could not get to the blinds because there was a filing cabinet in the way. Its location away from the team had left her isolated. She added that she had been unable to plug in her fan because there was no extension cable.

153. In the course of cross-examination of Mr Bland, the claimant put to him that, at the 28 September meeting, she had made an additional point. Her case is that, in addition to outsourced awareness training, she also wanted Access to Work to provide a support worker. By "support worker" the claimant clarified to us that she meant someone provided by an outside organisation who would assist her to carry out her day-to-day role. We find that the claimant did not ask for a support worker in that sense, or anything like it. She did say that Access to Work "would support me", but did not say what kind of support they would provide. Mr Bland had some experience of Access to Work as being a funding agency that would pay for adjustments such as taxis to work. He did not think of them as providing support workers. He reasonably understood the claimant's comment to be a reiteration of her request for outsourced awareness training, since this was the only specific adjustment that she had mentioned in connection with Access to Work.

154. Following the meeting, Mr Bland made further enquiries. He went to look at the Window Desk in Graeme House. It is possible that, by then, the layout of the room had changed slightly. Some filing cabinets may have been moved. Whatever the changes, they would not have significantly affected the distances between workstations or the ability to operate the blinds. When Mr Bland saw the Window Desk he was surprised by how different it was to the way the claimant had described it. The Window Desk appeared to him to be only about 2 metres away from the rest of the Team 8 desks. It was next to the window and well lit. The blind worked. That made him doubt that the claimant would return to work if a different workstation could be found.

155. Mr Bland spoke to Mrs McKinnell. On the issue of management support, Mrs McKinnell showed Mr Bland e-mails to show that she had kept in touch with the claimant as best she could. He asked her about the possibility of outsourced awareness training. Mrs McKinnell told him that Remploy had never offered that service. She told him that she struggled to see how it could be made to work in practice. In her view, as expressed to Mr Bland, the respondent could not compel managers or team members to attend outsourced awareness training. There would also be potential problems whenever there was a change of manager or where a new colleague joined the claimant's team. Would the training provider have to be brought back in specially to educate the new arrival?

156. It may be necessary, for the purposes of Allegation 8.1.1 of direct discrimination, for us to address the reason why Mrs McKinnell expressed this view to Mr Bland. We were able to find positively that Mrs McKinnell was simply telling Mr Bland what she honestly believed. Her view was not tainted either consciously or subconsciously by the fact that the claimant had a mental health disability.

157. Mr Bland also spoke to Mrs Muchmore, who provided him with the Access to Work Support plan from 1 June 2016. He noticed that there was no suggestion of outsourced awareness training.

158. In a further effort to follow up the possibility of outsourced awareness training, Mr Bland spoke to CSHR. They told him that it would not be reasonable to accommodate the claimant's wishes because of the provision already in place. There was already mandatory training on disability, community-based learning and the Employee Wellbeing team.

159. Mr Bland then set about reaching his decision. In his view there was no prospect that the claimant would return to work. He could not see how positioning the claimant's workstation a little closer to the rest of the team would make the difference between her remaining on sick leave and returning to work. Indeed, he did not understand her to be going as far as to say that it would. He was struck by how something as small as the missing extension cable – that could have been put right in a matter of minutes – had caused the claimant to take such a negative view of her workplace. He agreed that it would not be reasonable have to bring in outsourced awareness training and that, unless the claimant's wishes were granted, she would not return. There was little to be gained in making occupational health referral, because the claimant was saying it was pointless. The claimant was not interested in ill-health retirement. The only option that Mr Bland could see was to terminate the claimant's employment.

160. Contrary to Allegation 8.1.10 of direct discrimination, we find that Mr Bland's decision was entirely free from any conscious or subconscious considerations of the claimant's disability. Although this was a positive finding of fact on our part, we would add that we did not think there were any facts from which we could conclude that her mental health was a factor. He would have dismissed any employee, regardless of their mental health, who had been absent for so long and whose prospects for a successful return to work were so slim.

161. Mr Bland recommended that the claimant should receive a 60% award under the Civil Service Compensation Scheme. (During cross-examination, the claimant questioned Mr Bland about this aspect of his decision, but we found it difficult to see the relevance of this particular dispute. For the purposes of determining the issues that we have to decide, it would not matter whether Mr Bland's decision on compensation was right or wrong.)

162. By letter dated 26 October 2017 the claimant was given notice of termination, which expired on 25 January 2018. For some time she had been on nil pay, having exhausted her entitlement to occupational sick pay. She remained on nil pay during her notice period.

163. At the claimant's request, Mr Bland subsequently forwarded his detailed written rationale for his decision.

164. The claimant appealed against her dismissal. The appeal was assigned to Mrs Mandy Beresford, who met with the claimant and Mr Darlington on 14 December 2017. The claimant reiterated essentially the same points as she had made to Mr Bland. She also, however, said something that led Mrs Beresford to understand that the claimant wanted someone funded by Access to Work who could come into the workplace and provide support and "mentoring" for her. This, we find, was the first occasion on which the claimant had raised the possibility of a support worker as an adjustment.

165. Mrs Beresford decided that the decision to dismiss should stand. She did, however, decide to increase the claimant's award of compensation to 100%. In her outcome letter, Mrs Beresford engaged with the grounds of appeal and provided a lengthy reasoned response.

166. Mrs Beresford considered the possibility of outsourced awareness training as an alternative to dismissal. She did not think that the respondent could reasonably expected to obtain that training. We could not make any finding as to what Mrs Beresford thought about the possibility of bringing in a support worker. Her evidence in this regard was too inconsistent.

Relevant law

Direct discrimination

167. Section 13(1) of EqA provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others.

168. Section 23(1) of EqA provides:

> (1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.

169. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

170. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572*.*

171. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

Harassment

172. Section 26 of EqA relevantly provides:

> (1) A person (A) harasses another (B) if—
>
> (*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (*b*) the conduct has the … effect of—
>
> (*i*) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—
>
> (*a*) the perception of B;
>
> (*b*) the other circumstances of the case;
>
> (*c*) whether it is reasonable for the conduct to have that effect.

173. Subsection (5) names disability among the relevant protected characteristics.

174. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive

to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

Duty to make adjustments

175. By section 20 of EqA, the duty to make adjustments comprises three requirements.

176. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice (PCP) of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

177. Section 20(3) defines the third requirement. Where, but for an auxiliary aid, the employee would be at a substantial disadvantage compared to persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to provide that auxiliary aid.

178. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

179. Paragraph 6.28 of the Equality and Human Rights Commission's *Code of Practice on Employment* lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

179.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

179.2. The practicability of the step;

179.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

179.4. The extent of the employer's financial and other resources;

179.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

179.6. The type and size of employer.

180. Before a respondent is required to disprove a failure to make adjustments, there must be sufficient facts from which the tribunal could conclude not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

181. The tribunal may make findings of fact about the existence of a disadvantage without the need for medical evidence.

Discrimination arising from disability

182. Section 15(1) of EqA provides:

(1) 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.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

183. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

184. Treatment is unfavourable if the claimant could reasonably understand it to put her to a disadvantage.

185. As with direct discrimination, the focus must be on the conscious or subconscious motivation of the person or persons who decided on the unfavourable treatment: *IPC Media Ltd v Millar [2013] IRLR 707.*

186. These principles have been affirmed in *Pnaiser v. NHS England* [2016] IRLR 174.

187. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565, applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

188. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

189. The *Code* offers guidance on the interrelationship between the making of adjustments and the proportionate means defence. The following extract appears to us to be relevant:

> "5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments…
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.
> …"

190. Paragraph 5.21 of the *Code* is consistent with the following statement made by Simler J in *Dominique v. Toll Global Forwarding Ltd* UKEAT/0308/13 (concerning the Disability Discrimination Act 1995) at paragraph 51:

> "….where there is a link between the reasonable adjustments said to be required and the disadvantages …being considered in the context of ….disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a reasonable adjustment that has not been made can, as a matter of practical reality, be justified."

Victimisation

191. Section 27(1) EqA defines victimisation. Relevantly the definition reads:

192. A person (A) victimises another person (B) if A subjects B to a detriment because **-** (a) B does a protected act [etc]

193. Presenting a complaint of discrimination to a tribunal is a protected act. So is making an express or implied allegation of a contravention of EqA.

194. As in direct discrimination cases, tribunals hearing victimisation complaints are encouraged to adopt the "reason why" test (*Chief Constable of West Yorkshire Police v. Khan* [2001] ICR 1065. Victimisation may occur sub-consciously as well as consciously.

Time limits

195. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

196. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
>
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

197. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

198. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

199. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

199.1. the length of and reasons for the delay;

199.2. the effect of the delay on the cogency of the evidence;

199.3. the steps which the claimant took to obtain legal advice;

199.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

199.5. the extent to which the respondent has complied with requests for further information.

Burden of proof

200. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

201. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in

legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

202. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913

203. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

204. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

<u>Adjudicating on claims</u>

205. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

206. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a “claim” or a “case” is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was “their case”, and in order to argue that the

> time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

207. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

208. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota QC distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

209. In relation to unrepresented claimants, tribunals must not be overly technical in their application of the *Chandok* approach. Where the claim form is capable of being read as including allegations (for example of constructive dismissal, or of dismissal on a different day), and the parties have attended the hearing prepared to deal with those allegations, the tribunal should ordinarily permit those allegations to be argued (*Aynge v. Trickett t/a Sully Club Restaurant* UKEAT/0264/17 at paras 10 and 13). If the claim form cannot bear that interpretation, consideration should be given to an amendment (para 14)

<u>Amendment</u>

210. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

210.1. A careful balancing exercise is required.

210.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to

introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

210.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

210.4. The tribunal should have regard to the manner and timing of the amendment.

210.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

Time limits

211. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination] may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …

212. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298.

213. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

213.1. the length of and reasons for the delay;

213.2. the effect of the delay on the cogency of the evidence;

213.3. the steps which the claimant took to obtain legal advice;

213.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

213.5. the extent to which the respondent has complied with requests for further information.

Unfair dismissal

214. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal and
(b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it…(a) relates to the capability.. of the employee for performing work of the kind which he was employed by the employer to do.

(3) In subsection (2)(a) –
(a) "capability", in relation to an employee, means his capability assessed by reference to …health…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

215. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

216. Save in exceptional circumstances, an employer will not act reasonably in treating ill health absence as a sufficient reason for dismissal unless he/she consults the employee: *East Lindsey District Council v. Daubney* [1977] ICR 566. It may also be necessary to obtain a medical opinion: *Patterson v. Bracketts* [1977] IRLR 137.

217. In *Spencer v. Paragon Wallpapers* [1976] IRLR 373, EAT at paragraph 14, Phillips J observed:

> "The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances."

218. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

219. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

<u>Application of ERA to civil servants</u>

220. Part IX of ERA is headed, "Termination of Employment" and encompasses sections 86 to 93.

221. Section 86 of ERA provides that the notice required to be given by an employer to terminate the contract of employment is not less than 12 weeks' notice if her period of continuous employment is 12 years or more.

222. Sections 87 and 88 of ERA create rights for employees during their notice periods. By section 88(1)(b), where the employee is incapable of work because of sickness, the employer is liable to pay the employee remuneration according to a statutory formula.

223. Section 191(1) of ERA provides, so far as is relevant:

> "…the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers."

224. Subsection (2) lists the provisions of ERA to which section 191 applies. The list includes Part X (unfair dismissal). It also includes "in Part IX, sections 92 and 93". In other words, section 191 does *not* apply to sections 86 to 88.

225. The scheme of section 191 is consistent with the common law principle that the Crown is entitled to dismiss its servants at will (although in practice it routinely gives notice of termination to civil servants).

226. Our reading of section 191 is that the legislature clearly intended that persons in Crown employment should not have the benefit of minimum statutory notice periods or statutory pay protection during those periods.

Conclusions

Time limits generally

227. In our view there was no ongoing discriminatory state of affairs ending on or after 9 March 2017. As will be seen, we have found that no contraventions of EqA took place after that date. This means that for any discrimination (or other prohibited conduct) that is alleged to have taken place prior to 9 March 2017 the claimant needs an extension of the time limit.

228. In respect of most of the allegations, even those predating 9 March 2017, we were able to find the facts relatively easily and concluded that the allegation was not well-founded on its merits. In those circumstances we did not think it helpful to weigh all the factors relevant to the extension of the time limit. Technically, the extension of time was refused because the claim had no merit, but we do not see any need to repeat that conclusion separately for each allegation.

229. There were some allegations where the fact-finding exercise was more difficult. Here, the time limit took on greater importance. In those cases we set out our reasoning separately in relation to each allegation.

Direct discrimination

Burden of proof

230. We were able in this case to make positive findings of fact about the reasons why the various decision-makers had acted as they had. When making those findings of fact we reminded ourselves of the importance of drawing inferences

from primary facts, the dangers of sub-conscious discrimination, and the burden being on the respondent (at the second stage) to prove that the discriminatory reason did not in any sense influence their thinking. Having warned ourselves in this way, we nevertheless found the evidence convincing enough to make those positive findings without first considering whether the claimant had discharged her initial burden.

8.1.1 Refusal of outsourced awareness training

231. The alleged less favourable treatment did not happen. Mrs McKinnell did not refuse outsourced awareness training in any meaningful sense. Neither Access to Work nor Remploy ever offered to provide outsourced awareness training, so there was nothing for Mrs McKinnell to refuse. Mrs McKinnell did tell Mr Bland, at the dismissal stage, that the respondent could not reasonably be expected to have to provide that training, but that was not the same as refusing it.

232. In case we are wrong about whether there was a refusal, we would find that the refusal was not because the claimant had a mental health disability: see paragraph 156.

8.1.3 Refusal of trade union representative at case conferences

233. During the course of the oral evidence it became clear that the claimant was referring to two alleged case conferences. These were the conversations on 5 October 2016 and 17 November 2016. We deal with each in turn.

234. The meeting on 5 October 2016 was not a case conference and Mr Darlington's participation was not refused. The alleged less favourable treatment did not happen on this occasion. If we are wrong in that conclusion, the allegation would still fail because the treatment was not because of the claimant's disability (see paragraph 87).

235. The respondent contends that there was no "refusal" to allow Mr Darlington to participate in the conversation on 17 November 2016. In our view, the respondent takes too narrow a view of the allegation. Mr Darlington had asked to be involved in case conferences and was not invited. Nevertheless, the complaint is not well founded. Paragraph 95 explains why we concluded that the treatment was not because of the claimant's disability.

8.1.4 (1) 9 August 2016 – Mrs Muchmore and Miss Hayes falsely describing the claimant as aggressive

236. Mrs Muchmore did not speak critically of the claimant's behaviour on 9 August 2016 at all, whether falsely or otherwise and regardless of whether Mrs Muchmore used the word, "aggressive". So far as the allegation against her is concerned the less favourable treatment did not occur.

237. Miss Hayes did challenge the claimant's behaviour. As can be seen from paragraph 55, we could not determine whether or not Miss Hayes' criticisms were "false". She did not characterise the claimant's behaviour as "aggressive" so strictly speaking the allegation fails. In case we have taken too narrow a view, we also addressed Miss Hayes' motivation at paragraph 56. It was not because of the claimant's disability.

8.1.4 (2) 5 April 2017 – Mrs Muchmore falsely describing the claimant as aggressive

238. Here, see paragraph 134. Mrs Muchmore's description of the claimant's behaviour was reasonably accurate and not "false". In any event, it was not because of the claimant's disability.

8.1.4 (3) 6 April 2017 – Mr Hughes falsely describing the claimant as aggressive

239. Based on our findings it was not, in our view, "false" of Mr Hughes to tell Mrs McKinnell that the claimant's behaviour was aggressive on 6 April 2017. In any event, we have found (paragraph 138) that his description was not because of the claimant's disability.

8.1.6 – 31 March 2017 - Mrs McKinnell's refusal of entry and "dressing down"

240. It is inaccurate to describe Mrs McKinnell's intervention on 31 March 2017 as a "dressing down". Mrs McKinnell did, however, refuse the claimant permission to enter the workplace on 31 March 2017. Telling the claimant in the reception area that she was being placed on DAL was enough to amount to a refusal.

241. Our finding at paragraph 125 is that Mrs McKinnell's actions were not because of the claimant's disability.

8.1.10 - Dismissal

242. Mr Bland did treat the claimant less favourably than others by dismissing her, but as we found at paragraph 160, the treatment was not because of the claimant's disability. It was because of her absence and her poor prospect of return to work.

<u>Discrimination arising from disability</u>

(1) Mrs Muchmore's alleged comment on 9 August 2016

243. Mrs Muchmore did not criticise the claimant's behaviour on 9 August 2016. It was Miss Hayes. The alleged unfavourable treatment did not happen.

244. We wondered whether we should widen our remit to consider whether Miss Hayes had treated the claimant unfavourably by challenging the claimant's behaviour towards Colleague TH. Our conclusion was that it would be inappropriate for us to do so. It would raise too many additional lines of enquiry in an already complex case. Was it unfavourable treatment to describe the claimant's behaviour as snapping and rude? That would depend on how the claimant had actually behaved. Did the claimant's unhelpful remark to Colleague TH arise in consequence of the claimant's disability? There is little evidence on this point either way. It is to avoid precisely such difficulties as these that the *Chandok* approach requires us to hold the claimant to her formal case. At the very least we should not permit the claimant to deviate from the allegation as clarified by her during the hearing. That case fails because there was no unfavourable treatment.

(2) Exclusion of trade union representative from 5 October 2016 meeting

245. The respondent raised a procedural objection to this allegation being formulated in the way it was. It is respondent's case that the tribunal should be restricted to considering whether or not there was a "refusal" to invite a trade union representative. The suggestion that a mere *omission* to invite a representative was unfavourable treatment is one that was not apparent from the February CMO. An amendment would be required to the claim.

246. We found it unnecessary to decide the amendment dispute. Our factual findings were sufficient to enable us to adjudicate on the amended allegation in the respondent's favour. Whether one calls it a refusal or an omission, the absence of Mr Darlington from the 5 October 2016 meeting was not because of anything that arose in consequence of the claimant's disability. The alleged reason (or "something") for excluding Mr Darlington was a perception that, if invited, he would raise a concern that the proposed move to Group 4 was discriminatory. As paragraph 87 explains, we found that the three managers were not motivated by that perception in any way.

(3) Exclusion of trade union representative on 17 November 2016

247. We took the same approach to this allegation as to the previous one. The amendment dispute seemed to us to be sterile in view of our finding at paragraph 95 about Miss Hayes' motivation. The claimant could reasonably regard it as unfavourable not to have her trade union representative involved in the conversation, but the reason for leaving Mr Darlington out did not arise in consequence of the claimant's disability.

(4) Minutes of 20 September 2016 meeting

248. In our view Miss Everett did not treat the claimant unfavourably by recording in the meeting minutes that the claimant had shouted. The claimant could not reasonably have thought it as being unfavourable, because the description was essentially accurate. The claimant had raised her voice to an uncomfortable level.

249. In case our conclusion on unfavourable treatment is open to challenge, we have gone on to consider the remainder of the issues. The reason for Miss Everett's use of the word, "shouted" was her observation of the claimant having raised her voice (see paragraph 77). We have found (paragraph 78) that the claimant's disability contributed to that behaviour. It would therefore fall to the respondent to justify objectively the use of the word, "shouted" in the minutes.

250. Miss Everett's minute was a means of achieving the aim of creating an accurate record of things said and done during meetings. Not only was this aim plainly legitimate, it was also important. These meetings were part of the attendance management process. They formed the basis of management decisions about whether absence could be supported or not. They also formed part of the evidence upon which decisions could be taken about adjustments and the viability of the employment relationship. The minute taker was well placed not only to record what people said but how they said it. There was an effective safeguard against unfair value judgments – the claimant had an early opportunity to propose amendments to the minutes, which might include replacing the word, "shouted" with "raised her voice". Miss Everett's description of the claimant's behaviour was matter-of-fact and expressed in moderate language. In our view it was entirely proportionate.

(4) Minutes of 31 January 2017

251. We have reached the same conclusion in respect of the Month 4 meeting on 31 January 2017. It is debatable whether or not the claimant could reasonably have perceived the word "aggressively" in the minutes as being unfavourable. Her opening remark was certainly hostile. On balance, we think that with any

objectivity the claimant would have seen that the word "aggressive" was reasonably accurate.

252. In case we are wrong on that point, we would find that the claimant's remark did arise in consequence of her disability (paragraph 110), but that the label, "aggressively" was justified. It served the same aim as above. Although there is more of a value judgment built into the word, "aggressively" than into the word, "shouted", we still think that the use of the word was proportionate. It was important for the most independent person in the room to describe freely and moderately their genuine impression of what had happened in the meeting.

(5) Decision to transfer to Group 4

253. Contrary to the respondent's argument, it was unfavourable to the claimant to tell her that she was being moved to Group 4. The intention was supportive, but that is beside the point. The claimant did not want to be moved and could reasonably have understood the decision as placing her at a disadvantage.

254. A significant motivation for the decision to move the claimant was because she was absent from work and was telling the respondent that one of her reasons for not returning to work was that the environment in Team 6 was hostile (paragraph 85). That reason arose in consequence of the claimant's disability.

255. Moving the claimant to Group 4 was a means of achieving a number of different aims, set out in Mrs Lewis' helpful written closing submissions. The most relevant aims to our minds are:

255.1. Achieving a stable, efficient and productive workforce; and

255.2. Protecting management and staff from risks to their health and safety, promote their wellbeing at work and manage their levels of stress and distraction so they can focus on business priorities.

256. Both aims are obviously legitimate.

257. When deciding whether or not the decision was proportionate, we have sought to balance the impact on the claimant against the importance of the aims. We have also looked at whether the aims could have been achieved by less discriminatory means.

258. The discriminatory impact on the claimant was not stark. There were other reasons behind the transfer that had little or nothing to do with the claimant's disability. These included her refusal to participate in mediation or pursue a formal grievance. They also included the fact that three members of her team had complained about her. Their complaint did not arise in consequence of her disability, but out of their belief (based on a slightly distorted report of her concerns) that the claimant was calling them racist.

259. It was very important for the respondent to try to take steps to protect the health and safety of the claimant and Mr I, both of whom would be vulnerable in a hostile environment.

260. In our view it was necessary to remove the claimant from Team 6. The alternatives were not attractive: see paragraph 86. That still left the option of moving to a different team within Group 3. But, as the experience of 5 April 2017 showed, a move within Group 3 also presented its problems. Whilst in Group 3, the claimant would have to interact with her Group Manager, Mrs Muchmore.

She did not want to Mrs Muchmore to speak to her at all without a trade union representative, even if it was just to ask how she was.

261. The making of adjustments would not have avoided the need to move the claimant. All the other WAP adjustments were being implemented. It would not have been reasonable to have to bring in outsourced awareness training. Such training had not been offered by Remploy or Access to Work. We also agree with Mrs McKinnell's outline to Mr Bland of the practical problems that outsourced awareness training might present (see paragraph 155). There was already mandatory disability-related training in place for colleagues and managers.

262. We would question what additional benefit outsourced awareness training for managers would have brought. In general, Miss Hayes, Mrs Muchmore, Mrs McKinnell and Mr Hughes all acted with sensitivity to the claimant's mental health. They had a positive attitude towards making adjustments.

263. There would have been a limited benefit to outsourced awareness training for colleagues. Had Mr Peters received such training, it is possible that he might not have made the "pushing your worries" comment just before his holiday. But it would not have made any difference to some of the alleged harassment by Mr Peters. If the "straightjacket" incident happened as described by the claimant, no amount of awareness training would have prevented it. Likewise, awareness training would not have prevented the Kathy Bates photograph being posted on the spreadsheet if the claimant had asked for it. Our finding was that the evidence is so stale that we cannot tell whether the claimant had asked for the photograph or not.

264. Overall, the decision to move the claimant to Group 4 was, in our view, proportionate.

(6) Dismissal

265. It is not in dispute that Mr Bland treated the claimant unfavourably by dismissing her, or that his reason (length of absence and poor prospect of return) arose in consequence of her disability. Dismissing the claimant was a means of achieving the same legitimate aims as above. The respondent also relies on other aims, but in our view they do not add significantly to the analysis. The issue is whether the dismissal was proportionate.

266. By the time of the decision to dismiss, there was a closer connection between the claimant's disability and the reason for the unfavourable treatment. She had been absent for a long time and her most recent reintroduction to work had failed largely for reasons arising out of her mental health. The discriminatory impact weighs more heavily in the balance. This means that we need to examine with particular care whether the legitimate aims could have been achieved by means other than dismissal.

267. In our view, dismissal was the only realistic option. There was no point in maintaining the claimant's sickness absence unless there was a reasonable prospect of returning to work. Whilst the claimant was on sick leave, even though she was on nil pay, it still took considerable management resources to maintain her in employment. Those resources had to be financed by public money and their diversion on managing sick leave would inevitably have a knock on effect on the respondent's ability to administer tax credits efficiently.

268. The claimant was not going to return to work. As Mr Lewis put it, the claimant and respondent had reached "deadlock" over the question of outsourced awareness training. The experience of 6 April 2017 strongly suggested that, no matter how many adjustments the respondent made, the claimant would not have found the workplace acceptable. Delaying dismissal pending further medical evidence would have defeated the legitimate aims, because the claimant did not see any point in obtaining a further occupational health referral. The deadlock would have remained.

269. The respondent could not achieve the legitimate aim by making reasonable adjustments. We have already concluded that it would not have been reasonable to provide outsourced awareness training. The adjustment of a support worker would have made little or no difference. The claimant was good at her role and did not need anyone to help her carry it out. She never mentioned that a support worker would be of any benefit to her until her appeal against dismissal. As for the adjustments that form the basis of her claim to the tribunal (see below), we have concluded separately that the adjustments were either already in place or there was no duty to make them.

(7) Appeal

270. The appeal decision was unfavourable to the claimant, despite the fact that it offered the consolation prize of increased compensation. Again, it was for reasons that arose in consequence of the claimant's disability.

271. In our view, the decision was a proportionate means of achieving the same aims as the dismissal. If anything, it was easier to justify the appeal decision because, by the time of the appeal, more time had elapsed since the claimant had last worked and there was still no prospect of the claimant returning.

(8) Classification of the claimant's absences

272. We split this allegation into two time periods, separated by the change in applicable sickness absence policy on 26 September 2016.

273. In relation to the time after 26 September 2016, there are two short answers to this allegation. The claimant was not unfavourably treated. It was not open to Miss Hayes to treat the claimant's absence as being DRSA and the failure to do so could not reasonably have been thought unfavourable. Any disadvantage caused by her absence being considered as sickness absence was cured by the relaxation of trigger points under the new policy. Even if the "sickness absence" classification was unfavourable, it was not because of the alleged reason arising out of the claimant's disability: see paragraph 84.

274. In relation to the few weeks between 10 August and 26 September 2016, the claimant was potentially at a disadvantage, in that her absence could have been taken into account for future attendance management purposes. Miss Hayes' choice of label was not because of anything that arose in consequence of the claimant's disability: see paragraph 60.

(10) Rejection of the grievance

275. Ms Holland treated the claimant unfavourably by not upholding her grievance. At paragraph 113 we have looked for a connection between Ms Holland's

reasons for her decision and something arising from the claimant's disability. We could not find any such connection.

(11) Threat to call the police

276. Mrs McKinnell did not threaten to call the police. The unfavourable treatment did not happen.

(12) Information provided by Miss O'Rourke to the O-Grade managers

277. Miss O'Rourke did not tell the managers in the room on 6 April 2017 that the police had been called. She did tell the managers that the claimant was suicidal, but in our view that treatment was not unfavourable. The claimant could reasonably have understood that what she told Mrs McKinnell would be treated confidentially, but she must also have known that she was presenting the respondent with an emergency. With any objectivity she must have realised that the information would have to be shared so far as necessary to enable prompt and effective medical response.

278. In case we are incorrect in our assessment of favourability, we consider the remaining issues. The treatment was because the claimant had said she was suicidal. That comment arose in consequence of her disability.

279. Providing this information to the managers, who included the claimant's line manager, was a means of protecting management and staff from risks to their health and safety and manage their levels of stress and distraction. It was also a means of carrying out reasonable management instructions in good faith. Both aims were legitimate, but were Miss O'Rourke's actions proportionate?

280. We find that they were. Miss O'Rourke did no more than was reasonably necessary in a fast-moving, dynamic situation, to obtain urgent information as instructed by a senior manager. Next of kin details had to be passed on to the paramedics to help ensure the claimant's welfare and optimise any medical treatment. Theoretically, Miss O'Rourke could have asked Miss Hayes or Mr Hughes to leave the room for a private word. But that would not have fully achieved the respondent's legitimate aims. It was not just Miss Hayes and Mr Hughes who needed to know that the claimant was acutely unwell. Paramedics were about to arrive on the floor and team members across the whole Group would inevitably ask why they were there. Miss O'Rourke kept the disclosure of information within proportionate bounds by ensuring that it was only managers who found out. Her actions were justified.

<u>Harassment</u>

10.1.1 – Medusa and Kathy Bates photographs

281. We have declined jurisdiction to consider this complaint. It was presented too late. The photographs appeared on the spreadsheet in April 2016, some 15 months before the claimant presented her claim. The last 11 months of the delay are explained by the claimant's ill health, her pursuit of her grievance, and a further 6 weeks or so by the claimant's hospitalization. But it does not explain why the claimant did not present her claim before August 2016. The claimant was represented by her trade union throughout. She had brought a previous grievance, was very familiar with the language of EqA, and as early as April 2016 told Mr Blackmore about the potential to bring a claim to the tribunal. As we have indicated, the delay has resulted in a substantial deterioration of the evidence.

On key issues such as whether the conduct was unwanted, and whether it was related to the claimant's disability, we had real difficulty in finding the facts: see paragraph 24. For these reasons it is not just and equitable to extend the time limit.

10.1.2 – "Judgemental"

282. This allegation involves a similar delay, with similar effects on the cogency of the evidence: see paragraph 34. It is not just and equitable to extend the time limit. We therefore have no jurisdiction to consider the claim. It is likely, had we granted an extension, that we would have dismissed the complaint on its merits for the reasons also given in paragraph 34.

10.1.3 – 20 April 2016 – the holiday comment

283. This allegation is also substantially out of time and requires an extension. In contrast to the first two allegations, however, we did not think that the delay had really impeded our ability to find the facts. We were able to get a good sense of what had happened. Had the complaint been well-founded, we would have extended the time limit.

284. Mr Peters' comment was unwanted. There was some connection between his comment about "worries" and the claimant's disabling anxiety condition. In its context, the connection was a fairly loose one. It was obvious that Mr Peters was comparing the claimant's preoccupation with the issue she had raised with his own lack of worry being about to go on holiday.

285. The claimant genuinely perceived Mr Peters' comment as violating her dignity, as can be seen from her reaction at paragraph 27. In our view, however, it was not reasonable for her to take it that way. An important part of the context is Mr Peters having softened his remark by mentioning his own holiday. The other people present in the room were a reasonable barometer of how Mr Peters' comment came across. They all saw Mr Peters' comment for what it was – a genuine attempt to lighten the mood without any intent to ridicule the claimant's anxiety condition. We did consider the possibility that the reason why the remainder of the claimant's team reacted differently from the claimant is that they did not understand about mental health. That is unlikely in our view. Mr I, for one, knew what it was like to suffer from depression and anxiety.

10.1.4 – "Straightjacket"

286. We return to the allegations that were affected by the delay. The alleged "straightjacket" comment is one of them. Here the claimant has a better reason for not presenting her claim earlier. Only a week or two went by between the date of the alleged incident and the claimant beginning a long period of sick leave. That is only one factor, however. Fact-finding was particularly difficult. Although there were multiple sources of evidence to suggest that someone had mentioned a straightjacket at some point, that fact alone would not be enough to establish harassment. Making a flippant comment about a customer needing a straighjacket, for example, because of their erratic behaviour, would not reasonably violate the dignity of a colleague with depression and anxiety who knew that the comment was not about them. What would tip this incident into the statutory definition of harassment would be Mr Peters allegedly adding the hurtful comment implying that the claimant also needed a straightjacket. That allegation was disputed. The evidence was not helped by the inconsistency in

the claimant's timeline of events, or her delay in raising a grievance. It is her word against that of Mr Peters. Overall we thought that it was not just and equitable to extend time. We therefore have no jurisdiction.

10.1.5 Describing the claimant's behaviour as aggressive

287. Mrs Muchmore did not describe the claimant's behaviour as aggressive, indeed she did not criticise the claimant's behaviour. The alleged unwanted conduct did not happen.

288. As we have recorded under Allegation 8.1.4 of direct discrimination, Miss Hayes did not accuse the claimant of being "aggressive". This unwanted conduct did not happen either.

289. We are not in the business of splitting hairs. We did consider whether to widen the scope of this allegation to include Miss Hayes' actual criticism of claimant at the meeting. (She said that the claimant had "snapped at" Colleague TH and been rude, and this caused the claimant to become upset.) In the end we decided to hold the claimant to the letter of her allegation. This was for the following reasons:

289.1. Though the claimant felt upset, we did not go as far as to find that the claimant felt her dignity had been violated, or that she had been subjected to one of the forms of adverse environment.

289.2. In any event it would not be reasonable for her to have had that perception, based on what Miss Hayes actually said. Viewed objectively, Miss Hayes used appropriate language to challenge the claimant's behaviour, based on what Mr I had told her. We took into account the unfortunate timing of Miss Hayes' challenge to the claimant's behaviour. Even if with hindsight it ought to have been raised at a separate meeting, the imperfect timing did not come anywhere near to tipping Miss Hayes' conduct into harassment.

289.3. There would also be the difficult question of whether there was any, or any sufficient, connection between Miss Hayes' criticism and the claimant's disability. It is by no means clear that the claimant's mental health explained her comment to Colleague TH.

10.1.6 Requiring the claimant to attend a meeting with Mrs McKinnell without union representation

290. The alleged unwanted conduct did not occur. The claimant was not required to attend a meeting with Mrs McKinnell at all, still less was she required to do so unaccompanied. We also struggle to see how the conduct would have been related to the claimant's disability.

10.1.7 – Falsely describing the claimant as aggressive

291. With regard to 9 August 2016, much of our analysis is already set out under allegation 8.1.4 of direct discrimination and at paragraph 289 above. We do not think it is productive to replicate it here.

292. Moving on to April 2017, an integral part of the allegation of unwanted conduct is the assertion that the various managers' description of the claimant's behaviour was "false". In that sense, the unwanted conduct did not happen, because Mr Hughes and Mrs Muchmore described the claimant's behaviour reasonably

accurately. There is some connection to the claimant's disability – her mental health was quite obviously affecting her behaviour. But there is nothing wrong with a manager truthfully telling their senior manager about the inappropriate behaviour of a colleague. It would not be reasonable for the claimant to see this as violating her dignity or creating the proscribed environment.

10.1.8 – 31 March 2017 – the encounter at reception

293. Our relevant findings of fact are at paragraphs 125 and 126. The unwanted conduct did not happen in the sense that the claimant was not given a "dressing down", but she was subjected to unwanted conduct by being effectively refused access to the upper floors. Mrs McKinnell's comment about DAL relates her conduct to the claimant's disability. The claimant felt that a humiliating environment was created for her. That was not Mrs McKinnell's purpose. One question is left: having regard to all the circumstances, including whether the claimant's perception was reasonable, did Mrs McKinnell's conduct have that effect?

294. We are quite satisfied that the answer to that question is "no". Mrs McKinnell's intervention was measured and warranted. Anyone knowing the true circumstances – the claimant's late-night announcement having taken the respondent by surprise, and the claimant's apparent determination to go up to the team floor, would have regarded Mrs McKinnell as not humiliating the claimant, but doing her best to manage an extremely challenging situation.

10.1.9 – Mrs Muchmore speaking to the claimant on 5 April 2017

295. Mrs Muchmore subjected the claimant to unwanted conduct by asking her how she was, when the claimant did not want Mrs Muchmore to speak to her at all without a union representative present. As we have found, Mrs Muchmore's intentions were good. The claimant's reaction was to believe she had been subjected to an intimidating environment. Two issues remain. The first is whether Mrs Muchmore's conduct was related to the claimant's disability. It was not. The second is whether it would be reasonable for the claimant to perceive Mrs Muchmore's conduct as having created the relevant environment. Such a perception would not be at all reasonable. It is one thing to ask for a companion at meetings with a manager. It is quite another thing to believe that it is harassment for that manager to ask how the claimant was as they passed each other in the corridor.

10.1.10 – Mrs McKinnell accusing the claimant of inappropriate behaviour towards Mr Hughes

296. Mrs McKinnell acted with a proper purpose: see paragraph 140. was entirely justified in challenging the claimant's behaviour towards her line manager. She did so in moderate terms. A reasonable observer would have realised that and would not have thought it reasonable for the claimant to take offence. Her conduct, though unwanted, did not have the effect mentioned in section 26.

10.1.11 – Threatening to call the police

297. Mrs McKinnell did not threaten to call the police.

10.1.12 – Miss O'Rourke

298. We have already concluded that Miss O'Rourke's actions on 6 April 2017 were well-intentioned, not unfavourable to the claimant, and were in any event

objectively justified. They may have been unwanted by the claimant, and related to her disability, but they did not have the proscribed purpose or effect. The claimant was not harassed.

Duty to make adjustments

11.1.1 The Window Desk – natural light and opportunity to set up a desk fan

299. The Window Desk had plenty of natural light. So far as there was any duty to make adjustments by providing natural light, the adjustment was made. Looking at the filing cabinets, we cannot see how the claimant would have been prevented from operating the blinds even if they were in a different position.

300. What we understood this claim to be really about was the fact that there was no extension cable for the desk fan. Here we need to revisit, briefly, our discussion of the issues. When, just prior to the parties' final submissions, we rewrote a draft list of issues, we identified the extension cable specifically as one of the claimed adjustments. In his closing submissions, Mr Lewis reminded us that what the claimant actually contended for in her claim was "the opportunity to set up a desk fan". We amended the list of issues accordingly.

301. The claimant had the opportunity to set up a desk fan. The absence of an extension cable for two days did not deprive her of that opportunity, because it would have been so easy for the claimant or someone else on her behalf to fetch an extension cable.

302. We considered whether the claim ought to be amended so as to argue that the respondent should, as an adjustment, have specifically provided the extension cable by the time the claimant left the building on 6 April 2017. If that were the way in which the claimant were permitted to advance her case, we would have found that it failed on its merits. It was not reasonable for the respondent to have to provide the extension cable within in that timescale. It would not have cured the disadvantage presented by the absence of a working fan. The claimant spent very little time at her desk on 5 or 6 April 2017, because she was in meetings with her trade union representative, Mrs McKinnell and Mr Hughes. In any event the claimant was not prepared to accept the Window Desk (with or without an extension cable) because she felt isolated there.

11.1.2 – KIT meetings

303. We break this part of the claim down into three time periods: Mid-2015 to April 2016, April 2016 to 6 April 2017, and 7 April 2017 onwards.

304. So far as the first of those time periods is concerned, the claimant was unable to show that there was any occasion on which she felt vulnerable, or any occasion on which the lack of immediate managerial response to workplace issues put her at a disadvantage. There was no duty to make adjustments.

305. In April and May 2016, Mr Blackmore and Mrs Muchmore had frequent and lengthy meetings with the claimant, including meetings on 28 April 2016, 6 and 9 May 2016 and Mrs Muchmore's meeting during Mr Blackmore's paternity leave. Mr Blackmore also arranged the seating so he could sit next to the claimant and support her. That would go some way towards reducing the disadvantageous effect of having a manager who could not respond to every issue instantly. We know that, from when Miss Hayes took over as manager in June 2016, she had at least two meetings with the claimant before 9 August 2016. There appears to

have been a lull in June 2016 when the claimant was not feeling as vulnerable as she had in the previous April. The claimant's WAP did not require weekly KIT meetings at all times; only when such meetings were necessary. We do not think that it would have been reasonable for the respondent's managers to have had hold KIT meetings with the claimant any more frequently than they did.

306. Whilst the claimant was on sick leave, there was no duty to make the adjustment of KIT meetings. This is because of the way in which the claimant contends the duty to make adjustments arose. It stems from the PCP of having a Team Leader who did not respond to team members' workplace issues at the moment they arose. But that PCP only put the claimant at a disadvantage at times when the claimant was in the workplace. She was not in the workplace between August 2016 and 31 March 2017. In any event, Miss Hayes regularly kept in touch with the claimant by telephone. It was not reasonable for her to have to increase the frequency of her calls. Indeed the claimant did not put to Miss Hayes that she should have done so.

307. Between 31 March 2017 and 6 April 2017, Mrs McKinnell kept in regular contact with the claimant to make arrangements for her return to work. There was no need for a separate KIT meeting.

308. From 7 April 2017 the duty to hold KIT meetings did not arise, because the claimant was on sick leave. In any event, it was not reasonable for the respondent to have to hold KIT meetings whilst the claimant was an in-patient in hospital. After the claimant was discharged, regular KIT conversations resumed with Mrs McKinnell until her case was passed to Mr Bland. It was not put to Mrs McKinnell that the meetings should have been more frequent.

11.1.3 – informal meetings on 9 August 2016 without union representative

309. The PCP of holding informal meetings did put the claimant at a disadvantage when the claimant's mental health was suffering, in that she was less able to participate effectively than non-disabled persons.

310. On 9 August 2016 the claimant attended 3 informal meetings. At the third meeting, Mrs McKinnell made the adjustment of fetching a trade union representative. No representative was found for the first two meetings. We have to consider whether it would have been reasonable for the respondent to have to find a union representative for the claimant or to postpone the meeting.

311. It would not have been reasonable for Miss Hayes to have to find a union representative or to postpone her meeting. It was a meeting that the claimant herself had requested. She did not ask to be accompanied or for the meeting to be postponed.

312. We also find that it would not have been reasonable for Mrs Muchmore to have to find a trade union representative for her meeting. Although the meeting was instigated by Mrs Muchmore, it was with the apparent consent of the claimant, who had agreed to Miss Hayes passing the claimant's note to Mrs Muchmore. The claimant did not ask for a trade union representative at this meeting either. Mrs Muchmore could not have been reasonably expected to postpone the meeting. The claimant had raised a serious concern which needed addressing quickly. Indeed it is part of her claim (see Adjustment 11.1.2) that her anxiety put her at a disadvantage if her workplace issues were not addressed at the moment they arose.

11.1.4 Hot-desking

313. The claimant was not required to hot-desk. The only time when the claimant says she had to hot-desk was on 5 and 6 April 2017. Miss Hayes e-mailed the claimant in advance of 5 April 2017 to say that desk-sharing would be required, but that eventuality never materialised, because the Window Desk was found for her. The Window Desk was available for her as a dedicated workstation on both the days that the claimant attended work. Mr Hughes gave her the *option* of using a vacant desk on the Team 8 bank when he spoke to her on 5 April 2017, but that is not the same as a requirement to hot-desk because the claimant always had the choice of staying at the Window Desk. The alleged PCP did not exist and there was no duty to make adjustments.

11.1.5 Handover to Miss Hayes June 2016

314. The PCP of changing the claimant's line manager put her at a disadvantage compared with non-disabled people. The claimant required many adjustments for her mental health disability. In her own words she was oversensitive and needed to be managed carefully. The incoming line manager would not be as familiar with the adjustments or with the necessary style of management. There might be delays before the incoming manager found out the necessary information from the claimant to enable them to manage the claimant effectively and put in place the right adjustments. The disadvantage caused by that temporary hiatus would be more than minor or trivial.

315. It would be reasonable for the respondent to have to reduce that disadvantage by ensuring that the outgoing line manager handed over to the new line manager. When Miss Hayes took over, that adjustment was put in place: she and Mr Blackmore had a handover meeting where they discussed the claimant's WAP, her ACC1, her issues with Mr Peters and the involvement of Remploy.

316. That conclusion does not entirely dispose of this part of the claim. It is the claimant's case that the respondent should have had to conduct a *full* handover. That contention begs the question of what "full" means. In our view it means exchanging all information which, unless the incoming manager knew about it, the claimant would be put at the disadvantage we have just described.

317. The claimant has only identified one piece of information that was missing from the handover. That was the claimant's history of disputes with managers in 2009 and 2012. The information about those disputes was contained in the confidential sealed envelope in the claimant's sub-file. We have asked ourselves whether it would be reasonable for Mr Blackmore to have to tell Miss Hayes about that information. In our view, such a requirement would be too onerous. This is because:

317.1. The period of disadvantage caused by an inadequate handover would only be temporary: it would only last until the claimant brought the new manager up to speed. At any point the claimant could have asked Miss Hayes to read the confidential information in her sub-file.

317.2. The information was in a confidential sealed envelope. The claimant's consent would have been needed to open it.

317.3. The information about the earlier disputes would not have helped to overcome the disadvantage caused by a change in manager. It could only

reduce the disadvantage if it could have caused Miss Hayes to manage the claimant differently immediately following the handover, thus avoiding the temporary hiatus. Knowing about what happened in 2009/12 might have informed Miss Hayes about potential risks associated with moving the claimant out of her team, but at the time of the handover Miss Hayes had no intention of moving the claimant. In any event, even if the confidential information had been made known to Miss Hayes as part of the handover, it would not have affected the decision to transfer her to Group 4.

11.1.5 – Handover to Mr Hughes April 2017

318. The claimant would be put to the same disadvantage as above when her manager changed from Miss Hayes to Mr Hughes. Again, there was a handover and, again, the only missing relevant piece of information was the contents of the confidential envelope.

319. Had Mr Hughes known about the failed attempts to move the claimant in 2009, he would have known that the claimant found it particularly difficult to be moved and would need to be managed very carefully. But it is inconceivable that Mr Hughes did not know that already. No adjustments have been identified that Mr Hughes failed to put in place that he would have put in place had he known what had happened in 2009.

320. By this time, Mrs McKinnell had already offered to copy the confidential contents of the sub-file to Mr Darlington. If there was any hiatus where Mr Hughes' knowledge was incomplete, it could have been very quickly remedied by Mr Darlington and the claimant sharing the relevant information with Mr Hughes directly.

11.1.5 – Handover to Mrs Muchmore October 2015

321. Whilst have found that the PCP of changing *line* managers would put the claimant at a substantial disadvantage, we found that no such disadvantage would be caused by a change of *Group* Manager. A Group Manager was responsible for several teams. He or she did not manage individual team members on a day-to-day basis, and did not routinely deal with team members in relation to adjustments.

322. Moreover, it would not have been reasonable for the respondent to have had to ensure a full handover to Mrs Muchmore about the claimant. In October 2015 (when Mrs Muchmore took over as Group 3 Manager) the claimant had no outstanding issues and nothing with which Mrs Muchmore needed to get involved. It would have been too onerous to expect a full handover about the claimant.

11.1.5 – Handover to Mrs McKinnell May 2016

323. We do not see any disadvantage to the claimant caused by the practice of changing the Group 7 manager. She was responsible for over 300 people and had limited interaction with team members except when something specific arose that required her intervention. In May 2016 nothing had been escalated to Mrs McKinnell about the claimant. A change of Group 7 manager would have no different effect on the claimant than it would on a non-disabled person working at Graeme House.

324. In any event it would not be reasonable for Mrs McKinnell to have to have a full handover specifically about the claimant. She did not have the time to be discussing the detailed circumstances of 320 or so employees.

Victimisation

(1) Decision to transfer to Group 4

325. In our view this proposed victimisation complaint requires an amendment to the claim. Looking at the claim form as a whole, there was very little more than a bare assertion of victimisation. Any reasonable reader would think that, if victimisation were to be pursued at all, the claim would have to be clarified. That is what the claimant did at the preliminary hearing before Employment Judge Tom Ryan. She was specific about what her victimisation complaint was, and it was not about the move to Group 4.

326. Had this proposed complaint any merit, we would have allowed it to be introduced by way of amendment. In reality it caused the respondent very little disadvantage. The tribunal already had to look at the reasons of the three managers for transferring the claimant out of Group 4, otherwise it would not have been able to address Allegation (5) of section 15 discrimination. We were able to find facts about their reasons despite the passage of time.

327. This brings us to the merits. Contrary to the respondent's submission, we find that the claimant could reasonably have perceived the move to Group 4 as being to her disadvantage. She evidently did not want to move there and she had some reason to fear a move, having had a negative experience of being moved in the past. But the decision to transfer the claimant was not because she did the protected act. We made a positive finding that the three managers were not influenced by the fact that the claimant had raised a concern about a racially offensive comment: see paragraph 88.

(2) Allowing the three individuals to pursue formal complaints

328. This allegation also requires an amendment, which we refuse.

329. Our main ground for refusing the amendment is that it seeks to introduce an allegation which is itself substantially out of time. It would raise a new factual enquiry about what was decided at the meetings on 7 and 9 September 2016 with the three individuals and what Miss Hayes and Mrs Muchmore's reasons were for contributing to that decision. As we found at paragraphs 68 and 69, the facts in relation to those meetings were obscure, partly due to the passage of time. We understand why the claimant did not present her original claim between September 2016 and 7 July 2017, but that does not explain why she left it until the middle of the final hearing before trying to introduce this particular amendment.

330. In any event, based on the facts that we were able to find, we would have rejected the new allegation even if we were permitted to consider it. Miss Hayes and Mrs Muchmore did not "allow" the three individuals to make formal complaints, in the sense of giving them permission to do so. Permission was not theirs to give. They could not stop the three individuals from e-mailing to complain about the claimant, and they were powerless to prevent Mr I and Mrs Thomas from indicating that the complaint was formal. Once they received the e-mails, Miss Hayes and Mrs Muchmore, together with Mrs McKinnell, met with the

three individuals. Convening that meeting was not "allowing" them to pursue a formal complaint. Rather, it was investigating their complaint and ascertaining how the three individuals wished to pursue it. They indicated that they did not want to raise a formal grievance and would be content with informal resolution. From that point onwards, they were not pursuing their complaints formally, so it did not matter whether they were allowed to do so or not. The alleged detriment therefore did not occur.

331. By way of a footnote, we would add that it appeared to us that part of the claimant's complaint was that, on occasions after 20 September 2016, the claimant was reminded that the three individuals *had* raised formal complaints against her. It was appropriate for Mrs McKinnell to keep the history of the complaints in mind and take it into account when making decisions such as whether or not to transfer the claimant to Group 4. She could not pretend that the complaints had never been made.

(3) Isolating the claimant from Team 8 because of grievance

332. An amendment is required here and is refused. As well as taking into account the time and manner of the application, our main consideration has been that there would be no disadvantage to the claimant in refusing the amendment. It would inevitably fail on the facts.

333. Raising her grievance and appealing against the outcome were protected acts. It was just about reasonable for the claimant to perceive that being allocated the Window Desk was putting her to a disadvantage. She was therefore – just – subjected to a detriment. But the detriment was not because she had done the protected acts. Paragraph 130 records our positive finding of fact from which that conclusion must follow.

Unfair dismissal

334. The respondent has proved that the reason for the claimant's dismissal was the belief held by Mr Bland and Mrs Beresford that the claimant had been absent from work for a lengthy period and was unlikely to return. That was a reason that related to the claimant's capability.

335. We have asked ourselves whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss. In our view, they acted reasonably. Here are our reasons:

335.1. Both Mr Bland and Mrs Beresford consulted with the claimant and Mr Bland undertook appropriate further investigations in response to what the claimant told him.

335.2. It was reasonable of Mr Bland to take a decision without an occupational health referral because the claimant had told Mrs McKinnell that it would be pointless.

335.3. It was reasonably open to him to decide not to pursue outsourced awareness training. There were also reasonable grounds for believing that it would make no difference if the claimant were promised a desk on the same bank of desks as the rest of her team. She would still not return to work. Mr Bland's own assessment of the Window Desk made him think, quite reasonably, that the claimant's opinion did not match the reality.

335.4. We do not agree with the claimant's contention that the respondent should have looked at this purely as a disability issue and not one of sickness absence. Section 98(4) does not require an employer to pretend that a disabled employee is not absent due to ill health. Common fairness would, of course, require the respondent to take into account the claimant's disability. They must make reasonable efforts to investigate alternatives to dismissal. Where the employee is disabled, the employer should look at whether dismissal could be avoided by making adjustments. On our finding, Mr Bland did investigate that possibility and reached a conclusion that was reasonably open to him.

335.5. We have considered the impact of Mrs Beresford's unreliable evidence about her thought processes in relation to the adjustment of providing a support worker. In our view it does not alter the reasonableness of the decision as a whole. The claimant did not need a support worker. She only raised the possibility at the appeal stage. If Mrs Beresford failed to deal with that aspect of the appeal, it did not drag the whole dismissal procedure outside the range of reasonable responses.

335.6. Our own objective assessment for the purpose of section 15 discrimination was that dismissal was not only proportionate, but the only realistic option. It was reasonable in those circumstances for Mr Bland and Mrs Beresford to take the view that enough was enough.

Breach of contract

336. Our discussion of the law, in our view, provides the answer to the claim for damages for breach of contract. The claimant had no express contractual right to be paid during her notice period. Nor did such a right arise by statute. The claimant accepted that, as a civil servant, she came within the definition of "Crown employment" in section 191. Sections 86 to 88 of ERA did not apply to her. There was no entitlement to be paid and her contract was not breached.

Disposal

337. It follows from the above reasons that the entire claim must be dismissed.

SCHEDULE

Issues for determination

7. Unfair dismissal

7.1 It is admitted that the claimant was dismissed.

7.2 *Can the respondent prove the sole or principal reason for the dismissal? Was it a reason that related to the claimant's capability?*

7.3 The claimant's case is that the dismissal was unfair because it was discriminatory and the respondent did not follow the correct procedure for an employee with disability in that both at the dismissal and appeal hearings it should not have considered the claimant's absence as a sickness absence but as a disability related issue.

7.4 Was the decision to dismiss within the reasonable range of responses for a reasonable employer?

…

8. Section 13: Direct discrimination because of disability

8.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely*:*

8.1.1 by Jacqueline McKinnell ("JMK") in January 2017 refusing to allow Remploy and/or Access to Work to come to the respondent to train and support the claimant;

8.1.2 …

8.1.3 by Natalie Hayes ("NH"), Anne Muchmore ("AM") and JMK around the end of October 2016 refusing to allow the claimant's trade union representative to participate in case conferences;

8.1.4 by … NH, AM and JMK on 9 August 2016 and AM and Craig Hughes ("CH") in April 2017 falsely describing the claimant as being aggressive;

8.1.5 by Ann Everett in about August/September 2016 at the first attendance meeting and NH at the month 4 meeting in about December 2016 failing to accurately record the minutes of those meetings;

8.1.6 by JMK on 31 March 2017 refusing the claimant permission to enter the workplace and conducting a degrading, humiliating dressing down of the claimant in the public in the reception area of Graeme House;

8.1.7 …

8.1.8 …

8.1.9 …

8.1.10 by Simon Bland on 26 October 2017 dismissing the claimant;

8.1.11 …

8.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.

8.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

8.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

9. **Section 15: Discrimination arising from disability**

(These paragraphs replace 9.1 to 9.3)

(1) The first complaint of discrimination arising from disability arises out of a comment that AM allegedly made at a meeting on 9 August 2016. It is an alternative allegation in the event that the tribunal rejects her principal allegation that AM was motivated by stereotypical assumptions about mental health. The issues are:

(a) Did AM say at that meeting that the claimant had behaved aggressively?

(b) Was it unfavourable to describe the claimant's behaviour as aggressive?

(c) Was AM's assertion because of the claimant's actual behaviour on 9 August 2016 and in April 2016 (as opposed to assumptions about the behaviour of people with mental health conditions)?

(d) Did the claimant's behaviour on those occasions arise in consequence of her disability?

(e) Does the tribunal have jurisdiction (see paragraphs 13.1 to 13.3)?

(f) Was it a proportionate means of achieving a legitimate aim?

(2) It is common ground that a meeting took place on 5 October 2016 between NH, AM and JMK. The claimant's trade union representative was not invited to the meeting. The tribunal must decide:

(a) Does the claimant need permission to amend her claim so as to allege that the unfavourable treatment consisted of a failure to invite a union representative (as opposed to a refusal to permit such a representative?)

(b) Should permission be granted?

(c) Was it unfavourable treatment not to invite a trade union representative *in circumstances where the representative had asked to be included in case conferences*?

(d) In omitting to invite a trade union representative, were JMK, NH or AM motivated to any significant extent by a perception that, if invited, the representative would raise concerns that the respondent's actions were discriminatory?

(e) Did that perception arise in consequence of the claimant's disability?

(f) Does the tribunal have jurisdiction (see paragraphs 13.1 to 13.3)?

(g) Was the exclusion of a trade union representative a proportionate means of achieving a legitimate aim?

(3) It is also undisputed that on or about 17 November 2016, NH had a telephone conversation, described as a "case conference", with someone from the Human Resources Reasonable Adjustments Support Team. The

claimant's trade union representative was not invited to participate. What the tribunal has to decide is:

(a) Does the claimant need permission to amend her claim so as to allege that the unfavourable treatment consisted of a failure to invite a union representative (as opposed to a refusal to permit such a representative?)

(b) Should permission be granted?

(c) Was it unfavourable treatment not to invite a trade union representative *in circumstances where the representative had asked to be included in case conferences*?

(d) In omitting to invite a trade union representative, was NH motivated to any significant extent by a perception that, if invited, the representative would raise concerns that the respondent's actions were discriminatory?

(e) Did that perception arise in consequence of the claimant's disability?

(f) Does the tribunal have jurisdiction (see paragraphs 13.1 to 13.3)?

(g) Was the exclusion of a trade union representative a proportionate means of achieving a legitimate aim?

(4) The minutes of the first monthly attendance meeting on 20 September 2016 and the fourth monthly attendance meeting on 31 January 2017 describe the claimant as "shouting" and behaving "aggressively". The claimant brings an alternative claim in case the tribunal rejects her main complaint that Miss Everett was motivated by stereotypical assumptions about mental health. If Miss Everett was motivated by observation of the claimant's behaviour, the tribunal must decide:

(a) Was it unfavourable treatment to describe the claimant's behaviour in that way?

(b) Did the claimant's behaviour arise in consequence of her disability?

(c) Does the tribunal have jurisdiction (see paragraphs 13.1 to 13.3)?

(d) Were Miss Everett's descriptions a proportionate means of achieving a legitimate aim?

(5) It is common ground that NH, AM and JMK decided on 5 October 2016 that the claimant should be moved from Group 3 to Group 4. The issues for the tribunal are:

(a) Was that decision unfavourable to the claimant?

(b) Was the decision made because of something arising in consequence of the claimant's disability?

(c) Does the tribunal have jurisdiction (see paragraphs 13.1 to 13.3)?

(d) Were Miss Everett's descriptions a proportionate means of achieving a legitimate aim?

(6) Mr Bland treated the claimant unfavourably by dismissing her. The claimant's main case is that he did so because she was disabled, her alternative claim is that he did so because of her absence from work and

poor prospect of returning. There is no dispute that those reasons arose in consequence of the claimant's mental health disability. The tribunal must decide whether or not dismissal was a proportionate means of achieving the legitimate aims set out at page 67 of the bundle.

(7) On appeal Mrs Beresford confirmed the dismissal decision, which was unfavourable to the claimant. Both the claimant and the respondent positively contend that she reached that conclusion because of something arising in consequence of the claimant's disability, but they differ as to what that "something" was. The claimant says it was because of her need for adjustments, which (she says) were not put in place. The respondent says that it was because of her absence and poor prospect of return to work. The tribunal must decide:

(a) Which of those reasons it was; and

(b) Whether upholding the dismissal was a proportionate means of achieving a legitimate aim.

(8) Between 10 August 2016 and 31 March 2017, NH treated the claimant's absences under the sickness policy rather than as disability-related absences. The tribunal must determine:

(a) Whether, in deciding on the label to be attached to the claimant's absences, NH was motivated to any material extent, by a belief that the claimant was to blame for her own absence;

(b) Whether that belief arose in consequence of the claimant's disability; and

(c) Whether classifying the claimant's absence in that way was a proportionate means of achieving a legitimate aim.

(9) The claimant alleges that the respondent treated her unfavourably by delaying the processing and resolution of her grievance which she made on 25 October 2016, but has not alleged that this was done for a reason which arose in consequence of her disability. The tribunal is treating the claimant as not pursuing this element of her claim under section 15 of the Equality Act 2010.

(10) Ms Anne Holland treated the claimant unfavourably by rejecting the claimant's grievance on 1 March 2017. The tribunal must decide:

(a) Whether she reached her decision because of failures to investigate comments made at the investigation stage;

(b) Whether those failures arose in consequence of her disability;

(c) Whether the tribunal has jurisdiction (see paragraphs 13.1 to 13.3); and

(d) Whether the decision was a proportionate means of achieving a legitimate aim.

(11) The next complaint under section 15 involves considering:

(a) Whether or not JMK treated the claimant unfavourably on 6 April 2017 by threatening to call the police;

(b) Whether the threat was because of the claimant demonstrating a deterioration in her mental health; and

(c) If so, whether it was a proportionate means of achieving a legitimate aim.

(12) On 6 April 2017, Helen O'Rourke ("HOR") entered a room where a management meeting was taking place and spoke to the managers there, revealing information that she had learned about the claimant from JMK. There is no dispute that JMK gave this information to HOR and that she did so in consequence of a deterioration in the claimant's mental health. The tribunal must decide:

(a) Whether, at that time, HOR said that the claimant was suicidal;

(b) Whether saying so was unfavourable treatment;

(c) Whether HOR treated the claimant unfavourably by saying that the claimant was being escorted from the building by the police; and

(d) Whether saying those things was a proportionate means of achieving a legitimate aim.

10. **Section 26: Harassment related to disability**

10.1 Did the respondent engage in unwanted conduct as follows:

10.1.1 prior to April 2016 Gavin Peters ("GP") attaching a photograph of Medusa to a hand sheet next to the claimant's name and a person unknown attaching a photograph of the actress Kathy Bates in the film "Misery" to that sheet;

10.1.2 on 8 April 2016 GP calling the claimant "Judge Mental" and emphasising the word mental in a mocking and cruel tone;

10.1.3 on 20 April 2016 GP, despite having been warned by Mr Blackmore to refrain from making inappropriate comments, laughing at the claimant's distress over delays and/or changes to working practices and saying "I don't care. Don't go pushing your worrying on to me."

10.1.4 In about July 2016, when Mr I said to GP (apparently referring to somebody other than the claimant) "there's a prime candidate for a straitjacket" at which GP looked directly at the claimant and said in a snide and sarcastic tone "there's another candidate much nearer";

10.1.5 on 9 August 2016 NH and AM accusing the claimant of being aggressive;

10.1.6 by NH and AM on the same day requiring the claimant to attend a meeting with JMK without union representation;

10.1.7 by … NH, AM and JMK on 9 August 2016 and AM and CH in April 2017 falsely describing the claimant as being aggressive;

10.1.8 by JMK on 31 March 2017 refusing the claimant permission to enter the workplace and conducting a degrading, humiliating dressing down of the claimant in the public foyer of Graeme House;

10.1.9 on 5 April 2017, AM approaching the claimant in attempting to engage in conversation with her in regard to her return to work when the claimant had requested that she communicate with her through JMK or her union representative;

10.1.10 by JMK on about *6* April 2017 accusing the claimant of inappropriate behaviour towards CH;

10.1.11 on *6* April 2017 JMK threatening to call the police rather than rather than medical assistance to have her removed from the building;

10.1.12 on *6* April 2017 Helen O'Rourke entering a room and informing those present that the claimant was being escorted from the building by the police and that she was suicidal?

10.2 Was the conduct related to the claimant's protected characteristic of disability?

10.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10.4 If not, did the conduct have the effect of violating the claimant's dignity or creating such an environment for the claimant, having regard to: the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

11. **Reasonable adjustments: section 20 and section 21**

11.1 The claimant's case is that the matters set out below amount to failures to make reasonable adjustments in that they are failures to implement or continue adjustments that had previously been agreed:

11.1.1 on 5 April 2017 allocating the claimant to a place of work which was lit by natural light and had an opportunity for her to set up a desk fan;

11.1.2 from mid-2015 and particularly after April 2017 failing to hold KIT meetings;

11.1.3 asking the claimant to intend informal meetings *on 9 August 2016* without the assistance of the union representative;

11.1.4 expecting the claimant to hot desk after the claimant returned to work in April 2017;

11.1.5 failing to ensure that any new manager had a full handover from an existing manager, in this regard the claimant refers to NH in July 2016 and CH in April 2017 taking over as the team manager, AM taking over as the floor manager in about 2015 and JMK taking over as head of group in about March 2016.

(1) The tribunal must decide, in the case of Adjustment 11.1.1,

(a) Whether, without the auxiliary aid of a desk fan, the claimant would have been at a substantial disadvantage compared to persons who are not disabled; and

(b) Whether it would have been reasonable for the respondent to have to have made the adjustment of providing an *opportunity to set up a* desk fan by the time the claimant left the building on 6 April 2017.

(2) In the case of Adjustment 11.1.2, the tribunal must consider:

(a) Whether the tribunal has jurisdiction in respect of any failure to hold KIT meetings prior to April 2017;

(b) Whether a *practice* of the respondent, *namely the inability of the Team Leader to respond to team members' workplace issues at the moment they arose,* put the claimant at a substantial disadvantage compared to persons who were not disabled;

(c) Whether it was reasonable for the respondent to have to hold KIT meetings *weekly at times when the claimant was vulnerable*; and

(d) Whether it failed to hold those meetings at those times.

(3) Under Adjustment 11.1.3, the tribunal must decide:

(a) Whether the tribunal has jurisdiction (see paragraphs 13.1 to 13.3)

(b) Whether the practice of holding informal meetings put the claimant at a substantial disadvantage compared to persons who are not disabled;

(c) Whether the respondent held any informal meetings *on 9 August 2017* with the claimant without a trade union representative present; and

(d) Whether it was reasonable for the respondent to have to invite a trade union representative to those informal meetings;

(4) Adjustment 11.1.4 turns on a simple issue: whether or not the claimant was required to hot-desk in April 2017. The respondent does not dispute that hot-desking would put the claimant at a substantial disadvantage, or that it was reasonable for the respondent to have to give the claimant her own workstation.

(5) Adjustment 11.1.5 is based on the respondent's practices of changing the Band O manager responsible for line managing the claimant, and of changing the HO grade manager responsible for the Group in which the claimant worked. The tribunal must decide:

(a) (in all handovers except that of CH) whether the tribunal has jurisdiction;

(b) Whether those practices put the claimant at a substantial disadvantage compared to persons who are not disabled;

(c) Whether it was reasonable for AM to have to receive a full handover *about the claimant* when she became the Group manager for the claimant's Group;

(d) Whether it was reasonable for JMK to have to receive a full handover a full handover about the claimant when she became Grade 7 Manager for Graeme House in May 2016;

(e) Whether it was reasonable for NH and CH to have to receive full handovers; and

(f) Whether in fact they did receive full handovers.

12. **Section 27: Victimisation**

Original allegation

12.1 Has the claimant carried out a protected act in reporting to AM or NH or both of them that GP, Mr I and GT had made racially stereotypical comments?

12.2 Has the respondent by AM or NH or both of them subjected the claimant to detriment by reason of the protected act in reporting the fact that the claimant had alleged those members of staff made racially stereotypical comments to others? *(This allegation is not pursued.)*

Proposed new allegation (1)

12.3 Is the claimant permitted to amend her claim to include an allegation that the respondent victimised her by deciding to move her to a different group?

12.4 Does the tribunal have jurisdiction (see paragraphs 13.1 to 13.3)?

12.5 If so, did NH, AM or JMK subject the claimant to a detriment by deciding to move her from Group 3 to Group 4?

12.6 If so, what was the reason why they made that decision? Was it motivated to any significant extent by the fact that the claimant had done the protected act mentioned at paragraph 12.1?

Proposed new allegation (2)

12.7 Is the claimant permitted to amend her claim to include an allegation that the respondent victimised her by allowing employees to bring formal complaints against her?

12.8 Does the tribunal have jurisdiction (see paragraphs 13.1 to 13.3)?

12.9 If so, did NH and AM allow Mr Peters, Mr Ingram and Mrs Thomas to pursue formal complaints against the claimant?

12.10 If so, did what is the reason why the pursuit of those complaints was allowed? Was it because the claimant had done the protected act mentioned at paragraph 12.1?

Proposed new allegation (3)

12.11 Is the claimant permitted to amend her claim to include a complaint of victimisation based on the protected acts of raising a grievance alleging discrimination and appealing against the outcome?

12.12 Does the tribunal have jurisdiction (see paragraphs 13.1 to 13.3)?

12.13 If so, did CH subject the claimant to a detriment in placing her at a workstation separate from the rest of Team 8?

12.14 If so, did CH choose that workstation because the claimant had raised a grievance or appealed against the outcome?

13. **Time/limitation issues**

13.1 The claim form was presented on 7 July 2017. Bearing in mind the effects of ACAS Early Conciliation, any act or omission which took place before 9 March 2017 is potentially out of time, so that the tribunal may not have jurisdiction.

13.2 If so can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

13.3 If not, can the claimant show that it would be just and equitable for time to be extended so that the tribunal may find that it has jurisdiction? In this regard the claimant is referred to the cases of **British Coal Corporation v Keeble** [1997] IRLR 337 and **Robertson v. Bexley Community Centre** [2003] EWCA Civ 576 which summarise the principles applied by the tribunal in considering whether to grant an extension or not.

14. **Breach of contract**

14.1 It is not in dispute that that respondent dismissed the claimant with notice. *It is also common ground that the claimant had exhausted her entitlement to pay under the respondent's sickness absence policy and that, but for section 87 of the Employment Rights Act 1996, she would not have been entitled to be paid during her notice period. The issue is whether section 87 of ERA provided for the claimant to be paid.*

_____
Employment Judge Horne

21 December 2018

JUDGMENT SENT TO THE PARTIES ON

08 January 2019

…….

FOR THE TRIBUNAL OFFICE