EMPLOYMENT TRIBUNALS

Claimant: Mrs Kerry Richards

Respondent: Royal Mail Group Ltd

Heard at: Bristol **On:** 15 - 19 October 2018 and in chambers on 3 January 2018

Before: Employment Judge Street
Mr H Patel
Dr C Hole

Representation
Claimant: Ms S Hornblower. counsel
Respondent: Mr Peacock, counsel

RESERVED JUDGMENT

The claims in respect of disability discrimination, detriment on the grounds of a protected disclosure and unlawful deduction from earnings are dismissed.

The hearing listed on the 15 February 2019 is cancelled.

REASONS

1. Evidence

1.1. The Tribunal heard from Mrs Kerry Richards, the claimant, from her partner and colleague Dean McMullen and from Colin Sayles, Area Delivery Representative for the Gloucestershire Amalgamated Branch of the Communication Workers Union. For the Respondent, the Tribunal heard from Mr Reza Goldsmith, line manager, Ms Louise Birt, Delivery Office Manager at Dursley and Steve Mitchell, Delivery Office Manager at Cheltenham.
1.2. The Tribunal read the documents in the bundle referred to.

2. Issues

2.1. The claims made were of discrimination arising from disability, direct disability discrimination, the failure to make reasonable adjustments in respect of disability, detriment arising from protected disclosures and unlawful deduction of wages.
2.2. The agreed issues run to 30 paragraphs and so are not set out again here, but are set out below.

3. Findings of Fact

Royal Mail policies.

3.1. The Royal Mail policy proposes suspension where there is inappropriate behaviour, a serious breach of conduct, or a risk that investigation may be hampered if the employee remains at work. An alternative to sending someone home is to suspend them from their current role but allow them to undertake alternative work. There is no formal policy governing the management of staff placed temporarily in alternative roles but the suspension guidance applies (57).
3.2. Where the employee is suspended, the suspension must be reviewed.

> "Precautionary suspension should only be considered for serious incidents where there is a reasonable belief that the serious breach might be repeated and/or there is a risk to people, property, mail or the good image of Royal Mail Group."

3.3. Precautionary suspension should only last as long as necessary (48).
3.4. We have not seen a whistleblowing policy.
3.5. There is guidance for managers on conducting a thorough fact-finding investigation (46). It allows for evidence and documents to be shared including if new evidence comes to light, and for witnesses to be interviewed (47).
3.6. The outcome of a fact-finding investigation may be that there is no case to answer, that an informal approach is justified or that formal action is required. In that case, the manager may refer the case to a more senior manager, if a major penalty may be required or there has been repeated misconduct.
3.7. Where there are investigations under other policies, evidence may include the grievance file,

> "A grievance file can form part of the fact-finding investigation"

3.8. Bullying, harassment and victimisation are defined for the purposes of grievances (222).
3.9. Harassment is any inappropriate and unwanted behaviour that could reasonably be perceived by the recipient or any other person as affecting their dignity. Bullying is intimidation on a regular and persistent basis or as a one-off which serves to undermine the competence, effectiveness, confidence and integrity of the person on the receiving end.
3.10. The Respondent has a small Human Resources ("HR") department, from which advice is available but on a remote basis.

Employment History

3.11. Mrs Richards is employed as an Operational Postal Grade ("OPG") at Dursley Delivery Office.
3.12. She was interviewed for the post around February 2015. She discussed her anxiety at her interview, with James Delrosa, before resigning as a teacher.

She was at that time on long term sick leave from teaching, with many years of working in that profession but a 12 year history of anxiety. She was on medication for it. She had applied for the job delivering post because she had been advised that working out of doors would help her anxiety.

3.13. She was appointed and started work on 05/05/15.

3.14. Louise Birt and Reza Goldsmith were the Dursley Management Team. Louise Birt mentored Reza Goldsmith.

3.15. Mrs Richards raised anxiety with Reza Goldsmith for the first time on 28/06/17.

Contract and overtime

3.16. Paragraph 9.2 of her contract requires her to do overtime.

3.17. She was contracted to do regular but variable overtime under the Scheduled Attendance Agreement (73) ("SAR").

> "I understand that in return for this commitment RM will pay me at the appropriate rate for my attendance at the times above"

3.18. Scheduled Attendance overtime is not paid during periods of sickness absence (74).

3.19. Mrs Richards enjoyed an excellent attendance record, with only a couple of days absence prior to these events. She was known as a good and reliable worker

3.20. She felt much better for the outdoor work and regular exercise. While she had been on long-term sick leave as a teacher, she was able to come off medication in February 2016.. As she says, she felt completely well until the accident in June 2017 and associated events.

Accident

3.21. The events at issue began with a handbrake rollaway of Mrs Richards' van.

3.22. Another individual had previously been responsible for a handbrake rollaway on 12/05/17. She had left the empty vehicle in a Royal Mail carpark. It had been found without the handbrake fully engaged, and it rolled some 4 metres. She had driver re-training the following Monday, taking advantage of a cancellation. She had no suspension from outdoor duties. She had a conduct meeting with Reza Goldsmith on 27/05/17, having agreed to forego formal notice, and was given a two-year serious warning (293) . The whole episode was over without any upward referral within 15 days.

3.23. This was not that individual's only accident. She had an accident reversing in November 2016, had her driving training and retook a test within a few days and went back on driving. By November 2017, she had had four accidents.

3.24. Another individual had a number of accidents as a driver, including one in which a pedestrian sustained fractures. She too returned to driving and deliveries quickly.

21/07/18

3.25. It is agreed there had been no severe weather risk assessment in Dursley for 21/06/17 (334 and 212) *(Mitchell's summary)* James Mullakey was an inexperienced acting manager and he was in charge.

3.26. There are national posters available detailing symptoms and what to watch out for in terms of heat stress and heat exhaustion but they were not on display in the Dursley unit (335).

3.27. It was the hottest day, temperatures reaching 33 degrees centigrade (211).

3.28. Drivers are only allowed to have vehicle windows open by one inch for security reasons (173).

3.29. There had been training about being out in the sun, which Mrs Richards described as excellent, but not about heat stress; the training was on sun safety.

3.30. She suffered heat exhaustion (88/89/90). After a day of increasing distress, during which she re-organised her planned route to avoid additional fatigue, she nonetheless found herself feeling ill, exhausted, hot, confused, and disorientated. She did not realise that her judgment was impaired. By 1.00 pm, the temperature gauge on the van was showing 32.5 degrees. She explained at the time and in the later fact-finding meeting how she tried to manage the route to avoid exhaustion, how three customers in turn invited her in from concern at her appearance and gave or offered her drinks. At around 1.30 she rang her partner, Mr McMullen, another postal worker, in some distress. She went on to drive a part of the route she would normally walk. She felt she could not to call in to say she could not finish the route. She pulled in for a delivery and got out of the car. She reiterated later that she could not recall if the keys were in the car, but that she was "going to say they were as I just can't remember". She walked to the gate, a couple of steps, still at that point close to the van. She saw it move. It rolled about 1.5 metres and the open van door hit a fence. The mail for the current deliveries was on the seat.

3.31. She reported the incident. James Mullakey came out. She was asked whether she was hurt but the scope for medical advice was not recognised. (134 on).

3.32. She helped complete the last ten deliveries (177). She was asked to help move the parcels out of her van but found herself getting confused, both by that and by trying to handle the mobile phone using an automated system. She was asked to drive, but did not feel able to, although she did somewhat later drive herself home, including making a stop at the site of the accident on her way.

3.33. Neither James Mullakey nor Sue Palmer who saw her at the time thought that she was confused or disorientated. She told them she was all right although refusing to drive. (153, 151, 134 +). Reza Goldsmith made sure that someone was able to drive her to see the doctor the following day.

3.34. She acknowledges that the incident was potentially serious for the respondent and that other people have been dismissed for handbrake rollaways.

22/07/17

3.35. Mrs Richards was diagnosed with heat exhaustion. Amongst the symptoms of heat exhaustion are tiredness, weakness, dizziness, headache, muscle cramps, intense thirst. The GP later confirmed that the following day she was still suffering residual symptoms of heat stress (letter not seen but page 211)

3.36. In more severe cases, there is a risk of heatstroke with potential confusion and disorientation, seizures or loss of consciousness (103).

3.37. In the records made at the time, in the Handbrake Incident form, there is a note of the facts relating to the rollaway, but no entry against "Severe weather". That is not surprising because the illustration given is of icy roads. The risks of extreme heat were not recognised.

3.38. Mr Goldsmith suspended her both from driving and delivery duties. She was put on indoor work pending a disciplinary investigation. There was to be a fact-finding meeting on 28/06/17. The suspension was in respect of both the rollaway and the failure to safeguard the mail (80).

3.39. Precautionary suspension is for serious cases where there is a risk of repetition. Mr Goldsmith saw a risk because the hot weather was continuing and she had failed to take sun safety precautions.

3.40. On 26/06/17, still suffering overwhelming thirst, she took medical advice and was told that she needed more than just liquids. Louise Birt was supportive and authorised her to go out to buy dioralyte as advised.

3.41. Her role had included regular voluntary overtime. There was no overtime available for indoor duties. Once the day's deliveries were sorted, the work available was sorting publicity material, a monotonous, unskilled role that she had to undertake for a number of hours at a time. She found the indoor work aggravated her anxiety.

The Grievance

3.42. On 27/06/17, she lodged a grievance, accepted as a protected disclosure (87).

3.43. In that, she sets out that,

"Royal Mail is wholly, solely and exclusively responsible for the incident of 21st June 2017 after it failed in its statutory duty of care towards its employee Mrs Kerry Richards, under section 2 of the Health and Safety at Work Act 1974 and placed her at significant risk."

3.44. She alleged negligence, in not ensuring that a mandatory risk assessment for severe weather was conducted in the Dursely Unit or in the material cascaded to staff, in breach of the Health and Safety Executive guidelines. The Royal Mail's overall response and heat stress education programme was woefully inadequate.

3.45. She highlights that she is in a high-risk group which is a reference to her skin and hair colour and that Royal Mail should conduct a risk assessment for those in high risk groups and implement safe working measures.

3.46. The document includes a detailed account of the events leading up to the accident and of the accident itself and also material on how rapidly heat exhaustion and heat stroke can arise, how insidious the symptoms and how disabling they are. She appends to the grievance thirteen documents including material from NHS choices, witness statements from the customers who had shown concern for her condition on 21st June and other guidance on heat stress and practical measures to avoid it (91).

3.47. The statements from customers included that Mrs Richards was in a distressed state, appeared incoherent, looked ill and about to faint, said herself that "She felt so ill she could cry", seemed disorientated (212).

3.48. Mr Goldsmith knew that she was raising a grievance on 26th June (132 and oral evidence).

3.49. She lodged the grievance on 27/06/18 as a stage 2 grievance, that is, as outside the jurisdiction of the local managers, because of the serious policy issues raised. It was sent to a senior manager, Tim Dowd. Mrs Richards then asked for the conduct fact-finding meeting to be deferred so that the grievance could be considered first (134).

3.50. She was asked to disclose the contents of the grievance by Reza Goldsmith, but declined (133). She tells us that that was because she knew that

the contents of a grievance are treated as confidential by Royal Mail and she did not wish to challenge or breach that policy.

3.51. She was then called by Mr Goldsmith into the office to meet with Louise BIrt. He invited her to have someone with her. She would have chosen Dean McMullen , but he had unexpectedly been sent by Ms Birt on a Gloucester run. She chose Billy Hunt, another manager, as her representative *(235).*

3.52. While management were entitled to send Mr McMullen on any route they chose, Sue Palmer was scheduled for and available for the duty that day:

> "I had done duty 118 the previous day. This day I was due to do 123, so I would sit riding shotgun, he would show me where the named farms and large houses were, safe places to park, normal practice. So it was not part of that duty to be sent to Gloucester." Dean McMullen *Day 3 page 20*

3.53. The meeting was to discuss the grievance. Ms Birt wanted to find out what it was about.

3.54. Ms Birt now says it was to see if it could be resolved informally and to see if it was about her or Mr Goldsmith, which might have affected the management of the disciplinary. Neither course was appropriate given that the grievance had been made, confidentially, at a more senior management level. HR should have been able to advise if advice was necessary.

3.55. No minutes were taken.

3.56. At the meeting, Mr Goldsmith was behind Mrs Richards, between her and the door (235).

3.57. Mrs Richards' account is that Louise Birt gave her a dressing down "in a very abrasive manner" about lodging the grievance (p235),

> "On entering the office and without any preamble or being invited to sit, Louise launched into me verbally…. "Explain yourself…. What is going on… what is this letter about?"

3.58. In her contemporary note, she describes Ms Birt as getting heated, to the point where Mrs Richards said,

> "Louise, you are getting very heated and raising your voice at me".

She quotes Ms Birt as saying emphatically,

> "A child could have been killed",

and that she replied,

> "So could I".

3.59. Mrs Richards was distressed.

3.60. On the same day, she asked if she could leave the premises for a break, more as a courtesy than because she considered permission was needed. She felt humiliated that Reza Goldsmith took the issue to Louise Birt to discuss before authorising the absence (*238*) In oral evidence, Louise Birt explained she needed to know "when and where" Mrs Richards would be.

3.61. By the 27th, there were unpleasant remarks being made to her and about her, following the accident. (witness statements)

> "They were making comments, I was lying and needed to be sacked, unwelcome comments, when you collect the mail at the end of the day, there would be a group of say 7 people, they would be talking about my case, if I wasn't sacked they would get the union on to it. Leaving a workplace learning on 27/06, a safety briefing, Sue again saying "This is all to get her off the hook". (Mrs Richards' oral evidence, day one)

The Fact Finding Meeting

3.62. On 28/06/17, the formal fact-finding meeting between Mrs Richards and Reza Goldsmith took place. (131, 134). Mr McMullen was with her as her representative.

3.63. He was told at the outset not to answer any questions "and will be asked to leave if he does so, as stated in Royal Mail Guidelines."

3.64. The guidance we have seen is silent on representatives. That embargo was not imposed on others during other meetings, for example on the representatives in the bullying and harassment investigation, when the representatives spoke freely and were highly engaged, including intervening with comments and answering questions. They were permitted to continue in spite of making inappropriate prejudicial remarks about Mrs Richards.

3.65. That there was widespread wariness and perhaps resentment in the office is supported by the later remarks during Elizabeth Evans' investigation, for example, from Ian Friend, representing Louise Timms, commenting on the scope for mediation,

> "Well you would have to do a lot of mediation with a lot of different people." (310)

3.66. At the fact-finding meeting, Mrs Richard's anxiety was referred to by Mrs Richards and Mr McMullen,

> "Dean and Kerry made me aware she had suffered anxiety, I did say if she needed to take a moment, I was not aware that she was suffering at the time…" (Mr Goldsmith, oral evidence)

3.67. Mrs Richards explained in some depth the circumstances on the day of the accident and leading up to it, and referred to the contents of the grievance, saying that there had not been training on heat stress. *(day two page 18)*

3.68. Mr Goldsmith agrees that Dean McMullen also raised concerns about bullying with him with regard to a couple of colleagues, with their words reported

3.69. Mrs Richards was sent the minutes of the fact-finding meeting on 3/07/17and on 6/07/17 handed them back to Mr Goldsmith annotated, and with them a number of documents. Her account is this,

> "Mr Goldsmith said he would accept my mitigation, I hand the Fact Find notes in with the evidence and I thought he would accept and read and I watched him go into Louise, show her what I had submitted and scribbled on it what he would accept and not and came to me and said "I am sorry I can't take this", and he said "You haven't referenced it in your fact-find meeting" and I said "Actually I have" and I have had to state what I said and where it is backed up from, and he was going back and forward from Louise's desk, and so I pointed out what I had referred to but other documents that were relevant were just handed back."

3.70. She says Mr Goldsmith was not acting independently and was therefore not being consistent. He was later questioned by Elizabeth Eves, investigating the bullying allegations about the breach of confidentiality in handling the disciplinary matter that this entailed (314).

3.71. Mrs Richards felt disadvantaged:

> "So I was not able to put my full case forward, I thought the fact-find would be looking at all the facts and then what weight to add to them, so I had my mitigation limited."

3.72. From a discussion with a union safety representative on 4/07/17, Mrs Richards understood that it was not uncommon for offices to fail to carry out risk assessments of severe weather – 2 out of 11 offices had completed the mandatory risk assessment on 21/06/17 (Claimant witness statement, para 12).

5/07/17

3.73. On 5/07/17, there was a safety huddle over managing heat and staying safe in the sun.

3.74. Sue Palmer made pointed remarks,

> "My seven year old grandson knows how to stay safe in the sun"
>
> "Sue was mouthing off, everyone knows about heat, which in the context came across as very personally directed at Kerry." (*287,* 239, McMullen oral evidence)"

3.75. Mrs Richard's anxiety mounted. Mr McMullen spoke to Mr Goldsmith, reporting the remarks which were to the effect that the fuss about heat safety training was all to get Mrs Richards off the hook.

3.76. Mr Goldsmith had a "nip in the bud" conversation with the two complained of, Louise Timms and Sue Palmer, calling both together into his office.

3.77. Sue Palmer came out of the office directly after the "nip in the bud" conversation and challenged Dean about why he had complained, and then went up and down the back aisle saying "I will find out who it was and I'll have them" Mrs Richards felt intimidated, shaking and crying. She was feeling vulnerable because of her history of anxiety and because of the developing atmosphere in the office. She spoke about it to Mr Goldsmith, who saw her distress and agreed to her leaving early, before those involved came back from deliveries. Dean McMullen also made a further report to Mr Goldsmith.

3.78. Mr Goldsmith did not take any further action. He says that the "nip in the bud" conversation was successful because apart from that incident immediately afterwards, there were no later reports of misconduct.

3.79. Mr McMullen commented,

> "I struggle immensely, having been a Royal Mail manager, that you have a conversation, nip in the bud, cease and desist, with someone who will you hope, listen, and take on board and who then leaves the meeting and goes straight to the person making the report.
>
> That in and of itself could be an act of gross misconduct.
>
> And it is entirely inappropriate
>
> There is no action following that."

6/07/17

3.80. On 6/07/17, Mr McMullen asked Ms Birt what she was doing about the bullying. Louise refused to get involved. She said Mr Goldsmith was dealing with it.

3.81. On 7/07/17, Mr McMullen asked Mr Goldsmith what was happening about the bullying and was told that Ms Birt had dealt with it. (239).

3.82. There was no further action about the bullying until the formal grievance was put in about it in November.

The Dismissal of the Grievance

3.83. Mr Dowds was the Delivery Sector Manager. He had been informed on 21/06/17 of the rollaway accident.

3.84. On 7/07/17, he acknowledged Mrs Richards' grievance. He wrote to her refusing to log it or to take any further action under the Royal Mail's Grievance procedure. He cites the procedures available to her as under the following policies – Conduct, Attendance, Stop: Bullying and Harassment, Improving Performance and Trial Process. He does not refer to a whistleblowing policy (146)

3.85. He did not recognise this as a protected disclosure or as raising health and safety concerns. He saw it as relating to the ongoing conduct investigation. He saw it as a diversionary tactic, with Mrs Richards trying to escape the penalties for her misjudgement.

Escalation

3.86. On 10/07/17, Reza Goldsmith decided to escalate the disciplinary case to a more senior manager.

> "I consider the potential penalty to be outside my level of authority" (164).

3.87. That meant that dismissal was a possibility.

3.88. Mr Goldsmith was still handling the conduct matter for a while after that, in that on 21/07/17, he conducted interviews with Sue Palmer, the OPG who had helped out on the day of the accident, and James Mullakey, checking their statements with them and asking additional questions, including as to whether Mrs Richards had been wearing a hat on the day of her accident (151 – 154) and as to her mental state.

3.89. Mr Goldsmith still thought Mrs Richards been negligent about not wearing a hat and that that had contributed to the accident,

> "I thought not wearing a hat was a contributing factor."

3.90. The policy guidelines leave discretion. Mr Goldsmith could have accepted her case that she was taken ill, but he saw her failure to wear a hat as showing that she had failed to guard against the effects of the sun. In that, he saw a risk of repetition, including in the risk to the integrity of the mail.

3.91. Mrs Richards says,

> "The sun safe strategy is that I should be wearing a sun hat. If I was not, it could be a breach of that strategy, so that is setting me up for dismissal."

3.92. She points out that wearing a hat can make you hotter, so it is not appropriate where the issue is heat stress. Mr Goldsmith had not understood her case.

3.93. Mr Mitchell told us that the upward referral was entirely appropriate. He saw the failure differently, in that while Mrs Richards had been able to phone her partner to say she was ill, she had failed to notify the office that she was not in a fit state to continue driving and making deliveries.

Sickness absence

3.94. Mrs Richards found the indoor work she had been given dispiriting.

> "There is no meaningful indoor work. I ended up doing repetitive door to door mails, junk mail, putting it in frames and while it is a job that needs to be done, to sit doing that for six hours a day is tedious and demeaning and when you are suffering from anxiety, it has quite a worthless quality."

3.95. It was work that allowed her anxiety to prey on her.

3.96. At some point, Mr Goldsmith offered to move Mrs Richards to another office, if it was this office that was causing her stress and anxiety (316, see also 283). She did not see that as helpful.

3.97. He did not consider lifting the suspension from delivery work,

> "Due to the mail integrity issue, she could not do a walking delivery while the conduct matter was ongoing and I was not in control of that after I passed it up."

3.98. From 11/07/17, Mrs Richards was off work sick Mr McMullen reported that she had suffered from anxiety in a previous job and was going to her doctor stress and anxiety (316). That was due to the indoor work, work known to aggravate her anxiety, and the difficult atmosphere and comments being made, which left her feeling vulnerable, isolated and intimidated.

3.99. On 19/07/17, Mr Goldsmith made a referral to Occupational Health (149 238).

3.100. There was a telephone discussion between Ms Birt and Mrs Richards on 21/07/17, in the course of which Mrs Richards explained her history of anxiety and the difficulty she had coping with the anxiety when doing the indoor work. Ms Birt confirmed that Mrs Richards could not go out on delivery until the outcome of the conduct matter (246).

3.101. Mrs Richards told Mr Goldsmith more about the anxiety and the effects of indoor work in a discussion of her absence over the phone on 28/07/17,

> "Do you remember her saying being outside was really beneficial?"
>
> "Yes I do"
>
> "And she was so confident that she thought then she could return to work, working outside?"
>
> "Yes, I do recall a vague conversation, trying to recall it. But because of the conduct issue, we could not… "

The Scheduled Attendance Rota

3.102. The Scheduled Attendance rota was completed by Ms Birt for the month of August in mid-July. Mrs Richards was left off it, even though her sick note would have expired on 25/07/17. (163A, 179).

3.103. Ms Birt explained that it because she was both off sick and subject to suspension pending the disciplinary matter.

3.104. On 24/07/17, Mrs Richard's solicitors wrote to the respondent (154).

3.105. They challenge the refusal to deal with the grievance and see that as evidence that the disciplinary has been prejudged, since the matters raised were relevant to the disciplinary. They point out that the original fact-finding invitation did not refer to the mail integrity issue, which was apparently a new charge, that there were no clear allegations, that witness statements and meeting notes had not been shared. The precautionary suspension from delivery duties was unnecessary, given that so long as she was not driving, there was no risk of a repetition of the incident. They point out that a similar rollaway (156) and more serious traffic accidents involving in one case causing personal injuries to an elderly pedestrian had been dealt with differently, including by allowing continuing deliveries using a trolley. They raise the loss of pay from being on indoor duties, given the lack of overtime. They raise the question of bullying by Louise Birt, Louise Timms and Sue Palmer (156) They ask that the bullying be dealt with by formal disciplinary proceedings.

3.106. On 28/07/17, Mrs Richards again spoke to Mr Goldsmith confirming she was all right to continue with outdoor work (289).

3.107. On 31/07/17, the Occupational Health appointment was deferred, causing Mrs Richards more stress and difficulty. She also found it difficult to cope with unplanned phone calls from the office.

The Occupational Health Report

3.108. The Occupational Health report was prepared and issued on 3/08/17. It described a long history of anxiety and said that Mrs Richards would remain emotionally vulnerable. She had learned effective coping mechanisms to reduce the vulnerability. Working outside would continue to be therapeutic and she was fit to undertake that with immediate effect, but was not fit to work indoors. The report confirms that she is a disabled person within the Equality Act definitions (159). She was keen to attend the conduct meeting (160).

3.109. Nothing had been heard as to the date of the disciplinary hearing on conduct. Mrs Richards remained on sick leave.

3.110. On 4/08//17, Mr Chant, who was to deal with the conduct matter replied to Swan Craig, solicitors. He saw Mrs Richards as having a case to answer in the disciplinary matter.

3.111. He was willing to discuss the grievance with her, disagreeing with the approach taken earlier by Mr Dowd (162), for her to raise any issues in relation to bullying and harassment when he dealt with the conduct matter. He would then decide whether the grievance should be dealt with separately or jointly with the disciplinary matter.

3.112. Mr Chant subsequently went on long term sick leave. The conduct matter was passed to Mr Mitchell. He was not able to start work on it until September.

The disciplinary

3.113. On 8/09/17, Mr Mitchell wrote to Mrs Richards setting out that he would be dealing with the rollaway and her failure to ensure that the vehicle was correctly secured, leaving the door open while undertaking delivery work (165). This is the first time the charges had been formally set out to her, although they reflect the first contemporary note of the suspension (80). .

3.114. He conducted an investigatory interview on 20/09/17 (170 +), starting with the explanation that the failure to ensure that the vehicle was suitably parked

and secured whilst she was away from it undertaking deliveries were both potentially gross misconduct offences which could result in dismissal.

3.115. He had not been made aware of the grievance. He was not willing to explore it. He had not seen the correspondence between Mr Chant and Swan Craig. He did not know that Mr Chant had agreed to hear about both the grievance and the bullying. He did not have the Occupational Health report. He had the papers that had been sent to Mr Chant but it is not clear that he had all of them because they had not been left in order.

3.116. He was concerned about the delay. He was keen to see the conduct matter progressed. He was not willing to widen the scope of the disciplinary beyond that to include consideration of heat stress training or the bullying and harassment complaints but he emailed a form for Mrs Richards to bring a grievance about the bullying if she chose (357B). He is clear that he neither encouraged or discouraged her to submit it, but there was sufficient discussion for her to understand that his investigation might include relevant findings.

3.117. Although he had no knowledge of the grievance, he understood from the interview that there were two issues, the failure to offer training on heat stress and the failure locally to carry out a severe weather risk assessment on the day of the accident. Mrs Richards had the opportunity to raise those matters in mitigation.

3.118. He looked into Royal Mail training and agrees that while there were posters available on heat stress, there was a lack of guidance on it. He had not been really aware of it until this case.

3.119. Mrs Richards has no complaints about Mr Mitchell's handling of matters.

3.120. On the 28/09/17, there was a further telephone discussion between Mrs Richards and Ms Birt. Mrs Richards reported that she felt fully fit to work out of doors. Ms Birt again confirmed that she could not work outdoors on deliveries while the conduct matter was outstanding.

3.121. On 8/10/17, Mrs Richards returned the interview notes to Mr Mitchell, annotated and signed, with a number of other documents.

3.122. On 23/10/17, Mr Mitchell wrote to her with the outcome of the disciplinary (214). She was given a "corrective penalty of a 1 year serious warning". It was backdated to 2/08/17 so that she was not penalised for the delay that had taken place.

3.123. Her illness on the day of the incident is recognised. It is accepted that there was no severe weather assessment that day and there should have been, given the weather conditions. She is faulted for failing to tell the office that she was ill, having been able to ring her partner to tell him (212). The corrective penalty was imposed because the incident could have been avoided had she made a phone call to state that she could not complete the delivery.

3.124. Every other handbrake rollaway referred to has a more severe sanction than this. She did not have to undergo any driver retraining.

3.125. She received the outcome of the disciplinary matter on 25/10/17 (her witness statement). That brought to an end the suspension.

Return to work

3.126. The sickness absence formally ended on 31/10/17 and Mrs Richards returned to work on 6/11/17, after taking some holiday.

3.127. She tried to greet Louise Timms but had no response. She complained to Ms Birt, who responded that "Ignoring you is hardly bullying". (257)

3.128. In the "Welcome Back Meeting" (218) it is noted that she was coping with work all right but was feeling vulnerable. She was asked if there was anything more that could be done to help her maintain her health and attendance, and

she mentioned speaking to one individual about her behaviour. That was a reference to Louise Timms.

3.129. In relation to disability related absences, while the box shows N/A, it also records “anxiety issue triggered by certain positions” -a reference to indoor work.

3.130. Mr Goldsmith was on holiday and not made aware of the content of the meeting.

Attendance Review

3.131. The Royal Mail’s absence policy prompts a review after 4 absences or 14 days in a 12 month period (263). There are further prompts in respect of absences within 6 months of either 2 periods or in total 10 days. The attendance review is conducted after the return to work. There are penalties, including in due course consideration of dismissal if triggers are exceeded.

3.132. There had been no informal review of her attendance or of the suspension from driving and delivering during her absence.

3.133. Mr Sayles tells us that informal review should have been very much part of the attendance procedure.

3.134. Elizabeth Evans, who later dealt with the bullying investigation pointed out to Mr Goldsmith that he should have conducted the reviews required by the suspension policy (315)

3.135. Mr Goldsmith had taken HR advice and had not been prompted to undertake reviews either of attendance or suspension.

3.136. Mrs Richards was invited to a formal attendance review meeting on 13/11/17 due to the length of sickness absence (263).

3.137. This is a computer-generated letter. The letter explains that they will explore the reasons affecting ability to attend. It includes reference to potential dismissal, if the case reaches the levels indicated. In her case, she had gone well past all the prompted triggers.

3.138. For her, without any softening approach, it was a frightening letter. It renewed the threat of dismissal. She had already had months off with stress and anxiety and still felt vulnerable – she feared the consequences both of the recently ended absence and any future absence.

3.139. The attendance review took place on 16/11/17 (262) . Mr Goldsmith conducted it, asking her about the condition that had kept her off work. She gave her explanation and emphasised that there had been no review of her suspension from driving and delivery duties. Overall process had been slow because of the delay in handling the conduct case. Mr Goldsmith wrote subsequently, to set out Royal Mail’s expectations in terms of attendance but not issuing an Attendance Review or formal notification of a failure to meet those standards. (262, 276 – 280). It was therefore a favourable outcome in terms of the policy.

Bullying and harassment grievance

3.140. On 14/11/17, Mrs Richards made a formal complaint about bullying and harassment against Reza Goldsmith and Louise Birt (265). She says that nothing had been done about the conduct of Sue Palmer and Louise Timms before going off sick, in spite of four reports of bullying conduct; that the conduct had been renewed in that Louise Timms was ignoring her, and that she had been unable to carry out indoor duties because of the bullying and harassment.

3.141. That was acknowledged on 15/11/17, and Elizabeth Evans appointed to handle it (272).

3.142. Ms Evans interviewed Sue Palmer and Louise Birt in early December 2017. Sue Palmer was represented by Billy Hunt. Billy was vigorous on her behalf.

> "She (Kerry) had an accident and they are trying to get out of this accident, would we have a Bullying and Harassment case if there was no accident." (302)
>
> "It's worth noting again, Kerry had an accident, and she is trying to get out of it, I'm not sure we would be here facing B and H if the accident never happened." (304)
>
> "It could be considered Kerry has brought this stuff up to ruin Sue's name because she refused to say Kerry had sun stroke on the day of her accident."

3.143. When Louise Birt was interviewed, there were similar comments from Gary Sassoon-Hales,

> "Since being subject to the conduct code Kerry Richards has taken it upon herself to record and distort every little thing in the unit for the own gain and in an effort to get back at the line management team because of the conduct code investigation. The whole allegation of bullying and harassment is nothing more than a complete fabrication in retaliation for being under investigation." (324)

3.144. Those remarks reflect the culture in the office which is the backdrop to the bullying that Mrs Richards experienced. She was very aware that such remarks were being made and that those views were shared. Those comments were inappropriate but unchallenged nor did Ms Birt distance herself from them.

3.145. The outcome of the complaint was given on 11/01/18 (345). 17 allegations were considered. The grievance was upheld to a limited extent but no bullying was found. There had been a failure to review the suspension and formal recommendations were made for training in respect of conduct investigations for Mr Goldsmith and Ms Birt, for more even-handed management of overtime, for mediation and in respect of sickness records (356).

3.146. The appeal in respect of that was continuing at date of issue of proceedings on 26//01/18.

Health and Safety Grievance

3.147. Mr Fleming took up the grievance that Mrs Richards had lodged at stage 2 on 27/07/17 and conducted a hearing with her, accompanied by Colin Sayle on 20/11/17.

3.148. He partially upheld the complaint. No right of appeal was offered, but Mrs Richards lodged an appeal anyway (334-336).

3.149. Mr Fleming notes that there was no severe weather assessment carried out at Dursley on 21/6/17 and also that the nationally available posters on heat stress were not on display. He also notes that heat stress is missing from the summer calendar of training topics and had raised that (335). He commended Mrs Richards for raising the issue and for working with the regional team to include heat stress symptoms in the training calendar (336). He was not able to make recommendations about Royal Mail national policy on training.

3.150. The appeal was continuing at date of issue of proceedings. The eventual outcome was that advice on risks and training in Heat Stress should be

incorporated in the Stay Safe in the Sun materials, and that while again the manager concerned felt that the amendment of Royal Mail's Health and Safety policy and training materials were outside his jurisdiction, he had brought the issue to the attention of the Head of Safety and Wellbeing (386).

3.151. The claim to the Employment Tribunal was issued on 26/01/18

4. Law

Protected Disclosure ("PIDA")

4.1. The respondent accepts that the Stage 2 grievance lodged in June 2017 was a qualifying disclosure. There is no issue therefore to be determined as to whether the disclosure was made in the claimant's reasonable belief that it was in the public interest or that it raised an issue as to the health or safety of individuals being or likely to be endangered.

4.2. The issue is whether the claimant was subject to detriments and whether those were on the ground of that the claimant had made a protected disclosure, contrary to section 47B of the ERA 1996.

4.3. Under ERA 1996, s48(2), it is "for the employer to show the ground on which any act or deliberate failure to act, was done".

4.4. Any failure to act must be deliberate if it is to be protected under these provisions.

4.5. In NHS Manchester v Fecitt 2012 IRLR 64, CA, the nature of the causation test is discussed. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

> "Where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.

Disability

4.6. Disability is a protected characteristic under section 6 of the EA 2010.

4.7. By section 39(2) of the EA 2010,

> "An employer (A) must not discriminate against an employee of A's (B)…..
>
> (c) by subjecting B to any other detriment.'

Discrimination arising from disability

4.8. By section 15(1) of the EA 2010,

> "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."

4.9. The focus of section 15 is about the extent to which the employer is required to make allowances for disability. (General Dynamics Information Technology v Carranza [2015] EAT 0107). The consequences of a disability include anything that is the result, effect or outcome of a disabled person's disability.

4.10. The Code of Practice sets out at paragraph 5.7 that this means placing someone at a disadvantage. Even if an employer thinks they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

4.11. By section 15(2) of the EA 2010, the above 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.

4.12. So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know and could not reasonably have been expected to know that the person was disabled.

4.13. The knowledge required is of the disability only and does not extend to the "something" arising in consequence of it. (Pnaiser v NHS England and Coventry City Council [2015] EAT 0137.

4.14. There is no requirement for a comparator.

4.15. It is for the claimant to show that the unfavourable treatment was because of something arising out of his disability.

4.16. The anaylsis required is explained in Basildon v Turrock NHS Foundation Trust v Weerasinghe [2015] UKEAT 0397, [2016 ICR 305. At paragraph 26,

> "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. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. …
>
> In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of" and thus find out what the "something" is, and then proceed to ask if it is "because of that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

4.17. Simler P in *Pnaiser v NHS England [2016] IRLR 170, EAT*, gave the following guidance as to the correct approach to a claim, adopting and developing the guidance in Weerasinghe.

> '(a) 'A tribunal must identify the unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on

the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant:

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. This involves an objective question and does not depend on the thought processes of the alleged discriminator.

4.18. 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" (para 5.21 Code of Practice).

Adjustments for disabled persons

4.19. The Equality Act, by section 39(5), imposes a duty on employers to make reasonable adjustments.

4.20. The duty is set out at section 20 of the EA 2010.

4.21. The duty comprises three requirements. The first is where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. The second relates to where a physical feature puts the disabled person at a substantial disadvantage, making the same comparison, to take such steps as it is reasonable to have to take to avoid that disadvantage. The third, in similar terms relates to the provision of an auxiliary aid.

4.22. A failure to comply with any of those requirements is a failure to make reasonable adjustments. By section 21(1) and (2), "A discriminates against a disabled person if A fails to comply with that duty in relation to that person".

4.23. The duty does not arise where A did not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the disadvantage referred to – that is the effect of schedule 8, paragraph 20, as amended, to the EA 2010. However, the employer must do all they can reasonably be expected to do to find out whether a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer will be taken to have the requisite knowledge provide that they are aware of the impairment and its consequences. They do not need to be aware of the specific diagnosis.

4.24. The ACAS Code at paragraph 6.19, says:

> "For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

4.25. And at 6.21,

> "If an employer's agent or employee (such as an OH adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's … disability the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment."

4.26. When asking whether the unfavourable treatment is because of something, one must identify what that something is. That requires the consideration of a subjective question what was in the alleged discriminators conscious or unconscious mind – Madani Schools Federation v Mr F Uddin UKEAT/0194/16

4.27. No like for like comparator is required – the comparison may be between those who could do the job and the disabled person. As explained in Royal Bank of Scotland v Ashton ([2011] ICR 632), the tribunal must identify the non-disabled comparator or comparators. That may be a straightforward exercise,

> "In many cases, the facts will speak for themselves and the identity of the non disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play." Fareham College Corporation v Walters ([2009] IRLR 991)

4.28. There is no onus on the disabled worker to suggest what adjustments ought to be made. It is good practice for employers to ask. If the disabled person does make suggestions, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. (Code of Practice para 6.24)

> "It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. … It is advisable to agree any proposed adjustments with the disabled worker in question before they are made." (Code of Practice para 6.32.)

4.29. In considering whether there has been a failure to make reasonable adjustments, the tribunal must identify the step or steps it is reasonable to take to avoid the disadvantage – the question is the nature of the step, not the assessment of the mental process concerned. (Royal Bank of Scotland v Ashton, op cit).

4.30. The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage.

4.31. The process for the Tribunal therefore is to identify:

(a) the employer's provision, criterion or practice which causes the claimant's disadvantage
(b) the identity of the persons who are not disabled with whom comparison is made
(c) the nature and extent of the substantial disadvantage suffered by the employee
(d) what step or steps it is reasonable for the employer to have to take to avoid the disadvantage (General Dynamics Information Technology Ltd v Carranza [2014] EAT 0107).

4.32. The Tribunal must identify all of those in order to judge whether the proposed adjustment is reasonable. It must identify the nature and extent of the substantial disadvantage suffered by the claimant, including, if applicable, any cumulative disadvantage, say, from both provisions applied and physical features. In the absence of that, it is not possible to identify the adjustments that

are reasonable to prevent the disadvantage. There is no need to find that the adjustment would have prevented the adverse effects. The Tribunal is entitled to find that the adjustment proposed was a reasonable option with a not unreasonable chance of success. (The Environment Agency v Rowan [2007] EAT 0060)

4.33. Assessing the reasonableness of any particular step, relevant factors will be how effective it will be in preventing the substantial disadvantage, how practicable it is, how much it will cost and how disruptive it may be, the size and resources of the employer and the nature of the business. It may also be relevant that external resources are available to help provide adjustments.

4.34. Failure to make a reasonable adjustment cannot be justified, but only reasonable steps fall within the duty. Whether or not adjustments were reasonable in the circumstances is to be determined by the employment tribunal objectively, (HM Land Registry v Wakefield [2009] All E R 205 (EAT)).

4.35. 1f the Tribunal finds there are other reasonable adjustments which could have been made, the tribunal is not entitled to rely on that if the adjustment in question was not raised as an issue and the parties given the opportunity to make submissions on that (Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664).

Direct Discrimination

4.36. There is direct discrimination where someone treats a person less favourably than he or she treats or would treat others, where that is because of a protected characteristic. That is section 13 of the Equality Act 2010 ("the EA 2010") .

4.37. Identifying direct discrimination is a comparative exercise and it may be approached using either a specific comparator, for example, another employee, or a hypothetical comparator. There should be no material difference between the complainant and the comparator (section 23(1)). The use of the comparator will assist in identifying whether there has been less favourable treatment and in identifying the reason why.

4.38. It may equally be appropriate to start by identifying the reason for the treatment complained of; if the reason is a protected characteristic, the finding of less favourable treatment may follow (Stockton on Tees BC v Aylott [2010] EWCA Civ 910 and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL11.

Burden of proof

4.39. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

4.40. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the

respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

4.41. For the burden of proof to shift, the claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case (Igen v Wong, 2005 IRLR 258 CA), remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. That approach has been approved at the highest level in Hewage v Grampion Health Board [2012] UKSC 37, [2012] IRLR 870, SC. That guidance applies to questions arising under the EA 2010.

4.42. However, the nub of the question is why the claimant was treated as he or she was:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (Madarassy v Nomura International plc) 2007 IRLR 246).

4.43. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

4.44. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25) it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

Procedural

4.45. The ACAS Code of Prctice on Disciplinary and Grievance Procedures 2015, at paragraph 46 sets out,

> "Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."

Time Limits: Discrimination

4.46. The claim may not be brought "after the end" of the period of three months starting with the date when the act complained of was done. That is EA 2010 section 123(1).

4.47. An omission is done when the person in question decided on it

4.48. In the absence of evidence to the contrary, that person is to be taken to decide on a failure to act when doing something inconsistent with acting, or on the expiry of the period in which that person might reasonably have been expected to do it.

4.49. In Hull City Council v Matuszowics 2009 ICR 1170 CA, the guidance is that if omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission at what is in one sense an artificial date: the date when it could have been expected to have been done.

4.50. An act extending over a period is to be treated as done at the end of the period. Hendricks v Metropolitan Police Commissioner [2002] 1 All ER 654 sets out the correct test as whether the acts complained of are linked and are evidence of a continuing discriminatory state of affairs as distinct from a succession of unconnected or isolated specific acts.

4.51. The claimant's solicitor cites EAT SSWP v Jamil and others [2013] UKEAT/0097/13BA, which considers Hendricks, in distinguishing conduct in failing to carry out a continuing duty, so conduct extending over a period, from failure to do something treated as occurring when the failure took place. We were also referred to Lyfar v Brighton and Sussex University Hospitals, 2006 All ER (D) 182.

4.52. For the extension of time, in discrimination cases, the test is whether it is just and equitable to extend time. Time limits are applied strictly in employment cases. An extension of time is the exception rather than the rule.

Time Limits, PIDA

4.53. For PIDA, by section 48 of the ERA 1996, for the Employment Tribunal to have jurisdiction, the claim must be "presented before the end of the period of three months beginning with the date of the act, of the failure to act, or where there is a series, the last of the series,

4.54. The test for the extension of time is that it was not reasonably practicable to bring the claim in time. Reasonably practicable means reasonably capable of being done.

Extension of Time: ACAS Early Conciliation

4.55. Section 207B of the ERA 1996 and section 140B of the EA 2010 each provide for an automatic extension of the time limit for bringing a claim when ACAS conciliation is required.

4.56. By those provisions, Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

4.57. Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

4.58. In working out when a time limit set by a relevant provision expires, the period beginning with the day after Day A and ending with Day B is not to be counted.

4.59. If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

4.60. In Mrs Richards' case, Day A is the date of contacting ACAS, 14/11/17.

4.61. Day B is the date on which the claimant receives the certificate, 15/11/17.

4.62. The period beginning with the day after day A and ending with day B is disregarded. So in calculating time, 15/11/17 is disregarded.

4.63. If the time limit would expire between the first date and one month after day B, that is between 14/11/17 and 15/12/17, then there is a further extension by a month after Day B, to 15/12/17.

5. Discussion

Knowledge of Disability

5.1. Mrs Richards disclosed an anxiety condition at her interview in February 2015. She disclosed that she was on long term sick leave, that she was leaving teaching to help manage that condition. Royal Mail knew that she had a disability.

5.2. It is probably right that the individuals she worked with and for did not know until June 2017 of her condition. It had no ill effects on her while she was doing postal deliveries and working out of doors benefited her to the extent that she was able to come off her medication in 2016.

5.3. It is agreed that Mr Goldsmith was told on 28/06/17 that she suffered anxiety with a long history, and the same information was reported several times before her last day of work on Friday 10/071/8. She went off sick with anxiety on 11/07/17.

5.4. The Occupational Health report on 3/08/17 confirmed both the long-standing anxiety and that she qualified as a disabled person.

5.5. The respondent therefore knew throughout that she was a disabled person, although individual managers did not know of a tendency to anxiety before June 2017 and only knew that she could be classed as a disabled person with a long-standing disabling condition from the Occupational Health Report.

The Accident

5.6. Mrs Richards had a good record as an employee. Nothing is recorded against her as to conduct or capacity. She reported both the rollaway and leaving the van unattended from the outset. That stands to her credit.

5.7. She was immediately suspended by Mr Goldsmith both from driving and from outdoor deliveries on security grounds (80). Mail integrity was a concern from the outset, as shown by the contemporary note on page 80, not a later addition

5.8. At the Fact Find on 28/06/17, Mrs Richards gave Mr Goldsmith a very full account. She had struggled with the heat, was taken ill, her judgment was impaired and that is what led to the accident. Where she was at fault was in failing to recognise that she was too ill to continue, as Mr Mitchell eventually concluded.

5.9. Mrs Richards expected that Mr Goldsmith would be able to deal with the matter. He had the authority to do that and had done that with Louise Timms. He referred it because he considered that the case raised the possibility of a greater sanction than he had jurisdiction to apply. That was likely to include the possibility of dismissal and she so understood it (290). The other cases involving rollaways or traffic accidents on which evidence was heard did not involve mail

integrity and that was a significant differentiating factor here governing the different treatment of Mrs Richards' case.

The Grievance

5.10. Mr Dowd refused to accept the health and safety grievance initially. It was seen as a diversionary tactic. It raised a serious issue but it was rejected out of hand. In listing the policies under which she could raise it, he did not include any health and safety or whistleblowing policy.

5.11. Ms Birt reacted badly to learning that a grievance had been lodged on 27/06/17. It was inappropriate to summon Mrs Richards to a meeting about the grievance. It was inappropriate to ask her directly what or who the grievance was about. That information should have been obtained through HR.

5.12. For reasons that those present were not sensitive to, there were additional stressors for Mrs Richards. She did not have her usual representative, Mr McMullen. She had not expected a meeting. She was in a closed room. She was not asked to sit. Mr Goldsmith was behind her. That is an arrangement – having someone in authority behind her and between her and the door – that could only add stress.

5.13. During her oral evidence, Mrs Richards found speaking of the meeting difficult. She was immediately distressed, overwhelmed.

5.14. Ms Birt denies raising her voice or behaving inappropriately. Even to embark on that discussion was inappropriate. It discloses a lack of understanding of whistleblowing and the care which must be taken. She describes the purpose of the meeting as supportive but nothing in the account of the content or purpose confirmed that.

5.15. Ms Birt is calm, clear and naturally authoritative. She has shown that she can be both assertive and lacking in awareness. Aside from calling this meeting, and not appreciating that it was the wrong approach, she interrupted the bullying and harassment interview being conducted between Elizabeth Eves and Mrs Richards (288): that was insensitive and inappropriate. She failed to recognise that the comments made by union representatives about Mrs Richards were inappropriate or as tending to confirm the existence of a hostile atmosphere in relation to her. We found Mrs Richards' account of Ms Birt raising her voice and demanding to know what the grievance was about to be convincing and accept it. .

5.16. Dean McMullen raises a question about why his duty was changed that day, so that he was not available to support Mrs Richards in this unexpected meeting. Ms Birt did not have a good answer for that. The only enquiry made – and this has been raised as an issue over a long period of time – related to the wrong date. It is consistent with Ms Birt's conduct in calling the meeting that she did so when Mr McMullen was not available. There is similar caution in the handling of Dean McMullen by Mr Goldsmith, who told him at the fact-find with Mrs Richards that he would be asked to leave if he said anything inappropriate. Other representatives at the later bullying investigation took a full part, answered questions and made inappropriate comments, prejudicial to Mrs Richards, without restraint. Ms Birt even at the hearing did not distance herself from those comments. There is a background picture there, that we find confirms wariness of Mr McMullen and lack of sensitivity to Mrs Richard's position.

The Bullying

5.17. Unpleasant gossip directed at Mrs Richards started very quickly after her accident. Dean McMullen reported it from 27/06/17. Some remarks were made

in her presence, others were reported back to her. The thrust of the gossip was that she was trying to avoid the consequences of the accident – "This is all to get her off the hook, she should be sacked, if she is not sacked…. " She was seen as using every means to try to get out of the trouble she was in. The same comments were still being made much later by the representatives of those interviewed during the bullying and harassment investigation in December 2017.

5.18. The bullying remarks were reported to Reza Goldsmith,. who had a "nip in the bud" conversation with Ms Palmer and Ms Timms on 5/07/17. The misconduct was immediately renewed and that in turn was immediately reported. Mrs Richards was intimidated by Ms Palmer's behaviour and Mr McMullen was shocked by the immediate and frank repetition.

5.19. Mr Goldsmith let Mrs Richards go home early that day to avoid the people that she felt harassed by. He was aware of her distress.

5.20. Between them Mr Goldsmith and Ms Birt failed to address the bullying. There was no response to the immediate conduct of Sue Palmer after the "nip in the bud conversation", in spite of further requests.

5.21. That took place on Wednesday 5/07/17. Mrs Richards' last working day before her absence was Monday 10/07/17. She went off sick with anxiety on 11/07/17. The company cannot claim to have resolved bullying on the basis that it didn't happen when she wasn't there.

5.22. The bullying had made it difficult for her to attend work and was a factor in her taking sick leave.

5.23. Her solicitors raised again the question of bullying on 24/07/17. Mr Chant was willing to hear about it during the conduct investigation, Mr Mitchell was not. It was in late September that Mrs Richards learned that it would have to be raised separately.

5.24. She raised the grievance formally on 14/11/17. She relied on the earlier incidents of bullying and harassment and the earlier reports, but also refers to its continuation in that Louise Timms was ignoring her. She wanted the managers to be aware of the bullying and harassment. She felt vulnerable.

5.25. The nature and effects of bullying were not well understood, hence Louise BIrt's later comment that "Ignoring you is not bullying". With hindsight, seeing the two named individuals together may well not have been the best approach, and a swift follow-up was needed after the report of a further incident immediately following the "nip in the bud" conversation.

The Scheduled Attendance Rota

5.26. Mr Goldsmith indicated that he was referring the disciplinary matter to a more senior level of management on 10/07/17.

5.27. Mrs Richards' first sick note was due to expire on 25/07/17

5.28. Louise Birt did not put her on the forward rota for scheduled overtime (SAR) rota on 19/07/17, given that she was both off sick *and* subject to disciplinary proceedings –pragmatically, there was a strong possibility that Mrs Richards would not be back at work and doing deliveries during the currency of the rota. That was a realistic appraisal, even though the rota covered several weeks ahead. There was scope for later adjustments to be made if she returned.

The Occupational Health report

5.29. Management had the Occupational Health report in early August. That clearly identified the disability of anxiety. It confirmed that she could not work indoors due to the anxiety but that she was fit for work out of doors, that is, on deliveries.

5.30. That should have prompted a review to consider the implications. It raises the issue of whether the suspension should continue. There was no review of the suspension. There was no acknowledgement of the report and disability and no consideration of how to mitigate her anxiety.

5.31. The managers were aware of the distress that had been reported from bullying and could have been expected to realise that that would bring added difficulties for her given the diagnosis.

Requiring her to work indoors

5.32. Mrs Richards was required to work indoors because she was facing a disciplinary and suspended from outdoor duties. Working indoors had historically made it difficult for her to manage her anxiety. She had taken the job because working outdoors alleviated her anxiety and enabled her to manage it. She had been able to come off her medication. The circumstances of the present indoor work were more difficult for her because of the monotonous nature of the work and her exposure to critical remarks.

5.33. Having no option but to work indoors given the nature of the work and the bullying atmosphere led her to be off sick.

5.34. She was required to work indoors from June to late October. She was fit to work outdoors from at least early August. Being required to work indoors, she remained off sick. She returned to work on 6/11/17. Had the suspension been lifted, she could have returned to work earlier.

The failure to issue formal notification

5.35. There was at no stage a formal notification to Mrs Richards of the suspension. The respondent's position was that Mrs Richards was on precautionary bar on driving and delivery but not a suspension so the requirement for a formal letter and for a review was not triggered, although it was later conceded that the suspension policy did apply to someone being suspended from deliveries but not from work. Ms Eves saw it as applying. In any case, it is plainly good practice and important to set out in writing the basis of suspension including the expected time scale and to keep it under review.

5.36. Even without a condition of anxiety, information is important to someone under suspension. That is particularly the case where the suspension places the employee at a disadvantage as was plainly the case here. Mrs Richards could not do overtime, so her income dropped, as well as struggling with indoor work.

The failure to review

5.37. From August, she was fit for work, but outdoors, not in.

5.38. From a business management point of view, it would have been important to get her back to work. From her own point of view, she was anxious to get back to work, but not indoors. Because the only work available to her was indoor work, she remained signed off until 6/11/17. That was much longer than in the other incidents we have heard of.

5.39. What prevented Mrs Richards from returning to work was the suspension from delivery duties. The suspension from driving would not have precluded a return to delivery work. She could have done a walking delivery. In any cases, others who had worse driving records were back driving quickly. The mail integrity issue was the key factor. She had left mail in an unlocked and unattended vehicle.

5.40. Asked why he referred the case upwards to more senior management, Mr Goldsmith was clear: he accepted that she had been ill, that the illness had been caused by the weather, but she had failed to recognise what was happening to her and had not called in sick when she needed to.

5.41. Precautionary suspension is for serious incidents, where there is a risk of repetition and/or a risk to people, property or the good image of the Royal Mail. Asked what was the risk of repetition, Mr Goldsmith said that the hot weather was continuing.

> "What was the risk of this being repeated if she was not driving?"
> "Hot summer. …"

5.42. Concerned about a failure to follow sun safety guidance, that answer makes some sense, although Mrs Richards might have been expected to have learned from her distressing experience. Even though the issue actually was heat stress, not sun safety, there would be a risk of illness if she was exposed to the same conditions and not alert enough to recognise it.

5.43. That answer is limited however. For one thing, it is not likely that Mrs Richards would fall prey twice to such a condition. She is a sensible and intelligent woman; common sense and the medical advice she had had would help her avoid it. For another, the weather did not continue with excess temperatures until her return to work in November. Whatever concerns Mr Goldsmith had in June about Mrs Richards working out of doors in the heat could not reasonably be expected to subsist throughout the following months.

5.44. What is clear is that nobody considered outdoor working on deliveries or driving an option after 21/06/17, until the conduct matter was resolved. It was taken as a given by all managers, including Elizabeth Evens dealing with the later bullying and harassment complaint, that the investigation required suspension from delivery.

5.45. The delays proved substantial. They are not a good reflection on Royal Mail procedures, but broken down, step by step, it can be seen how they accrued. There were delays in making the upward referral after it was decided on on 10/07/17, Mr Chant was seized of the matter in August but then went off sick. The papers were left as he had been working on them, so out of order; Mr Mitchell was only free to undertake work on it in September. The gap between the interview on 20/08 and the issue of the decision on 23/10 included issuing notes to Mrs Richards, her comments and his deliberations.

5.46. To Mrs Richards, it must have felt like a glacial speed; while each delay might be minor in itself, it is the cumulative effect that was difficult for her.

5.47. The problem is that she was waiting throughout with all the intense anxiety of her own condition and fears about the future. That was a painful time for her. It is not satisfactory to be at home waiting on events when suffering anxiety: that in itself is a potential contributor to ill health, as she recognises.

5.48. The block was the suspension. There was no evaluation of the need for suspension after it was first imposed.

5.49. The immediate suspension from normal duties pending fact finding was not unreasonable. When it is clear that the suspension is blocking her return to work, it calls for reconsideration.

5.50. If nothing else did, simply receipt of the occupational health report called for consideration and review. It identified her as a disabled person, and as fit to return to outdoor duties immediately.

5.51. At that point, it would have been right to review her situation with her. Given information that she was a disabled person and fit for work, save that she

could not work indoors because that exacerbated her anxiety, a review was urgently needed, whether or not the policy required review. Being kept informed also helps people manage an anxiety condition.

5.52. But it was also the moment to assess the necessity for continued suspension from outdoor duties, given ongoing delays. A full review at that stage would have helped her. Waiting at home on an apparently indefinite basis is very difficult.

5.53. She was finally dealt with by way of a one year serious warning. It was backdated to 2 August in acknowledgement of the delays – that is when it might have been expected to be resolved.

5.54. In his findings, Mr Mitchell relied on another factor: the accident arose from Mrs Richard's failure to recognise that she was too ill to drive, in spite of the way she felt, the concern shown to her by customers and speaking to her partner about feeling ill. That led to the concern that this accident could be repeated.

5.55. Mrs Richards did not challenge Mr Mitchell's finding that the circumstances merited a corrective serious warning for a year. He took into account the failure by Royal Mail to carry out a severe weather risk assessment that day and her illness, but also that she had failed to report to the office that she was ill when able to report to her partner that she was struggling.

5.56. Every other handbrake rollaway we have learned of was dealt with more seriously, even Louise Timms. In the sanction applied, Mrs Richards was not unfavourably treated by comparison with others.

5.57. The issue here is not the penalty but the process. Mrs Richards suffers anxiety. That was well established by August 2017. It probably made her more sensitive to critical or unkind comments, making the need for effective management of the complaints of bullying more important. It certainly made the monotonous indoor work a challenge for her; her anxiety was bound to prey on her mind. Repeatedly in the records there are references to indoor work making her anxiety worse. The process was unmitigated by review.

Heat stress

5.58. Mr Mitchell frankly acknowledged that he did not understand heat stress fully. Mr Goldsmith plainly didn't. His justifications in oral evidence for handling the case as he did related to whether Mrs Richards had followed advice to avoid excessive sun exposure. In his questions on 21/07/17 to the two who attended the accident, he asked both about whether she had been wearing a hat – although she had told him herself that she had not been wearing a hat. A hat is helpful in protecting from the sun, but may – on the guidance Mrs Richards provides from NHS England – aggravate heat stress.

5.59. The issue of heat stress was of course what was raised in the grievance. Royal Mail do, we are told, have posters on it, but not on display at Dursley and the local managers were not aware of the risks.

5.60. Mr Goldsmith was reluctant to accept the material that Mrs Richards tried to hand him after the fact find. That is hard to understand. It is obviously his role at this stage to gather the material that would give the fullest picture. Papers were passed to Mr Chant, but collected up after he went off sick. We simply don't know whether all the material she put together was in the end seen by Mr Mitchell, although he took care to ensure she had the opportunity to provide material and comment..

5.61. Mr Mitchell was not made aware of the grievance by management and it had already been rejected. It wasn't before him. He took into account Mrs

Richards' explanations and understood the distinction between heat stress and sun safety, and that heat stress had not been well understood.

Attendance review

5.62. On return to work, Mrs Richards was required to attend an attendance review. The letter of invitation makes it clear that it is a potential disciplinary matter with dismissal a possible consequence of a breach of Royal Mail standards. Her absence breached those standards, which were set out in the letter. She had been off work for months in fear of dismissal and on her return faced the renewed fear of dismissal.

5.63. No sanction was applied. Again, it is the process not the outcome that was difficult. To issue such a letter as a matter of routine, and in the absence of a process including recognition of disability is unhelpful, particularly where mental health is a concern.

6. Conclusions

6.1. Applying the law to the facts found and the analysis made, we find as follows, in relation to the agreed issues put before us.

Knowledge

6.2. As more fully discussed at paragraphs 5.1 – 5.5 above, the Respondent knew throughout that she was a disabled person because of the discussion at her interview. Her anxiety condition and its severe consequences, in leading her to leave a profession for which she had trained and in which she was experienced, were disclosed to the manager interviewing her.

6.3. The Respondent's managers specifically knew that she was disabled from the date of the Occupational Health report.

6.4. Mr Goldsmith and Ms Birt were aware of her condition as someone suffering a symptoms of anxiety with a history of the condition from 28/06/17. From her account of anxiety, they knew of the impairment and its consequences.

6.5. They knew it was a long-term and recurrent condition meaning that she was a disabled person from 3/08/17.

Discrimination arising from disability

6.6. Was she treated unfavourably because of something arising in consequence of her disability?

6.7. The disability is anxiety. The "something arising" is pleaded as her increased likelihood to have sickness absence due to suffering from anxiety (para 4 of Agreed Issues).

6.8. The unfavourable treatment as set out in the agreed issues is as follows.

3a Not taking formal action when the claimant and/or the claimant's partner on her behalf reported, on 28/06/17, 5/07/17, 6/07/17 and 7/07/17, bullying and harassment conduct by her colleagues.

6.9. There was a failure to address the bullying effectively in June and July 2017. The bullying and the failure to address it contributed to her difficulties in doing indoor work and so to her taking sick leave. That was unfavourable treatment.

6.10. However, the failure to bring formal action against the culprits was not because of the increased risk of sickness absence. Even if we read the "something arising" from her disability as including her heightened sensitivity, it was not that which led to the failure to bring formal action in response to the report of bullying.

6.11. For completeness, we do not identify anything else arising from the disability that in turn led to that failure. Mrs Richard's heightened vulnerability and sensitivity may well have sharpened her distress and it did justify more immediately effective action but it cannot be said to be the cause of the failure.

3b *On or around 19/07/17, removing Mrs Richards from the scheduled attendance rota prior to the expiry of her MED3 certificate.*

6.12. Mrs Richards was suspended from delivery duties pending a disciplinary that had been referred to more senior management. As at 19/07/17, no date had been fixed for the conduct investigation. She was also off sick. It was reasonable in mid-July to think that she would be unlikely to be available to work the shifts being organised.

6.13. While her being absent on sick leave was something arising from her disability, not to put her on the rota at this stage was reasonable in the light of the suspensions and the suspensions were justified to protect safety and the security of the mail. The suspensions themselves were a proportionate means of achieving a legitimate aim as pleaded, and not putting her on the rota was realistic at that date.

3c Requiring the claimant to work indoors during the period June to November 2017, preventing her from working overtime and receiving her normal salary.

6.14. The indoor work was imposed because of suspension from her delivery duties pending the outcome of the disciplinary matter. The respondent says this was to protect mail integrity and to protect health and safety (38). We accept that. Those were the reasons given on the day of the suspension. Given that Mrs Richards had been driving when unfit to drive and had failed to secure the mail when leaving the vehicle, these were potentially serious offences.

6.15. The indoor work was not imposed because of the increased risk of sickness absence due to suffering anxiety. It wasn't because of her actual absence. It wasn't because of anything arising from her disability – her misjudgement at the time of the accident was not caused by her anxiety, at the time well controlled without medication, but by her difficulty with working in the exceptional heat.

6.16. There was a failure to review the suspension, in particular given that from the date of the Occupational Health report, when the respondent's managers knew that working indoors was not possible for her but working outdoors was. From then on, had the suspension been lifted, she could have returned to work.

6.17. That failure to review was not because of something arising from her disability; it wasn't because of the increased risk of sickness absence due to her anxiety, it wasn't because of her absence and it wasn't because of her anxiety itself. The failure to review came about because Mr Goldsmith did not appreciate that the policy required review; because he failed to recognise that he had a continuing role in relation to the management of the suspension once he passed the conduct investigation up to a more senior manager; because nobody more experienced or informed was guiding him. The small and remote HR department

appears to be respond only to enquiry, so there was no-one taking a proactive role in ensuring that the proper steps are taken for the protection of staff.

6.18. We cannot find a basis to say that the restriction to indoor work, or the failure to review the suspension was unfavourable treatment because of something arising from her disability.

6.19. The claims in respect of discrimination arising from disability are dismissed.

6.20. In any event, the decisions in respect of bullying or the scheduled attendance rota were made in June and July;, the decisions that the claimant must work indoors, suspended from deliveries or from driving, were made in June and renewed in July, August and September, when the claimant, directly or through the Occupational Health report, raised the issue. The suspension came to an end on the penalty being decided on on 23/10/17 and notified to her on 25/10/17.

6.21. The claim made on 26/01/18 is out of time. Extension of time is considered more fully below but we have not extended time in respect of any claims.

Direct Discrimination

6.22. Did the Respondent treat the claimant less favourably than it does or would treat others because of her disability?

6.23. The treatment relied on in particular is set out in the agreed Issues as follows:

- Not taking any formal action when the claimant and/or the claimant's partner on her behalf reported, on 28/06/17, 5/07/17, 6/07/17 and 7/07/17, bullying and harassment conduct by her colleagues
- Not confirming the conduct suspension, on or around 22/06/17 in writing or reviewing it after 48 hours contrary to the respondent's conduct code. In addition, not reviewing the suspension during the entire length of the suspension
- Disciplining the claimant for a conduct matter in October 2017, when colleagues who had committed similar conduct issues did not receive similar sanctions
- Removing the claimant from the scheduled attendance rota on or around 19/07/17 prior to the expiry of her MED3 certificate
- Requiring the claimant to work indoors during the period June – November 2-17, preventing the claimant from working overtime and receiving her normal salary

6.24. ("Disciplining the claimant for a conduct matter in October 2017 when colleagues who had committed similar conduct issues did not receive similar sanctions" was not pursued in relation to protected disclosures but remained in the list of issues in relation to direct discrimination.)

6.25. We are asked to consider a hypothetical comparator. We have heard of others who have had rollaways. Each was dealt with through a disciplinary process. The difference is that this case raised a concern as to the security of the mail. The hypothetical comparator is therefore someone who had a rollaway or similar driving accident where the integrity of the mail was also put at risk.

6.26. The claimant did not accept that the integrity of the mail was a significant factor distinguishing her case. This is more fully discussed in relation to reasonable adjustments.

6.27. The sanction imposed in Mrs Richards' case was mild, specifically described as corrective rather than as a penalty. We are told it is the mildest sanction for a rollaway.

6.28. What did distinguish her treatment was the upward referral to enable a more severe sanction to be considered. Mr Goldsmith believed that she had not only misjudged how badly affected by the heat she was, but that she had failed to follow the sun safety guidelines. He saw it as negligence. Mr Mtchell also saw it as negligence, albeit that the failure was in not recognising that she was too sick to continue.

6.29. While at least one significant traffic accident – the one giving rise to fractures sustained by a pedestrian - did not lead to a gross misconduct dismissal, the respondent was entitled to attach weight to the issue of the security of the mail being potentially an added and serious factor.

6.30. The consideration of a hypothetical comparator adds little more. Mrs Richard's disability was anxiety. Her managers did not treat her as they did because of her anxiety. We cannot see the anxiety as a factor in the decisions made. It was not the reason for failing to take formal action in respect of bullying or harassment, for failing to confirm the suspension in writing or reviewing it; for removing her from the rota in July 2017 or for requiring her to work indoors. It was not the reason for bringing the conduct proceedings or for imposing a warning in October 2017.

6.31. The managers did not act as they did because of her disability. They emphasised that they treated everyone the same. We have heard no evidence that points to someone without her disability or a disability would be treated differently and more favourably.

6.32. The claims of direct discrimination are dismissed.

Reasonable adjustments – section 20

6.33. The agreed Issues raise questions as follows: do the following constitute the application of a provision, criterion or practice ("PCP") within the meaning of s20 EA 2010:

a. Conducting conduct investigations separately from the overlapping grievance investigations?
b. Suspending outdoor delivery duties during a conduct investigation?
c. Not conducting a review and/or a risk assessment following an Occupational Health report?
d. Requiring staff to attend formal attendance review meetings due to the length of sickness absence?

6.34. The following are put forward as a non-exhaustive list of adjustments

a. Not taking any formal action when the claimant and/or the claimant's partner on her behalf reported, on 28/06/17, 5, 6 and 7/07/17, bullying and harassment conduct by her colleagues
b. In the light of complaints of bullying and harassment made by the claimant about her indoor colleagues, allowing the claimant to work outdoors during June to November 2017
c. Lifting the suspension of outdoor delivery duties for the claimant during the conduct investigation
d. reviewing the necessity of the conduct suspension on a regular basis

e. Removing the requirement for the claimant to be invited to a formal attendance review meeting due to the length of her sickness absence

f. Prolonging the absence trigger point at which the claimant would be invited to a formal attendance review meeting due to the length of her sickness absence

6.35. The substantial disadvantage relied on is the heightened level of anxiety for Mrs Richards, that she suffered as a result of those PCPs.

a. Conducting conduct investigations separately from the overlapping grievance investigation

Is this a PCP?

6.36. To proceed to deal with the conduct investigation separately from the overlapping grievance was the advice given by HR. It was given promptly and without considering the content of the grievance or the nature of the conduct investigation. It was never reviewed. While Mr Chant considered it would have been appropriate for the two matters to be dealt with together at least initially, that had not been the approach suggested or taken by HR, Mr Dowd or Mr Mitchell. Mr Mitchell had not been briefed on the grievance by the management team. That tells us that separating the two matters that was their standard approach; it was their practice. This was a PCP.

Did it put her at a substantial disadvantage in comparison with non-disabled persons?

~~6.37.~~ The grievance and the conduct matter were closely related. As well as NHS material on heat stress, with the grievance Mrs Richards included customer statements of the effect of the heat stress on her. Reading that material would have assisted the managers handling the conduct matter in understanding the nature of her case.

6.38. The failure to understand the point being made about heat stress led Mr Goldsmith to see her as more culpable, in his belief that she had ignored the sun safety training and so left herself vulnerable to becoming ill. That contributed to the decision to refer the conduct case upwards. The final sanction was well within Mr Goldsmith's authority to impose and if he had dealt with the matter, the disciplinary might have been concluded as was the case with others, within a few days or weeks of the incident.

6.39. The failure to deal with the grievance compounded her anxiety.

6.40. Those were substantial disadvantages. They are the more substantial for her in comparison with non-disabled persons by virtue of the nature of her disability: an anxiety condition leaves the individual prone to greater distress and anxiety.

Did R know/ could be expected to know that the claimant was likely to be placed at that substantial disadvantage

6.41. The point about the heat stress that she suffered was that it was a risk which Royal Mail had not addressed in training and to which she had been exposed in work. Understanding that was germane to her explanation of her conduct on 21/06/17. It was a different risk from those addressed in sun safety training. It is obviously important that managers dealing with the rollaway understood that this was a different issue and that the usual precautions against

the sun such as wearing a hat would not help and might compound the problem of heat stress. Royal Mail could reasonably be expected to know on reading the grievance that this was highly relevant to the conduct matter.

What is the adjustment proposed:

6.42. No adjustment is proposed in the agreed issues that has obvious relevance to this. We had the parties written to to consult them after the hearing, suggesting that the adjustment should be that overlapping grievance and conduct matters be taken together. The claimant agreed. The respondent says that the claimant was not asking for this at the time. It is the case that Swan Craig on her behalf (154) asked for the grievance to be dealt with first with the conduct matter postponed. That emerges too from the agreed PIDA issues, where it is again suggested that the failure was in not postponing the conduct matter until the grievance was heard.

6.43. The respondent goes on to say that Mr Mitchell in effect dealt with both together. That is not accurate, but it is the case that he heard what Mrs Richards had to say about the grievance and in mitigation and she makes no complaint about his handling of the case.

6.44. While the two matters are intimately connected, and a good understanding of the points raised in the grievance do have a bearing on the mitigation advanced in the conduct matter, we are not persuaded that taking the grievance and conduct matters together was necessarily the right course. They raise very different issues for different levels of management. Ensuring that the mitigation was fully understood didn't require that the grievance was heard at the same time or first. That is clear from the fact that Mrs Richards in the end has not challenged the way that Mr Mitchell dealt with the case. What mattered was that her mitigation was understood, and that she had the opportunity to put in the evidence she relied on, not which was taken first or that they were taken together.

6.45. As a matter of good employment practice, conduct investigations need to be resolved without undue delay. The grievance raises serious issues, not of a purely local nature. Both managers who eventually looked at it felt that the issues were out of their jurisdiction to resolve. Delaying the conduct matter until the outcome of the grievance or taking the two together might well have caused further delay. There was no merit in delaying the conduct matter unless it was plainly necessary for the mitigation to be understood and we have found that it was not.

6.46. The conduct investigation concluded with the penalty being given on 23/10/17 which Mrs Richards got on 25th. The stage 2 grievance was then given to Mr Fleming to handle and he wrote to her about that on 14/11/17.

6.47. The period during which there was an opportunity to consider the two together ended at the latest on 23/10/17, but in practice, Mr Mitchell had declined to consider the two together on 20/09/17.

6.48. On that basis, even if we had found that the respondent had failed to make a reasonable adjustment here, the claim is out of time.

b Suspending outdoor delivery duties during a conduct investigation.

6.49. The proposed PCP is very widely drawn. We did not hear evidence pointing to suspension of deliveries in all conduct investigations. There must be many conduct investigations that do not involve or require suspension from

outdoor delivery duties. It is easy to envisage those in which suspension from deliveries would be immaterial or ineffective.

6.50. We suggested to the parties that the PCP should be "during a mail integrity investigation" rather than "during a conduct investigation". The claimant says that was the way the respondent put their case but that she "does not necessarily agree it was supported by the evidence heard".

6.51. We can be clear that the issue of mail integrity was present at the outset – it is the basis for the initial suspension as the contemporary record shows (80) and remained a key issue for all managers throughout.

6.52. We concluded that there was no such PCP as "*Suspending outdoor delivery duties during a conduct investigation."* Having put the parties on notice, we considered this on the basis that the PCP was suspending outdoor delivery duties during conduct investigations where mail integrity was an issue.

Is this a PCP?

6.53. We are satisfied that it is standard practice to suspend from outdoor delivery duties during a mail integrity conduct investigation. That is clear from each management witness that commented, including Elizabeth Eves whose view is in the notes of the bullying investigation.

Did it put her at a substantial disadvantage in comparison with non-disabled persons?

6.54. Mrs Richards could not cope with the indoor work. That was because of her anxiety. She had taken the post because outdoor work helped her cope with her anxiety and while doing the outdoor work, she had been able to come off her medication. She was well enough to work out of doors by August, but she could not work indoors That was a substantial disadvantage.

Did R know/ could be expected to know that the claimant was likely to be placed at that substantial disadvantage

6.55. The respondent knew from the date of the Occupational Health report which confirmed the long-standing anxiety and that she was able to do outdoor duties but not indoor work. Mrs Richards herself explained repeatedly that she was fit for outdoor work but not indoor duties, both before the Occupational Health report and subsequently. The respondent knew that she was struggling with indoor work due to her disability.

What is the reasonable adjustment proposed?

6.56. The adjustments proposed are reviewing the necessity of the conduct suspension on a regular basis and lifting the suspension of outdoor delivery duties for the claimant during the conduct investigation.

Where the adjustments reasonable?

6.57. Review would have been reasonable. There should have been reviews, as a matter of good practice and having regard to Royal Mail's own policy as confirmed by Elizabeth Eve. The respondent in the amended response concedes that review was required within 48 hours and thereafter regularly. In Mrs Richards' case, there should have been a review on receipt of the Occupational Health report that made it clear that the indoor work placed her at a substantial disadvantage. The suspension was the sole thing that kept her off

work. Other people could work while suspended from normal duties, she could not. That alone should have prompted review.

6.58. So too should the delay in concluding the conduct matter.

6.59. The basis for the suspension was the issue of the safety of the mail. Mail integrity is very properly a very high priority for the Royal Mail. Suspension from delivery duties where someone has failed to take proper care of the mail reflects that. There was also concern about the health and safety of the public (38).

6.60. There were clear grounds for the suspension, which was justified.

6.61. While there is justification for the practice, it may also be right to deal with cases on an individual basis and proportionately. That is where there is scope in particular for review.

6.62. This is not a case of deliberate misconduct or negligence. There is no history of failure to take proper care of the mail. The risk of repetition needed to be evaluated rather than assumed. That is why review was merited

6.63. If the risk of repetition was of further hot weather, hot weather does not last and was not likely to last throughout the period of the conduct investigation. Mr Goldsmith's reasoning required review.

6.64. Review was reasonable as an adjustment, even though it should have been applied in all cases.

6.65. The second adjustment proposed is lifting the suspension. There is a strong case for the suspension to be lifted, both from the point of view of the business and her own. She was fit to work on deliveries. Having her remain off work sick was not helpful to the business and difficult and distressing for her as well as costing her the loss of overtime.

6.66. But there is also a case for not lifting the suspension. Royal Mail has to be seen to be taking the issues of public safety and mail integrity seriously both internally and from the point of view of the public. Mrs Richards had not reported in that she was ill. In that failure to report and to stop driving and delivering, she put herself, others and the reputation of the Royal Mail at risk. She quotes Louise Birt as saying "You could have killed a child". She could have, and as she acknowledged, she could have sustained injury herself. Mitchell concludes that she needs a corrective penalty on the basis that that failure to report in that she could not continue that was negligent.

6.67. Given that, while the suspension certainly required review, we cannot say that a reasonable step would have been to lift it. All the managers involved were unhappy at seeing Mrs Richards resume driving and deliveries until there had been the necessary full investigation and that is reasonable. The continued suspension was proportionate.

Might that adjustment have had a prospect of preventing or overcoming the disadvantage?

6.68. Review would have been reassuring. It would have ensured that she knew what was happening and why, rather than being isolated at home without clear information; that is the case, even if, as we also find to be reasonable, suspension was not lifted. She would have known that her disability was better understood.

6.69. Review would not have overcoming the disadvantage that Mrs Richards could not do the indoor work and we have not held that it would have been reasonable to lift the suspension.

Was the claim brought in time?

6.70. The conduct matter was concluded by the decision dated 23/10/17 (214), which she received on 25/10/17 (witness statement para 49, Mrs Richards) and at that point the suspension from driving and delivery duties was ended. Her sickness absence formally ended on 31/10/17 (218) and she returned to work on 6/11/17 after taking holiday. (218).

6.71. The claim is based specifically on the period of suspension from deliveries. The suspension was lifted on 25/10/17.

6.72. There should have been reviews of the suspension. By definition, they should have been carried out during the suspension, not at the end of it. On the basis that the failure to act is treated as occurring when the person might reasonably have been expected to it, the reviews should have been carried out periodically throughout July after sick leave started, and August and September, into early October. The point at which they should reasonably have been carried out was not at the point when the suspension was ended, so not on 23 or 25/10/17.

6.73. It is argued that rather than an individual failure, this is a continuing act in that there was a continuing duty to review the suspension. The key failure was in failing to review the suspension in particular in the light of the Occupational Health report. There was no risk assessment. Other people would have been able to work while suspended from normal duties, Mrs Richards could not and the suspension was additionally painful as well as causing financial loss.

6.74. Even if we regard this as a continuing discriminatory state of affairs, it came to an end at the latest on 25/10/17. Time is extended by one day by the ACAS early conciliation rules. The time limit as extended ends on 25/01/18. The claim was brought on 26/01/16.

6.75. This claim is brought out of time. Extension of time is considered below.

c Not conducting a review and/or a risk assessment following an Occupational Health report

Is this a PCP?

6.76. There was no review or risk assessment following receipt of the Occupational Health report either when it was received or on Mrs Richards' return to work.

6.77. We have seen nothing that points to there being a policy of conducting such a review or risk assessment on receipt of a report confirming disability. Managers told us more than once that they treat everyone the same, and that Mrs Richards' disability would have made no difference to the way she was treated. Mr Mitchell wasn't made aware of the Occupational Health report. All of that speaks of a failure to understand disability that is surprising.

6.78. On that basis we find there was an informal practice not to conduct a review or risk assessment following receipt of an Occupational Health report.

Did it put her at a substantial disadvantage in comparison with non-disabled persons?

6.79. What the failure to review the Occupational Health report meant in this case was that Mrs Richards had no acknowledgment of her disability, nothing to indicate any level of understanding of its impact on her. It compounded her anxieties. It also meant that the impact of her disability was not understood by management. No adjustments were considered.

6.80. Review of the Occupational Health report would have highlighted that she was fit to return to work but not indoor work. The suspension from deliveries precluded her working at all. Review of the report would have prompted review of the necessity for the suspension.

6.81. She was at a substantial disadvantage in comparison with non-disabled persons because her disability was not fully considered or taken into account when it should have been. It was only the suspension that led to Mrs Richards being off sick, not at work on substitute indoor duties as those not disabled might have been..

Did R know/ could be expected to know that the claimant was likely to be placed at that substantial disadvantage

6.82. The respondent knew by virtue of the content of the report.

What is the reasonable adjustment proposed?

6.83. The natural adjustment for this would be to conduct a review following receipt of the Occupational Health Report, which is not expressly stated in the agreed issues, but the respondent clearly had the opportunity to address it given that review in general was at issue.

6.84. The reasonable adjustments put forward are reviewing the necessity of the conduct suspension on a regular basis, and lifting the suspension of outdoor delivery duties for her during the conduct suspension, including to take account of the complaints of bullying and harassment made by the claimant about her indoor colleagues.

Where the adjustments reasonable?

6.85. Review following the Occupational Health report was of course reasonable for the reasons explained above (para 6.71)

6.86. Review of the suspension would have been reasonable and good practice as well as a requirement of the Respondent's policy. Even given that indoor work was worse given the critical atmosphere she faced, we have not held that lifting the suspension was a reasonable adjustment, given that Mrs Richards faced serious misconduct issues, going to matters of health and safety, mail integrity and her misjudgement.

Might that adjustment have had a prospect of preventing or overcoming the disadvantage?

6.87. Review following receipt of the Occupational Health report would have helped her again for the reasons in 6.71 above.

6.88. Review would not have overcome the disadvantage of being unable to work. The disadvantage was in having to remain off work because she could not do the indoor work, and lifting the suspension is an adjustment we have not held to be a reasonable adjustment.

Was the claim brought in time?

6.89. The Occupational Health report was available in August. That is when there should have been a review. At the very latest there should have been a review based on the Occupational Health report by September.

6.90. The complaint is not in relation to the period after her return to work. It is in relation to the period during the conduct suspension.

6.91. The Occupational Health report was received on 3/08/17. On the basis that the failure to act is treated as occurring when the person might reasonably have been expected to do it, it should have been the basis of risk assessment during August, certainly no later than early September.

6.92. It is argued that rather than an individual failure, this is a continuing act in that there was a continuing duty to review the suspension.

6.93. Even if we regard this as a continuing discriminatory state of affairs, the claim is still out of time as explained at paragraphs 6.73 -6.74 above.

6.94. Extension of time is considered below.

d. Requiring staff to attend formal attendance review meetings due to the length of sickness absence.

Is this a PCP?

6.95. Yes, this is a recognised policy, initiated with computer generated letters.

Did it put her at a substantial disadvantage in comparison with non-disabled persons?

6.96. Yes, because of her anxiety and the context set out above – she had just seen the conclusion of the disciplinary process in which she had a well-founded anxiety about dismissal only to be faced with a further procedure in which she had a heightened concern about dismissal. Both of those would also have been true for non-disabled persons, but given her diagnosis and recent history, the anxiety would have been greater. Her condition made future absences more likely, and she had already exceeded the trigger points given, substantially. The process, in its automatic nature and unmitigated by informed consideration of her disability, placed her at a disadvantage.

Did R know/ could be expected to know that the claimant was likely to be placed at that substantial disadvantage

6.97. Yes because of the nature of the diagnosed condition and the nature of the procedure with its potential consequences.

What is the adjustment proposed?

6.98. Removing the requirement for the claimant to be invited to a formal attendance review meeting due to the length of her sickness absence.

6.99. Prolonging the absence trigger point at which the claimant would be invited to a formal attendance review meeting due to the length of her sickness absence.

Were they reasonable?

6.100. It would not be reasonable to remove the requirement for formal attendance review. This is a necessary policy to address absence. To hold a formal attendance review was not unreasonable.

6.101. It is not clear from the standard letter issued that her disability was acknowledged. The notes from the Welcome Back meeting didn't reach her line manager. We have not heard that the Occupational Health report was considered on her return to work or even at this meeting. It is not surprising that

the invitation to an attendance review provoked further anxiety, the more so given the reference to possible dismissal at a later date if absences continued.

6.102. The effect for someone recently returned after a prolonged absence and with a continuing condition of anxiety is harsh; there is little co-ordination in management and little to mitigate the intense anxiety that this review provoked, even though the outcome was as generous as the policy permitted.

6.103. However, that does not justify abandoning the requirement for attendance review altogether, even in the individual case. What is required is careful, sensitive, personal management.

6.104. The second proposal would mean abandoning the absence triggers altogether, given how long Mrs Richards had been off sick. That too is not a reasonable proposal.

6.105. These were not reasonable adjustments.

Time Limits and the Just and Equitable Extension of Time

6.106. We have determined that many of the claims identified in the agreed issues are out of time. The Tribunal has jurisdiction to hear them if it is held to be just and equitable to extend time.

6.107. Time limits in employment cases are intended to apply strictly. The discretion to extend time is broader in discrimination than in protected disclosure cases, but the onus remains on the claimant to show that it is just and equitable to extend time. Neither the claim nor the witness statement makes out a case for extending time or explain the timing of the claim. Matters arose later – for example, the renewed cold-shouldering on her return to work - which caused Mrs Richards disquiet, but they are not included in the agreed issues.

6.108. Mrs Richards, on the basis of the occupational health report and by her own account, was well enough to resume work in August or September, had she been able to continue with outdoor deliveries. We know she continued to experience significant anxiety, in that she found dealing with phone calls from the office difficult, but she was not unable to cope with the disciplinary itself including by responding to Mr Mitchell's communications.

6.109. She had legal advice in July and union advice throughout. She had raised, through her solicitors, the possibility of bringing a case in July. She was not unaware of the time limits.

6.110. She was not misled by thinking that procedures were continuing for which she had to wait the outcome.

6.111. It is not at all clear to us why the claim was made when it was. It is right that both the bullying grievance and the health and safety grievance were still being considered in the period November to January, but in the agreed issues, she does not complain about matters after the suspension from outdoor work was lifted.

6.112. We do not find a basis on which to say it is just and equitable to extend time.

6.113. The claim in respect of the failure to make reasonable adjustments is dismissed.

PIDA

Time Limits

6.114. What has to be decided here is whether the claimant suffered detriment on the ground of having made the protected disclosure and whether her claims were made in time.
6.115. The respondent concedes that the claimant made a protected disclosure by her grievance raised on or around 27 June 2017.
6.116. Nine detriments are pleaded. Many relate to matters in June or July 2017.
6.117. The ACAS referral was made on 14/11/17 and the ACAS certificate was given on 15/11/17. The rules provide little by way of automatic extension of time.
6.118. If the incidents complained of are out of time, the test for extending time is based on whether the delay is reasonable and that it was not reasonably practicable for the complaint to be presented in time.
6.119. Mrs Richards took legal advice in July 2017. The solicitor's letter of 24/07/17 expressly refers to the grievance as a protected disclosure, and also discusses the refusal to deal with the grievance or to postpone the disciplinary while it was considered and to the bullying and harassment. The letter refers to potential claims to a tribunal: time limits must have been considered.
6.120. She reported herself to be well, save for her inability to cope with indoor work in September. If there was any point at which she was not able to pursue matters by reason of illness, she was able to do so by September 2017 and thereafter. She does not report delay on the basis of mistake or ignorance.
6.121. Neither the claim form nor the witness evidence explains the delay in putting in the claim. It is suggested that these were continuing acts, or a continuing state of affairs, but on the facts found, we do not find that to be the case.
6.122. Where claims are late, we have found no case for extending time on the basis that it was not reasonably practicable for Mrs Richards to lodge her complaint in time.

The detriments pleaded

- *Taking no action to investigate the Stage 2 grievance in July 2017?*

6.123. The decision not to investigate the grievance was taken on 7/07/17. It was seen as a diversionary tactic. That was the reason for not investigating it. The merits were not considered. It was not seen as a health and safety alert.
6.124. The decision not to investigate was not made on the ground of her having made a protected disclosure per se, but it was made on the ground that she had lodged a grievance while facing a conduct investigation. In other words, the decision not to investigate was specifically because she had lodged the grievance.
6.125. This complaint is worded as specific to the decision made at that time – the grievance was later considered, not unfavourably.
6.126. The ET1 was lodged on 26/01/18. The complaint about the July decision is made substantially late, the time limit expiring in early October. Mrs Richards was specifically aware that the decision had been made and the grounds for it. Even though we can see a causal relationship between the lodging of the grievance and the decision not to investigate it, the claim is made too late. We find no basis on which to say that it was not reasonably practicable to bring this claim in time. The Tribunal has no jurisdiction.

6.127. For completeness, after the decision not to investigate the grievance, and the solicitor's letter, Mr Chant indicated that he would consider the grievance at the fact-finding interview (162). A decision could then be taken as to whether the matter should be dealt with together or not. Because of his illness, Mr Mitchell took over. Mr Mitchell was not aware that the grievance had not been considered or of the correspondence with Swan Craig Solicitors and did not want to embark on it in the course of the conduct matter.

6.128. While not the pleaded issue, there was a renewal of the decision not to investigate the grievance on 20/09/17, at least in the course of handling the conduct matter.

6.129. Mr Fleming wrote to explain that he had been appointed to handle the grievance at stage 2 on 14/11/17.

6.130. The latest decision not to investigate the grievance or to delay the conduct matter while it was handled or to handle the two matters together was therefore that of Mr Mitchell in September. In relation to an ET1 lodged on 26/01/18, that too is substantially late and there are no grounds for extending time.

- *Not taking any formal action when the claimant and/or the claimant's partner on her behalf reported, on 28/06/17, 5/07/17, 6/07/17 and 7/07/17, bullying and harassment conduct by her colleagues.*

6.131. We see Ms Birt as rattled by learning that a grievance had been lodged at a more senior level. The bullying was being reported at the same time. Both were seen as diversionary. The failure to take formal action is influenced by the way Mrs Richard's actions were seen: the lodging of a grievance, which turns out to have been a protected disclosure, was a material influence in seeing the bullying complaints as exaggerated and a diversionary tactic. The bullying she complained of was therefore not given weight or effective management. What that means was that that failure was in response to a grievance having been lodged, regardless of the content. There is a connection between the lodging of the grievance and the ineffective handling of the bullying.

6.132. The decision not to take formal action on bullying was made before Mrs Richards went off sick on 11/07/17.

6.133. We cannot see this as part of a series of similar acts. There was no decision later than the decision in July not to take formal action in respect of bullying. We can't add in the later complaint of bullying on Mrs Richards' return to work on 6/11/17 which went uninvestigated, because the complaint she makes is expressly about matters in June and July.

6.134. The complaint is made substantially late and there are no grounds for extending time.

- *The prolonged period of victimisation, bullying and harassment, including belittling and differential treatment by the Respondent's management team (notably Louise Birt and Reza Goldsmith). Those are identified as the meeting about the grievance on 27/06/17, not being allowed to leave the office without authority, being required to work the full contracted hours in June and July when others were able to leave early and collating witness statements after the protected disclosure without supplying copies.*

6.135. We accept that what is described as a dressing down on 27/06/17 was on the ground of having lodged the grievance. It is not material that Ms Birt did not

know the content or that it was a protected disclosure. It was a detriment on the ground that the protected disclosure had been lodged.

6.136. Ms Birt wanted to know who and what the grievance was about, which, given that it was lodged as a stage 2 grievance, above her level of seniority, was not appropriate.

6.137. Ms Birt did want to know "when and where" Mrs Richards was going when taking breaks, using her words, which in our judgment, reflects anxiety arising out of the lodging of the grievance.

6.138. Both matters relate to the period prior to Mrs Richards taking sick leave on 11/07/17. The ET 1 was lodged at the end of January. The complaint is made substantially late and there are no grounds for extending time.

6.139. The other matters complained of were not on the ground that Mrs Richards had lodged a protected disclosure. Delivery workers may have to do extra time on their rounds and it is recognised that they can leave if they finish early. Indoor work requires that people work their full shift. That is the explanation for the different treatment reported. We don't know why witness statements were still being collated in August, but it appears that Mr Goldsmith was only slowly putting together the pack of material for the upward referral. Nothing relates that or his failure to provide copies to the protected disclosure.

6.140. We do not identify the matters itemised, even taking into account the broad picture, as showing a continuing state of affairs; the latest matter itemised is in August 2017.

6.141. This claim opens with a more general complaint about the "prolonged period of victimisation, bullying and harassment, including belittling and differential treatment by the Respondent's management team (notably Louise Birt and Reza Goldsmith)." We have found management failures but we do not find a prolonged period of victimisation, bullying and harassment by Louise Birt and Reza Goldsmith lasting into the period of sick leave and beyond. The complaints against Ms Birt and Mr Goldsmith during the period of sick leave relate to the decision not to authorise a return to outdoor duties. They are not evidence of victimisation, bullying or harassment and we have found that a return to outdoor duties was not to be expected pending the outcome of the conduct investigation.

- *Failing to postpone the disciplinary procedures to allow the claimant's grievance to be investigated first.*

6.142. Failing to postpone the disciplinary procedures was not a detriment nor was it a decision on the ground of Mrs Richards having made a protected disclosure.

6.143. It would probably have meant the conduct matter taking even longer with a longer suspension.

6.144. What mattered was that the fact finding was undertaken and the mitigation was fully heard. That is what in the end happened – which is why Mrs Richards does not complain about Mr Mitchell's conduct of the matter.

6.145. Her request for the disciplinary matter to be postponed pending the grievance was made in June. The decision taken to proceed with the disciplinary was taken in June. The decision not to act on the grievance at all was taken in July. That decision is well out of time for a claim issued the following January.

6.146. The grievance was recognised again in August and Mr Chant would have dealt with it. Mr Mitchell chose not to. He would have had to postpone in September. He chose not to. She was aware that that was his view on 20/09/17. She was not then unhappy with his handling of it.

6.147. Even if this had then been a detriment, the claim is out of time and there are not grounds to extend time.

- *A prolonged period of suspension (126 days) resulting in the disciplinary not being heard until September (this should read October).*

6.148. The suspension was not on the ground of her having made a protected disclosure. It was because of the driving and mail integrity issues. The duration of the suspension was because of the delays arising in referring the matter upwards, Mr Chant's illness and Mr Mitchell's thoroughness. The matter was not delayed on the ground that Mrs Richards had made a protected disclosure.

- *A failure to conduct any review or safeguarding checks (such as keeping the facts under review during the investigation, reviewing the suspension on a weekly basis, maintaining contact with the claimant all in accordance with the Respondent's suspension policy, considering a return to work on outdoor duties in accordance with the Occupational Health report recommendations) during the Claimant's period of suspension*

6.149. No review of the suspension was carried out, although the managers kept in touch with Mrs Richards by telephone – that is not the same as a review. The respondent concedes there should have been regular review. A return to work on outdoor duties was not considered pending the outcome of the disciplinary and we have found that was reasonable, even though the matter should have been kept under review.

6.150. We cannot see a basis for saying that the failure to review was on the grounds that Mrs Richards had made a protected disclosure. Whatever the reason, whether managerial inexperience, the lack of a clear framework for reviews, confusion over who was responsible for review, a failure to recognise that the policy invited review so that suspension was not longer than necessary, we do not find a basis for saying that the failure to review was because of the protected disclosure.

6.151. Even had the failures here been seen as on the grounds of the protected disclosure, the reviews should have been being carried out in August, September and perhaps early October. There was no requirement for review once the decision was reached and given.

6.152. The claim is out of time and there are no grounds to extend time.

- *Being required to work indoors during the period June to November 2017, preventing the claimant from working overtime and receiving her normal salary.*

6.153. Mrs Richards was required to work indoors during the period from June to late October because the conduct matter was outstanding. We have held that that was reasonable, notwithstanding that reviews should have been taking place. It was not a detriment and in any case it was not something done on the ground that she had made a protected disclosure.

- *Being subject to a protracted investigation for a conduct manner, when colleagues who had committed similar conduct offences had their disciplinary proceedings conducted within a reasonable time frame.*

6.154. Her conduct matter was delayed. Step by step, it is possible to see why. It was not because she had made a protected disclosure. It was because Mr

Goldsmith saw a more serious case requiring consideration of more weighty penalties, then Mr Chant was ill and Mr Mitchell unable to take the matter on immediately. Mr Goldsmith was not aware of the content of the grievance. Mr Chant expressed himself willing to consider the grievance. Mr Mitchell only became aware of it at his meeting with Mrs Richards. The protracted suspension cannot be attributed to her having made a protected disclosure. Royal Mail do not present a picture of sound and effective management with good communication between those involved, but we cannot attribute the delays in handling the conduct matter to the fact that Mrs Richards had made a protected disclosure.

- *Being removed from the scheduled attendance rota, on or around 19/07/17, prior to the expiry of her MED3 certificate.*

6.155. This was a pragmatic decision based on an expectation that as of mid-July 2017, given both sickness and a conduct matter that was being referred to senior management, Mrs Richards was unlikely to be able to fulfil any commitment for overtime doing delivery work. That is a sufficient explanation, and it does not lead to us to find that it was a decision influenced by Mrs Richards having made a protected disclosure.

6.156. In any event, the claim is substantially out of time.

6.157. The claim in respect of detriment on the grounds of making a protected disclosure is dismissed.

Unlawful deduction of wages

6.158. Mrs Richards claims for the overtime pay she had lost by being unable to do scheduled overtime during her suspension and sickness absence. The contract does not guarantee any level of overtime. Overtime payment was contingent on attendance. Scheduled attendance overtime is expressly not payable to those not attending, that is, for example, on sickness leave (261).

6.159. There was no contractual entitlement to overtime as claimed and no unlawful deduction from wages.

6.160. The claim in respect of unlawful deductions is dismissed.

Employment Judge Street

Date: 11 January 2019