



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Dr S Quinnell

v

British Council

Heard at: London Central in-person/by CVP **On:** 28, 29 and 30 September and
1, 2, 5 and 6 October 2020

Before: Employment Judge A James
Ms D Olulode and Mr S Godecharle

Representation

For the Claimant: Ms C Meenan, counsel

For the Respondent: Ms R Tuck QC, counsel

JUDGMENT

- (1) The claims for direct disability discrimination, unfavourable treatment due to something arising from disability, indirect discrimination, failure to make reasonable adjustments, harassment related to disability and victimisation (Equality Act 2010 sections 13, 15, 19, 20, 26 and 27) are not upheld and are dismissed.

REASONS

The proceedings before the tribunal

1. The claim form was submitted on 11 January 2018, following a process of Acas Early Conciliation. The response form is dated 15 February 2018. A case management hearing was held on 23 April 2018 at which the issues were identified and directions made. The hearing was re-listed for 4 days from 9 October 2018 onwards. That was subsequently re-listed to 5 to 8 February 2019. Due to the claimant commencing a new role at UCL, an application was made to vacate that

hearing and re-list it in August 2019. The re-listed hearing was again adjourned for reasons which do not concern us at this point. The claim came before the tribunal again on 16 March 2020. A tribunal panel spent the first day reading, and evidence was due to be heard on 17 March 2020. Unfortunately, that then had to be adjourned for Covid-related reasons, to 28 September 2020.

2. Adjustments were agreed at the hearing on 17 March 2020 as follows:
 - 2.1. *The claimant would be permitted to take breaks as required and if possible would be allocated a quiet room she can go to with her companion. The claimant is aware that if this is necessary whilst she is giving evidence, she cannot discuss her case or her evidence and will not do so. The breaks required should not generally be longer than 10 to 15 minutes.*
 - 2.2. *The tribunal acknowledges and understands that the claimant's mannerisms are part and parcel of her Asperger's and not in any way intended to be disrespectful.*
 - 2.3. *The claimant will be allowed to give her evidence first, which would be the normal course of events anyway, in a discrimination claim.*
 - 2.4. *The claimant is more comfortable in casual dress, and the tribunal will not be affected by that in any way, in coming to its judgment.*
3. In the event, the claimant joined the hearing remotely by video link, as did a number of witnesses. We allowed the claimant to take regular breaks. The claimant did on a number of occasions find the process of cross examination distressing, and we adjourned the hearing as appropriate when that occurred. The fact that the claimant joined remotely, made it more difficult for her companion to provide her with support and on one of the cross-examination days the companion was not available. We therefore agreed that the claimant's counsel, Ms Meenan, could speak to claimant, purely to provide support, while she was still giving her evidence. Ms Tuck did not object to that, on the basis that Ms Meenan was fully aware of her professional obligations and duties.
4. The claimant's evidence was due to take one day but given the frequent breaks necessary and some technical issues arising from the hybrid nature of the hearing, amongst other things, her evidence took two days. We were able to add a further deliberations day at the end of the hearing to accommodate that. We have borne in mind that any directness on the part of the claimant is due to her condition and that has not influenced our findings of fact or our conclusions below.
5. There was an agreed bundle, containing about 1200 pages. We heard evidence from Dr Quinnell, the claimant; Andrew Hodge, solicitor and independent consultant who conducted the appeal against dismissal hearing; Sheena Macdonald, former Global Head of Talent Management; Robert McChesney, Senior HR Business Partner; Andrew Phillips, Learning and Development Manager and former Head of Business Training Services; and Lauren Spendlove, former Head of Business Training Services and the claimant's line manager. We were asked to consider the written statement of Ruth Blane, former Training Manager in Business Training Services. Apart from Mr McChesney, those giving evidence did so via CVP. Counsel and the members of the tribunal were present throughout the hearing, apart from for submissions, where counsel joined via CVP.

Facts

6. The respondent is an Executive Non-Departmental Public Body, a public corporation, and a charity. It is the UK's international organisation for cultural relations and educational opportunities. It employs about 12,000 staff who are based in the UK and overseas.

Offer of employment and role

7. On 19 October 2016, the respondent made an offer of employment to the claimant. The offer was signed and returned on 20 October 2016. The contract was fixed term for a period of 18 months and was due to expire on 30 April 2018. The terms of the contract included a 9-month probationary period.
8. The claimant's employment commenced on 31 October 2016 in the role of E-Learning Training Manager within the Business Services Training Team, which is located within the respondent's HR Function. The claimant worked in the respondent's London office.
9. The purpose of the job required the postholder to:
"[B]e responsible for the eLearning strategy for Business Training Services. They will manage, design, produce and maintain eLearning materials to support in-house training projects. They will build the eLearning capacity within the team and take the lead on pursuing eLearning opportunities that are of benefit to the British Council. The role will ensure learning objectives, requirements and instructional design are translated into highly engaging eLearning content".
10. In addition, the claimant was to *"ensure content is Brand compliant and adheres to copyright laws; collaborate with our in-house eLearning community; [and] promote the training team's eLearning portfolio to key stakeholders"*. The job description and person specification required the claimant to work collaboratively with colleagues and stakeholders. She was required to work as part of a team and to lead on eLearning issues.
11. The claimant had completed a pre-employment questionnaire but that was not seen by Ms Spendlove and nor were any recommendations made by Occupational Health (OH). The claimant did not speak to Ms Spendlove about any adjustments she might require to her role or duties. The claimant's recollection was that she spoke to a woman called Anne in HR and told her that recommendations had been made by OH. There is however no record of that discussion or of any such recommendations being made by OH and we consider that the claimant's recollection in that regard is mistaken. See further below in relation to the discussion about a referral to OH on 6 December 2016 (para 19).
12. The claimant underwent an induction programme. As part of that induction programme she undertook mandatory training on the organisation's policies including its Equality and Diversity Policy and the British Council's Code of Conduct.

Level of support required

13. The claimant required particularly high levels of support from management and colleagues during the first few months of her employment. For example, Training Managers reported spending 2 to 3 hours on some days, supporting the claimant.

She was often tearful and broke down in tears. During the first few months, Ms Spendlove would often spend 20 minutes to an hour speaking to the claimant on the phone.

Issue with Steve Mitchell

14. The claimant's relationship with other training team members was sometimes difficult. The issue with Steve Mitchell is an example of these issues. The claimant visited the respondent's Edinburgh office on 14 November 2016 and met with Steve Mitchell. She subsequently complained to Ms Spendlove about that conversation. The issues were documented in an email sent by Ms Spendlove to the claimant on 24 November. The claimant did not contradict what Ms Spendlove set out in that document. Part of the email reads:

"1 During your visit to Edinburgh on 14th Nov Steve told you that your role was artificial and that he did not consider it to be either necessary or at the pay band 8 level.

2 After you had returned from Edinburgh, on a different call he stated again that your role was artificial and added that he did not think your contract would last the full 18mth due to a lack of commitment on our side.

3 He was resistant to your ideas e.g. negative response to video simulation, not open to seeing external examples."

15. Ms Spendlove subsequently discussed these matters with Mr Mitchell who denied that he had made the remarks as suggested. He was upset about what had been alleged and he sent a lengthy rebuttal on 28 November, confirming that he had since spoken to the claimant and she had accepted that there had been 'some sort of misunderstanding'.
16. The claimant had made it clear to Ms Spendlove in conversations and by email that she wanted her to raise the above issues with Mr Mitchell. However, the claimant later told Mr Mitchell that it was just a passing comment to Ms Spendlove and she had not wanted Ms Spendlove to discuss it with Mr Mitchell. This and other matters referred to below created a certain level of distrust towards the claimant by other members of the team and by Ms Spendlove.
17. Another pertinent example of the claimant's unusual behaviour during this period is her email to Ms Spendlove on 28 November 2016 referring to her 'imposter syndrome' ie that she thought she should not have got the job/was not capable of doing it and was full of self-doubt about her own abilities in the role. She then sent an email on 29 November 2018 to Ms Spendlove saying, "I'm drowning here". She told Ruth Blane via Office Communicator (OC) on 15 December 2016 that she "just want[ed] to walk in front of a bus".

Discussion about referral to OH – 6 December 2016

18. On 6 December 2016 Ms Spendlove and the claimant exchanged emails about referring the claimant to OH. The claimant raised a concern that it might "*be used as a reason to get rid of me*". Ms Spendlove assured her that was not the case. She reassured the claimant that it was to ensure that she received confidential advice and that OH might be able to suggest reasonable adjustments.

19. The claimant emailed Ms Spendlove to say: "*OH normally deal with long-term conditions which this isn't*". Again, Ms Spendlove assured her that OH did not just deal with long-term conditions. Nevertheless, the claimant declined to be referred at this stage and Ms Spendlove respected that decision. At no point in this exchange did the claimant suggest that OH should already have put forward recommendations, on the basis of the pre-employment questionnaire she had completed, which we have borne in mind in relation to our finding about that above (para 11).

Team training event and Christmas meal – 13 and 14 December 2016

20. The team Christmas dinner was planned for 13 December 2016, during a 2-day training event which took place on 13 and 14 December 2016 in Manchester. The claimant had expressed some anxiety about the dinner because she has a serious allergy to mushrooms. Ms Spendlove was respectful of the claimant's concerns and did not simply dismiss them. Both the claimant and the respondent contacted the restaurant directly who provided reassurance to the claimant about her concerns.
21. The claimant was due to present a training session on the morning of the second day of the planned training event, 14 December 2016. This had been discussed at her induction. It had been agreed that the claimant would present a session about her work and Ms Spendlove had suggested the claimant ask the team what they wanted her to cover. The claimant sent Ms Spendlove a draft plan on 5 December to which Ms Spendlove responded, 'looks good to me'. She offered comments on it. Suggestions were also sought from other team members and passed onto the claimant.
22. On 12 December 2016, the claimant emailed Ms Spendlove and referred to "*having a nervous breakdown*". In a later email in the exchange on 12 December the claimant states: "*I really should have said when I started that I wasn't available these two days and just left it at that as now I find myself committed to something I am not sure I can cope with. The closer it gets to the anniversary the harder it is to focus on the now.*" The reference to 'the anniversary' was the anniversary of the death of her sister which coincided with the date of the training event.
23. As Ms Spendlove was concerned about the "having a nervous breakdown" comment, she asked Ruth Blane to check on the claimant. (Ms Spendlove worked in Manchester, a different office to the claimant). The claimant later emailed to say, "*It's fine*" and that Ruth had been to see her and "*is her brilliant self so that's helped*". The claimant's recollection was that she verbally told Ms Spendlove that she wanted to cancel the session. Ms Spendlove denied that there had been any such request and the claimant's recollection is inconsistent with the written documents. We prefer Ms Spendlove's evidence on the point.
24. On 13 December 2016, prior to travelling up to Manchester for the team dinner, the claimant met with Jenny Compton at the London office and told her she had a resignation letter with her. In addition, the claimant said she had very mixed feelings about everything, she did not feel could do the job the way she wanted to and was considering whether she should be there at all.
25. The claimant subsequently travelled to Manchester and attended the team Christmas meal with her colleagues. The meal itself passed off uneventfully. A

number then attended a nightclub following the dinner. The claimant says she subsequently suffered a 'seizure', leaving her unable to remember what had happened. When asked about the events of that night she confirmed that she could not remember anything about it, other than a vague memory of a colleague Ruth Blane being present in her room in the morning.

26. According to Ms Blane's statement, which was not challenged in this regard, the claimant, Ms Blane and other colleagues left the night club at about 3am. The claimant told Ms Blane that she felt unwell. Ms Blane took her to the claimant's room and Ms Blane went back to hers. She changed into her pyjamas and went back to check the claimant was okay. At 5 am the claimant called Ms Blane's room and said she needed her. Ms Blane went to the claimant's room. She felt that the claimant was being melodramatic. She told the claimant to get into bed and lie down, and that she would stay with her. Ms Blane fell asleep and woke up about 7 am. The claimant appeared to be surprised to see her in her room.
27. On the same morning of 14 December 2016, the claimant was due to present her training session between 9.00 am and 10.30 am. Due partly perhaps to the events of the previous night, the claimant was tearful when she arrived at the office. Ms Spendlove agreed that the start of the session would be delayed by an hour. (The claimant had asked for just an extra 15 minutes but Ms Spendlove suggested she take an hour). The training session started off fine but after a few minutes, the claimant went to the ladies' toilet where she collapsed and was found on the floor. She was helped to the first aid-room.
28. Paramedics attended but the claimant refused to attend the A&E department. Ms Spendlove stayed in the first aid room with the claimant until about 2.00 pm. She then walked with the claimant to the train station and the claimant travelled back to London by train. The claimant was met at Euston station by a friend who went to UCLH with her so that medical checks could be carried out.

Further OH referral and suggestion of Serotonin Poisoning

29. The claimant had agreed to a referral to OH on 12 December 2016 and Ms Spendlove had replied on 13 December to say she would make the referral. Ms Spendlove provided information by email to Ms Mwaura for the OH referral on 15 December 2016. On the same day, the claimant sent an email to Ms Spendlove which put her collapse out down to mild serotonin poisoning due to her taking two different medications. She specifically put her 'paranoia, feelings of uselessness, depressive symptoms over the last three weeks' down to medication issues too, namely taking Naproxen for headaches which led to extremely high levels of naproxen in her system which 'can cause psychological disturbances'. She also said she had been informed that the Naproxen could have interacted adversely with the St Johns' Wort that she was taking for her anxiety. In a message to Ms Blane on 15 December, the claimant confirmed that the issue was not going to be long term.
30. On 16 December 2016, a GP letter was provided by the claimant to Ms Spendlove, confirming that the claimant had symptoms of depression and anxiety. It reported that she was in receipt of medication and psychological support and had recovered from 'her recent serotonin syndrome when she collapsed at work'. This email was received after the email referred to below about performance had been sent.

Deliverables

31. On 15 December, the claimant had sent to Ms Spendlove an email with a plan attached about her 'deliverables', setting out the timescales within which they could be achieved. Ms Spendlove made constructive comments in relation to the document and sent the claimant her reply on 21 December 2016. Further clarification was requested by Ms Spendlove. The key deliverables were identified as being: 1 update and implement an eLearning strategy; 2 agree and prioritise eLearning needs; 3 manage, design, produce and maintain eLearning materials; 4 build eLearning capacity of team; 5 update the BTS part of LMS. Those tasks – or 'deliverables' – were central to the role the claimant was employed to carry out.

Concerns about claimant's performance and Twitter account etc

32. On 16 December 2016, an internal report was sent by Ms Spendlove to Dee Massiah in HR raising issues about the claimant's performance. The report suggested that the claimant needed excessive support from her colleagues and lacked confidence. Concerns were also raised about the claimant's Twitter account. Examples of negative tweets were included in the report, suggesting the claimant was not being supported. For example, a tweet dated 12 December said, "off to Manchester for 2 days of team building hell"; "I have severe anaphylaxis every1 at my work xmas do eating things im allergic 2 have said i dont want 2 go why is this seen as unreasonable". There was also a photograph taken of Ms Spendlove by the claimant on 13 December with the comment "My boss; thoughts people". Other team members were aware of and were upset about the tweets, suggesting as they do, a lack of support and understanding from the claimant's colleagues towards her.

33. Ms Spendlove did not show the claimant the actual tweets (this was after all a telephone call) but we find she did discuss the contents with her. She specifically discussed the photo of Ms Spendlove that the claimant had taken, and the 'team building hell' comment. Ms Spendlove wanted the claimant to think how that would come across to members of the team. Ms Spendlove was never asked for any further information about the tweets by the claimant. The claimant just wanted to know why people were reading her Twitter feed.

34. In her evidence before the tribunal the claimant argues that the tweets were not in fact hers. We were shown email correspondence from 2014, in relation to a logo which the claimant had had designed for her Twitter feed. That was different to the logo on the tweets we were shown which were said to be from the claimant. However, we were not shown any examples of the use of the 2014 logo in any tweets from the claimant, from 2014 onwards. The Twitter handle used in the tweets we were shown is the claimant's. In the circumstances, we are satisfied that the content of the tweets was produced by the claimant.

Feedback Meeting on 22 December 2016

35. An informal feedback meeting took place on 22 December 2016. There was some argument as to whether this was a formal performance management meeting but it is recorded in an email from Ms Spendlove to Ms Massiah as a 'feedback conversation'. Matters discussed included:

- *the fact that the Twitter posts were in the public domain and the need to consider the impact on the team;*

- *the fact she had not met the deliverable with regard to preparation of the training session; and*
- *the level of support she was receiving, both in the British Council and externally.*

36. Ms Spendlove's note of the meeting which we accept as an accurate record confirms that the following exchange took place;

[The claimant] said if she was her line manager that she would be concerned and would offer more support. I told her that the support she received both professionally and emotionally was unsustainable and unmanageable. She repeated that she felt disconnected with people from work. She said that the people were lovely and friendly but that they would not engage with her and were busy. I told her that team members have given her plenty of time and are willing to engage. I also said that as a PB8 [Pay Band 8] she should be able to work independently and although I recognised that new members of staff need additional support that the support she was requesting was too much.

37. Ms Spendlove's report of the meeting concluded:

Overall she was very negative and made comments about how she needs to remind herself that she is not here to make friends just to be paid to do what she needs to do. She said that she was dealing with 2 very difficult life issues and that the normal people she would turn to for support were not there anymore. She said how she would get to work and break into tears and call her mum saying she did not know what had come over her. She said that getting on the right medicine should make things better. In the end the conversation concluded on an OK note. She said I gave her the feedback in a good way and we wished each other the best for Christmas and New Year.

OH referral - January 2017

38. The GP letter was provided by the claimant to Ms Mwaura on 4 January 2017. In the email attaching that letter she raised concerns about the meeting with Ms Spendlove on 22 December but stated "I don't want to make a fuss, I just want it noted as I am feeling much better and want to move forward".
39. On 5 January 2017, an OC exchange took place between Ruth Blane and Steve Mitchell, suggesting that Ruth used to spend 2 to 3 hours a day on messenger with her. The claimant denied this was true and indeed refused to accept that these OC records were true or accurate. We find that they are contemporaneous records of what was said and they were of assistance to us in making our findings of fact.
40. On 23 January 2017, an OH appointment took place. The report confirmed that the claimant had a background history of reactive depression and was likely to be covered by the disability provisions of the Equality Act. However, OH did not 'identify any adjustments that are required'. The report also confirmed that the claimant was 'fit to remain at work in her current role and contractual hours'.
41. The OH report was sent to Ms Spendlove by Beatrice Pryde, of HR, on 25 January 2017 summarising the reports contents. The covering email confirmed that OH had advised that a stress risk assessment should be completed if there was any significant future deterioration. In a follow-up email on 26 January 2017, Ms Spendlove asked Ms Pryde for confirmation what she needed to do, for example

did Ms Spendlove need to ensure that the claimant undertook treatment? She also asked Ms Pryde to expand on the recommended adjustments section. Ms Pryde confirmed in reply:

You don't need to do anything further in relation to this as there weren't any recommendations for reasonable adjustments. All you need to do is manage her as any other employee, so managing her workload, absence, behaviour etc. The report also says "there should be no reason why she should not be able to continue her substantive role and contracted hours" so Sarah should be able to carry out her duties as any employee would.

42. In light of the HR and OH advice and the claimant's comment that she was feeling much better, Ms Spendlove continued to line manage the claimant in line with the duties set out in her job description.

January 2017 – 3-month probation review

43. The claimant's 3-month probation review was due to take place on 25 January 2017. Prior to the meeting, Ms Spendlove sought input from colleagues including Steve Mitchell and Angeli Shori. Ms Shori provided positive feedback.
44. Due to issues being raised by the claimant with Ms Spendlove, about the contents of the OH referral and her email to Ms Hutchinson (see below), the meeting was postponed and did not take place until 15 February 2017.

Email to colleague JH

45. On 1 February 2017, the claimant sent an email to a colleague, JH. The context for that email being sent was that the day before, the claimant had discussed with Ms Spendlove that she had shared with the number of colleagues that she was attracted to JH which had been reported back to them. The following day, Ms Spendlove suggested to the claimant that since she had a meeting coming up with JH that day, they both take the opportunity to try and resolve the matter. Instead of discussing the matter as suggested, the claimant sent a lengthy email to JH. JH took exception to the contents, and forwarded the email to Ms Spendlove, complaining that they did not think it was 'appropriate'.
46. The claimant had replied to Ms Spendlove, complaining that male members of the team, specifically a colleague Giles Morris had made comments about JH, and that she felt she was being treated differently. Ms Spendlove spoke to Mr Morris, who denied making the comments. He was in any event reminded about BC values.
47. Also, on 1 February 2017, Ms Spendlove emailed Ms Massiah raising concerns about the claimant's performance and requesting she contact her urgently to discuss options "for ending the probationary period with immediate effect".

'More data' email – 6 February 2016 - Ms Wynn to Ms Spendlove

48. On 6 February 2017 Ms Caroline Wynn sent an email to Ms Spendlove which stated:

I was a bit surprised to receive this email and you not be copied in, more data? I have had a quick look through your response to Anne. I agree and try and push that with her. If they stick to you needing to do the month then the answer is to set up the feedback mechanisms right at the start with the stakeholders so that there

is no chance that she can slip through the net.

49. There were other similar emails from Ms Wynn to Ms Spendlove, containing similar comments. We did not hear from Ms Wynn. We did hear from Ms Spendlove. We accept Ms Spendlove's evidence that 'the data' that she was keeping, was data to support the performance management process. She had been asked by HR to collate all of the information that staff were providing to her and she did so, in line with normal performance management processes.
50. As for the reference to the claimant not 'slipping through the net' and 'if they insist you need to do the month', we accept that as far as Ms Spendlove was concerned, the claimant needed to complete the PIP to stay in work. The PIP was to set out clearly what the claimant needed to do. Ms Spendlove was not trying to do anything underhand. She took these comments as meaning she should document everything that was said, keep all the evidence, and to state clearly the requirements on the PIP. We find that was her understanding.
51. On 7 February 2017, the claimant sent an email to Ms Spendlove headed "*why are people I'm sitting with telling me I'm going to be fired*". Ms Spendlove replied asking who the claimant was sitting next to. Later that evening, the claimant emailed Ms Spendlove to say: "*All resolved, no issues, just a sense of humour failure*".

Probationary review meeting - 15 February 2017

52. On 15 February 2017, Ms Spendlove met with the claimant for a probationary review meeting. Ms Spendlove started off with some positives about what had been working well, and positive feedback eg from Ms Shori, but then discussed with the claimant problem areas. These included that the claimant had required excessive support; the inappropriate tweeting; and incomplete development of the training course. Further, deliverables were not progressing as expected, including updating and implementing the e-learning strategy; and building the e-learning capacity of the team.
53. She also raised behavioural issues, in relation to the BC values of integrity and professionalism and working together. Ms Spendlove concluded by telling the claimant she would draft a PIP based on the issues raised in the review which would set out what needed to be done and by when, and "if no improvements then we would end the contract". This was no doubt a difficult meeting for both Ms Spendlove and the claimant.
54. Following the meeting, the claimant sought union advice from Esther Hay, PCS union representative. She contacted Dee Massiah by email on 16 February 2017. Ms Massiah supported the approach of Ms Spendlove and the PIP.
55. On 16 February 2017 there was an OC conversation between the claimant and Ms Spendlove, in which the claimant stated amongst other things, that she had gone to her union for advice and she had two courses of action, to ask for a mediated discussion, or to submit a grievance. Ms Spendlove replied, "okay I realise that that may be what you have to do. Please feel free to do whatever is best for you, glad you're getting the support from union". The contents of this OC conversation were not challenged by the claimant.

21 February 2017 – further issues with colleagues

56. On 21 February 2017, the claimant's colleague JH complained to Ms Spendlove that the claimant had ignored her in a meeting and was uncommunicative. JH said she was thinking of working from home more as she did not want to be distracted 'by this behaviour in the workplace'. Ms Blane corroborated those concerns in an email sent to Ms Spendlove on 23 February; as did Laura Pett in an email dated 22 February; and as did Helen Ingram.

57. On the same date, the claimant conversed with Rosalyn Kennedy via OC. The conversation records:

“Sarah Quinnell: I think a long walk off a short pier would be best.... I need to go to boots, I've got so stressed I've cut a great long slash mark into my arm

Kennedy. Rosalyn: on purpose, or when you were having a 'moment'?

Quinnell, Sarah: combination of the two really it's hard to deal with when they all hate me as much as they do”.

58. As a result of that conversation, Ms Kennedy was concerned about the claimant's safety. She tried to telephone the claimant and could not get through. She contacted colleagues, who went looking for her. Later that day, the claimant emailed Ms Spendlove to say:

I am not really sure what went on today, I had been talking to Roz on OC and said I had cut my arm with a pair of scissors and was off to Boots to get some plasters. While I was on the phone to my Mum my phone started beeping and I had texts from you, from Steve and from Ruth all concerned about my safety. When I got back to the office HR had been contacted and wanted to talk to me. I appreciate I have anxiety, and I've had some bad news today, and I will have days when I am really anxious, less as the medication does its job, but we can't have people jumping to conclusions that I am going to commit suicide every time something goes wrong.

59. This contradicts what is set out as a matter of record in the OC conversation with Ms Kennedy. The claimant told us that the contents of the conversation are not accurate. We find that they are, there being no evidence of any tampering with or forging of the documents in the bundle.

Performance Improvement plan – 22 February 2017

60. The PIP was sent to the claimant on 22 February 2017. This confirmed that the following action was required by 20 March 2017:

Produce a clear action plan with timelines to update and implement the eLearning strategy including the operational toolkit and standards.

Agree training plan and communicate to team on when and how you will build eLearning capacity of the team.

Ensure that there are no complaints or feedback from the team or wider stakeholder group about any behaviours or actions contrary to BC values:

Integrity: We are honest, we are consistent both in what we do and say, we take responsibility for our actions and decisions

Professionalism: We are true to our values and keep our promises, We listen to and value the ideas and opinions of others, We accept individual and collective responsibility for delivering work to a high standard

Make sure you are fully familiar with the British Council definition of the behaviour Working Together [hyperlink to pdf] so that you are able to: Build professional working relationships with team members and stakeholders by demonstrating the British Council Working Together behaviour.

61. In a follow up email sent by Ms Spendlove to the claimant at 15.34 on 22 February 2017 she said:

In terms of your workload please let me know if things are mounting up and we can priorities [sic] together on what to work on. Moving forwards I issued the Performance Improvement Plan today and I am happy to meet as soon as possible to clarify anything. As I said on the phone my general advice would be to concentrate on your deliverables and let them be the focus of your efforts.

62. A formal meeting to discuss the PIP took place on 27 February 2017. The claimant's union representative told Ms Spendlove that the PIP had not been accepted and they were not going to sign anything. Nevertheless, it was made clear to the claimant that the PIP was in force and the claimant would be expected to comply with it.

63. During February and March 2017, the claimant was in touch with Andrew Spells, Head of Wellbeing, who had given her a document to read. The claimant was told in an email from Ms Spendlove dated 3 March 2017 to "*let me know any suggestions you want to take forward*". The claimant accepted this could be interpreted as meaning to let her know of any adjustments required. We find that this is what Ms Spendlove meant.

64. A stress risk assessment form was sent by Dee Massiah to Ms Spendlove on 2 March 2017. This was not completed by Ms Spendlove. Ms Spendlove accepted in cross examination that, in hindsight, it would have been helpful to have completed the stress risk assessment. We accept that in the meetings with the claimant, Ms Spendlove would cover some of the matters in the stress risk assessment, but by no means all of the matters which would have been discussed with her, had the form been completed.

Ongoing issues with relationships with colleagues

65. On 7 March 2017 following a meeting between the claimant and Laura Pett, Ms Pett sent an email to Ms Spendlove with a note about her concerns about the claimant's capabilities. This include the following:

"She often expresses how swamped she is in work. This means you start a meeting feeling a) you are putting her out and b) she isn't fully ready or engaged in what the meeting is set to cover. She does not make me feel confident that she can design and deliver eLearning material to a higher standard than we do already. She is yet to offer any training to professionalise the team. She has not constructively shown me how to develop new material (quiz templates, animations, Learning portal pages) that are not just text based. I therefore question the support and development she can bring to our team in this area."

66. When asked about this during the hearing, the claimant told us that the problem was that the Training Managers did not engage with eLearning, that they showed very little commitment. We do not find however that the other training managers were uninterested in e-learning. Rather, the problem was the difficulty that the claimant had in her social interactions with the other team members, and the atmosphere that created, which led to the other team members being wary of her. It was that which the claimant was picking up on, rather than an unwillingness on their part to engage with e-learning. The other team members did not appear to be aware at this stage of the claimant's diagnosis of anxiety and depression. In any event, they certainly were not aware of the Asperger's diagnosis at that stage – indeed, nobody was.

Disciplinary Hearing – March 2017

67. In March 2017 Ms Spendlove became concerned that a draft strategy document sent to her by the claimant had been plagiarised from documents produced by Glasgow University and Greenwich University. Ms Spendlove had checked online because the strategy document that the claimant had sent was not appropriate for a business organisation like the British Council. It was more of an academic piece of work. It was nothing like the document Ms Spendlove had been hoping for and it talked about students; whereas the British Council talks about users and learners. It simply did not make sense to Ms Spendlove. She therefore googled a sentence from it. She was shocked when it came up as having been lifted from a University document.

68. She spoke to the claimant over the phone about this issue on 13 March 2017. Ms Spendlove's note of the meeting records the following exchange which we find accurately reflects what was said:

"I asked her if it was her own work. She said, "yes thank you very much and I find that a bit insulting". I said that I had the eLearning strategies of Glasgow university and Greenwich university in front of me and it looks almost word for word copied. She said it is not the same. I said I was looking at the documents and they are the same. She said she had looked at a range of other eLearning strategies and the layout was based on these and then she was going to adapt it. I said it was not only the layout but 99% of the content. I asked why she used these rather than creating a strategy document herself. She did not answer."

69. It later transpired that the claimant had sent to Ms Spendlove the wrong document. That not being apparent at the time from the above exchange, and there being no source referencing in the material provided, Ms Spendlove sought further HR advice. The claimant was subsequently invited to a disciplinary hearing relating to an allegation of gross misconduct due to plagiarism on 16 March 2017.

70. An exchange of emails subsequently took place between Robert McChesney and Esther Hay, PCS union rep, concerning the status of the meeting to discuss the allegations of plagiarism. Mr McChesney confirmed on 21 March 2017 that the planned meeting on 22 March was a "*disciplinary hearing to discuss Sarah's under performance in relation to the work she has presented, specifically the work that is alleged to have been plagiarised*" [497]. In other words, it was now being treated as a disciplinary hearing about performance, rather than a disciplinary hearing for conduct.

71. The union objected to the meeting going ahead. On 22 March 2017, the claimant emailed the respondent saying that her union had advised her not to attend the planned meeting. Her union also advised her to raise a grievance, as a tactic, in order to stop the disciplinary process. We find nothing unusual in the claimant being advised to do that by her union who were simply trying to protect her interests.

22 March 2017 – grievance submitted

72. The grievance submitted by the claimant alleged bullying and harassment and poor line management by Ms Spendlove. It suggested that she was being treated differently to heterosexual colleagues in relation to the incident with JH and alleged that homophobic banter had taken place. This is said to be the first protected act.

73. During the period of the grievance process, the PIP was suspended. It was not withdrawn.

Grievance meeting – 6 April 2017

74. Sheena MacDonald met with the claimant to discuss her grievance on 6 April 2017. The notes of the meeting are accepted as an accurate record. The claimant had asked Mrs MacDonald to make changes to the notes and she had done so. They specifically record that the claimant agreed that Mrs MacDonald should just speak to Ms Spendlove and that she did not need to speak to other members of the team.

Management by Ms Wynn

75. Ms Wynn took over the claimant's line management as a result of the grievance being submitted. For a period afterwards, Ms Spendlove was not directly involved in line-managing the claimant. Ms Wynn was not as readily available to the claimant as Ms Spendlove. The claimant therefore found it harder to access management support during this period. She continued to feel 'swamped' by work.

76. Other team members tried to support the claimant during this period in relation to the deliverables. Ms Pett sent a note to Ms Wynn on 17 April 2017, setting out the concerns of her and Jenny Compton that the claimant did not turn up to Zoom meetings to review documents and when asked where she was said there was nothing to review. A concern was also raised about timelines being missed.

Dismissal of grievance – 21 April 2017

77. The claimant's grievance was dismissed by Mrs MacDonald on 21 April 2017. Amongst other things, Mrs MacDonald rejected the allegation of bullying and harassment; found that Ms Spendlove had shown understanding about her anxiety and depression; had offered practical and reassuring support; that the allegations of homophobic and heterosexual banter were considered by Ms Spendlove who took appropriate action; there was no evidence to suggest that she tolerated homophobic or heterosexual banter; and whilst the claimant's email to JH was well intentioned, it had not been requested and caused them to feel uncomfortable. The issues raised were comprehensively dealt with.

78. When considering the claimant's grievance, Mrs MacDonald had a copy of the GP report and had looked at it. Mrs MacDonald noted that the letter simply confirmed that the claimant was receiving treatment and was fit to return to work. That was also the conclusion of OH.

Grievance appeal – May 2017

79. The claimant appealed against the grievance outcome on 3 May 2017. The appeal was considered by Ms Wynn who sent her appeal decision to the claimant on 10 May 2017. The appeal alleged, amongst other things, that Mrs MacDonald had failed to speak to other witnesses; failed to consider the validity of the PIP; failed to properly consider the differential treatment of other members of the team; and expressed dissatisfaction with the outcome regarding the 'banter' issue.
80. The grievance appeal was not taken forward because the respondent took the view that it did not meet the definitions of the criteria for an appeal. Appeals could not be lodged simply because the complainant did not like or disagreed with the decision at the end of the formal stage. It was not therefore processed any further.

References to 'collating' and to 'the original plan'

81. On page 619 of the bundle is an email from Ms Wynn to Ms Spendlove dated 9 May 2017 regarding the claimant's non-attendance at a meeting. Ms Wynn states in that email: "*I think this is more evidence for our original plan*". Similarly, in an email from Laura Pett to Ms Spendlove on 16 May 2017, Ms Pett asked: "*Are you collating? I haven't written anything for a few weeks. Let me know if you need anything else.*" To which Ms Spendlove replied on the same day – "*Yep collating. Cheers I'll let you know.*"
82. The email exchange attached a document prepared by Ms Pett about a meeting with the claimant on 8 May, regarding the production of standard templates. The note stated:
- I believe this work should have been led by Sarah and she does talk about producing these documents and standards for the team but she requires so much support to begin working on things and requires support to push things forward.*
83. Not surprisingly, Ms Meenan made much of these emails during cross examination. We will come back to them in our conclusions.

GMC eLearning product

84. An important part of the claimant's role was the production of a piece of work on the Global Model Contract (GMC) e-learning project. On 18 May 2017 Ms Spendlove had emailed Sue Shaw and Michelle Lawless, stakeholders on the GMC project, summarising her conversation with them, which was to the effect that they were unhappy with the work that had been produced by the claimant. Ms Spendlove confirmed during cross examination that she felt that claimant had over-promised and under-delivered. The claimant told us that she did not think they knew what they wanted. We reject that suggestion.
85. Following the rejection of the grievance appeal, Ms Spendlove recommenced line-managing the claimant, on 22 May 2017.

Confirmation of deliverables, 8 June 2017

86. A meeting took place between the claimant and Ms Spendlove on 8 June 2017. The note of that meeting confirms that the same deliverables were discussed as in January. Ms Spendlove clearly set out at this meeting what the expectations of the claimant were in relation to the key deliverables of an eLearning strategy, a pipeline document, production of e-learning materials, capacity building, and the learning

management system. It was fed back to the claimant that LMS was a strong area of hers but that she should concentrate on her deliverables and not on other work which would jeopardise completing her own deliverables.

Raising of Asperger's – June 2017

87. On 14 June 2017, a meeting took place between the claimant, Ms Spendlove and Ms Wynn. The claimant was informed that because of continuing concerns about her performance in her role, the PIP was being reinstated. It was confirmed that one of the possible outcomes was the termination of her employment at the conclusion of the PIP and/or her probationary period.
88. During this meeting, the claimant broke down in tears. She informed those present that due to a friend's suicide she had been seeing a psychologist and that they had diagnosed her with Asperger's syndrome. She said she was going to have a full psychiatric assessment and would need to contact HR and OH. Ms Wynn and Ms Spendlove confirmed that they would follow this up with Mr McChesney and HR.
89. The reinstated PIP was formally sent to the claimant on 16 June 2017. The deliverables set out included the production of a strategy document; building e-learning capacity within the team; and production of learning materials that met stakeholder and learner needs, including for the GMC Portal. Again, there was mention of the importance of behaviours and values. The specific reference to the production of high-quality eLearning materials that met stakeholder and learner needs was an addition but it reflected the discussions with the stakeholders on that project (see para 84 above), as well as the duties set out in her job description. Specific reference was made in the document to the need for action plans including to update and implement the eLearning strategy; and as to how the claimant was going to significantly improve her credibility with key stakeholders.
90. Ms Spendlove continued weekly meetings with the claimant after this discussion, in order to assist her to achieve the deliverables.

Psychiatric Assessment Report – 24 June 2017

91. The claimant met with a consultant psychiatrist Dr Gina Gazizova on 24 June 2017 who made a formal diagnosis of Asperger's. The report confirmed:

It is clear that the problem with which Sarah struggles is knowing how to successfully engage with others including her colleagues as she struggles at times to behave in a socially desirable manner. This could well be understood to come from Sarah struggling with some social aspects of her work and not knowing how to improve this. This of course is a barrier to building up a successful relationship with her manager and to continue with a successful career.

92. Dr Gazizova suggested the following recommendations:

Sarah might want to consider declaring her diagnosis with her employers so that reasonable adjustments can be made for her to be able to work effectively around her difficulties and still bring her abilities to the workplace. Many employees with autism have found it helpful for line managers to be aware of their condition and Sarah will certainly benefit from having a named individual (mentor) at her place of work with whom she can discuss any concerns. It is important to know that Sarah's diagnosis would not be an obstacle to her career, however she may need more than the usual support in her current employment or training to enable her to be

most productive. An employee with autism who has difficulties in communicating with others in meetings might find working in groups of peers problematic. Most individuals with autism have difficulty in recognising social cues and knowing how to behave in an appropriate manner in various social circumstances and individuals with these conditions are usually greatly relieved when somebody with great social awareness spells this out to them. Also changes in routine or plans may upset them and predictable routine is advisable.

93. This report was provided by the claimant to Mr McChesney and Ms Massiah on 4 July 2017.

'Too difficult to manage' remark – 27 June 2017

94. The claimant met with Ms Spendlove again on 27 June 2017. The claimant alleges that at that meeting, Ms Spendlove told her she was "*too difficult to manage*". We find that at that meeting, the claimant was not told by Ms Spendlove that she was "*too difficult to manage*". Rather, Ms Spendlove fed back to the claimant that Ms Pett had informed her that she "*continue[s] to find Sarah's tone in meetings difficult to manage*". During the meeting, Ms Spendlove also informed the claimant that she found it difficult to accept constructive feedback; but that even if she did not want to accept such feedback, it was still important that she hear it.

95. We consider that the "too difficult to manage" issue is another example of the claimant misunderstanding or misinterpreting what was said. There are a number of examples set out above, where the claimant's recollection clearly contradicts the written records of the meeting. For example, the cutting of her arm incident with Roz Kennedy; or agreeing with Mrs MacDonald that she only need speak to Ms Spendlove, and then complaining in her grievance appeal document that Mrs MacDonald had not spoken to other team members. Hence our preference for the evidence of Ms Spendlove on this point, whose evidence was consistent with the documentation and who, for example in relation to the failure to carry out a stress risk assessment, was willing to acknowledge that she should have.

End of year appraisal – 6 July 2017

96. The claimant's appraisal outcome was delivered to her on 6 July 2017. That had been prepared by Ms Spendlove by the end of march but the process had been put on hold due to the grievance and temporary change in line management. The outcome was negative. The claimant was graded '5', the lowest performance grade, which confirmed that she was thought to be seriously under-performing in her role against their deliverables.

Alleged reference to Asperger's – 13 July 2017

97. The claimant attended a probation review meeting on 13 July 2017 with Ms Spendlove. The claimant alleges that at that meeting Ms Spendlove stated that if they had known that the claimant had Asperger's they would never have employed her. Ms Spendlove categorically denied making that comment too. Shortly after the meeting, the claimant sent an email to Mr McChesney and Ms Massiah, referencing the conversation that had taken place, prior to the accusation being made. This records:

She said I should see the diagnosis and that we would all have a different understanding once the Asperger's report comes through. She asked me if I would

have hired her if I'd known about her Asperger's conditions at time of hiring - I just said as with all recruitments we would follow the correct HR recruitment process as set out in our policies and procedures. I said that as soon as the Asperger's diagnosis was brought to our attention we began the appropriate course of action through the OH referral process and we expect the report on the 21st July.

98. We accept this as an accurate record as to what was said. We refer to the finding made above at para 95, in relation to the alleged “*too difficult to manage*” remark, as to why we prefer the evidence of Ms Spendlove on this and other disputed issues.

Further OH referral

99. Following receipt of the psychiatrist's report, a further referral to occupational health was made. Their report is dated 13 July 2017 and a copy of that was provided to Ms Spendlove on the same day. The OH report recommended disseminating information about the claimant's condition to the team, the appointment of a mentor, and ‘looking at the recommendations of the psychiatrist who assessed Ms Quinnell’. The report also stated:

The effect that this condition has on Ms Quinnell In a work environment is summarised in her report from the psychiatrist. In particular it will affect her social interactions and her ability to function effectively in group meetings.

Refusal of second grievance – July 2017

100. On 14 July 2017, the claimant raised a further grievance against Ms Spendlove and Ms Wynn alleging disability discrimination and harassment. Again, she had been advised to do so, as a result of the continuation of the performance management process. This grievance is accepted to be a protected act. The grievance was refused on the basis that it covered the same ground as the 22 March 2017 grievance.
101. In an email to the claimant, rejecting the grievance, Ms Hurley (of HR), referred to the possibility of the claimant being given an extension of time to deliver on her PIP. The email also referred to the post only being for 18 months, that the claimant was 8 months into it and “*any further extension of deadlines presents a particular challenge for the business unit as the key deliverables are now significantly behind schedule*”.
102. Ms Spendlove was still concerned about the claimant's ability to complete the deliverables within an acceptable period of time and to an acceptable standard. Ms Spendlove was spending a significant amount of time, up to 80%, on managing the claimant which she did not consider to be sustainable. As the claimant's line manager, she wanted to end her employment on the basis that she had not satisfactorily concluded her probationary period. Despite this, Ms Spendlove was advised by HR to extend the claimant's probationary period by one month. Since she did not agree with that, on 27 July 2017 Ms Spendlove sent a detailed report to Ms Hurley. This report included all of the background, including the issues in relation to the claimant's “behaviours”. In her report she concluded:

After reviewing the recommended adjustments from the latest occupational health report and the psychiatrist report I still do not think that there are any adjustments that we could have made that would have led Sarah to being able

to deliver the requirements of the role to the necessary standards and therefore concluded that the probationary period should not be extended.

Probation review meeting

103. The probation review meeting had been originally planned for 20 July 2017. The claimant requested a delay because her housemate had tragically died, after contracting meningitis. She was also on annual leave from 21 July to 7 August 2017. The probation review meeting was therefore rescheduled for 10 August 2017.

104. On that date Ms Spendlove met with the claimant to discuss targets and timescales. The claimant confirmed that she could have the various projects/tasks completed by the end of August.

105. On 16 August 2017 Lauren Spendlove sent a report to HR requesting that the claimant's employment be terminated as she had not successfully concluded her extended probationary period. The overall conclusion was as follows:

After reviewing all the performance information over the probationary period I feel that Sarah has significantly failed to perform to the standards the business requires. The suggested adjustments and timelines that Sarah has put forward in light of her Asperger's diagnosis gives me no confidence that she will be able to improve and meet the required deliverables and standards. This is because the majority of Sarah's poor performance is due to an inability to perform the technical, non-behavioural side of her role and because the majority of the suggested adjustments have already been in place for some time with no significant improvements being delivered. I therefore recommend that Sarah does not pass the probation period and that her contract be terminated immediately.

106. HR disagreed. The claimant's probationary period was extended by a further month.

Extension of probationary period - 21 August 2017

107. On 21 August 2017, a letter was sent by Ms Spendlove to the claimant confirming the extension of her probationary period to 14 September 2017. The deliverables were confirmed. They were to be completed to the required standard by 14 September 2017, two weeks after the suggested completion dates provided by the claimant on 10 August. Various adjustments were confirmed, including formally appointing a mentor, Jenny Allen; wearing headphones in the office; the provision of written not verbal feedback; and joining Zoom meetings with audio only. Many of those were happening already. They were simply formalised.

108. The letter included comments about the production of a document or tool to manage the e-learning pipeline. The claimant had not produced such a document or tool which should have been provided by January 2017. Ms Spendlove had put together a pipeline document on 28 February 2017 but that had not been used and the claimant had just added a column. Reference was also made to the need to complete the GMC Portal course, which was 90% complete by that stage.

Management by Andy Phillips

109. Ms Spendlove commenced maternity leave on 21 August 2017 and played no further part in subsequent events. As a result, Andy Phillips took over as her new line manager. In order to try and assist the claimant, he set out the deliverables which had been repeated in the 21 August 2017 letter in a table form. Having compared the 21 August letter, with Ms Phillips' table, we conclude that the deliverables were not changed, they were simply clarified. On 23 August 2017, Mr Phillips confirmed to the claimant that the deliverables must be finalised by 14 September 2017.
110. A further email exchange took place with the claimant on 23 August 2017 as to who was to sign off on the deliverables. He confirmed that it would be Laura Pett and Jenny Compton for the new starter modules, and Sue Shaw, for the GMC portal course. The claimant disputed that Sue Shaw should sign off on that deliverable. Mr Phillips confirmed that since Sue Shaw was the client, she was the person to sign it off, and that he was not willing to get into a debate with the claimant about it.

OH report – August 2017

111. A more detailed OH report was provided on 30 August 2017. The report confirmed areas that the claimant would find challenging including team work skills, accepting advice, and organising and planning. Amongst other things, this report also stated:

In relation to time scales; again, this is difficult but I would suggest that if a satisfactory change has not been seen following appropriate support (if this can be provided) within 6 months then it is unlikely change will occur.

Provision of a mentor and other adjustments

112. From April 2017, Jenny Allen started acting in an informal mentoring relationship with the claimant. She continued to do so throughout the claimant's employment. The claimant had also put forward a possibility that Giles Morris could act as her mentor. She emailed him on 20 July 2017. He responded as follows: "Wow, that's quite a bombshell, that's a big conversation for another time, noted though!" There is no evidence whether the claimant followed that up. We assume not, given that Jenny Allen was in effect acting as her mentor.
113. During the period of his management of the claimant, Mr Phillips provided her with written feedback, after giving verbal feedback. During the period of his management of the claimant, Mr Phillips tried to help her to deliver. Mr Phillips (and Ms Spendlove before him), were under serious pressure from stakeholders in relation to the e-learning project. All of the claimant's deliverables were meant to be indirectly servicing the Change programmes. For example, the eLearning Strategy aimed to cut the costs of face to face training. The Change Programme was very demanding; it was "what kept Mr Phillips most awake at night". They were under tight demands from key stakeholders who imposed very tight delivery times. The Training team was not working in isolation. The projects were finite and had an end date and the training team were expected to deliver value by helping stakeholders carry out work more efficiently.
114. We accept Mr Phillips' evidence that credibility was an issue with the stakeholders as a result of the continuing failure to deliver on eLearning. It required

a lot of work on Mr Phillips' part to try and encourage them to trust the claimant again. Mr Phillips view was that if the claimant could start delivering, credibility would be restored.

115. Similarly, Mr McChesney was trying to avoid a situation where the stakeholders did not want the claimant on the project. He did his best to reassure them that the claimant would be able to deliver on the technical aspects. We accept Mr McChesney's evidence that Mr Phillips and Ms Spendlove had "put their reputation on the line" by maintaining that the claimant could carry out the role. We also accept Mr Phillips evidence that he was spending up to 50% of his time managing the claimant. He was trying to manage a team of sixteen.

Email to colleagues about Asperger's

116. On 22 August 2017, an email was sent to the claimant's colleagues about her condition. The draft had been agreed with her and with HR. In response to the draft, the claimant confirmed that she felt "*a tad overcome actually as I never thought I'd get anyone to take this seriously*".
117. The psychiatric report had also referred to the possibility of a referral to the National Autistic Society (NAS). Mr Phillips was asked about that. His recollection was that the claimant was not pressing him for the NAS workplace assessment to take place. The priority had been the email to the team and working on the deliverables.
118. On 14 September 2017, Mr Phillips emailed the claimant about the following words which she had used in an email to her colleague JH:

I am sorry if I am going on about this, its obviously in the back of my mind that this is a person not wanting to work with me thing (paranoid Aspie, who knows she screwed up). If I have to tell Andy I haven't got a full sign up to this because of me, then I will.

119. Mr Philips reminded the claimant of the importance of keeping her correspondence professional at all times. He reminded her about the importance of making sure the emails were consistent with British Council values.
120. The claimant commenced a period of annual leave on 4 September 2017, returning on 11 September 2017.

Probationary review meeting – 15 September 2017

121. A probationary review meeting took place on 15 September 2017 between the claimant and Andy Phillips. The claimant was then invited to attend a formal review meeting on 22 September 2017. The claimant was warned that dismissal could be an outcome.
122. Mr Phillips concluded at the meeting that a member of the deliverables had not been met. These were the production of an e-learning strategy; building the e-learning capability of the training team; preparation of the eLearning materials for the GMC course; preparation of a pipeline tool (the claimant had produced one but it was too simple for its intended purpose); and the completion of a plan setting out the steps the claimant would take to improve stakeholder relations - which was partially met.

123. As a result of the claimant failing to complete a number of important deliverables, a decision was made to terminate her employment. A letter confirming that was sent to her on 25 September 2017. She was dismissed on that date, with a month's pay in lieu of notice. The claimant was advised of her right to appeal

Appeal against dismissal

124. The claimant subsequently appealed against her dismissal. Between 6 and 11 November 2017 a series of emails were exchanged between Mr McChesney and the claimant concerning the appeal.

125. The appeal was conducted by Andrew Hodge, a solicitor and independent consultant. In a 10-page report dated 25 October 2017 he rejected the claimant's appeal. He considered that there were four main grounds to her appeal, which were;

125.1. A change in line manager's expectations/requirements to be fulfilled during the extended probation period made the deliverables unachievable;

125.2. A failure to make reasonable adjustments to the deliverables to address the impact of her Asperger's on her performance;

125.3. A failure to make reasonable adjustments to the performance review process/adjust objectives; and

125.4. The deliverables were not an appropriate measure of her performance.

126. Mr Hodge concluded that the claimant was unsuited to the role, bearing in mind the respondent's needs at the relevant time. The role required strategic thinking and a high level of people interaction, both of which were difficult for the claimant because of her Asperger's. He concluded that the role was not suitable for the claimant because of that. He further concluded that reasonable adjustments had been made and that it was not possible to change the nature of the job of e-learning manager to suit her capabilities, without it becoming a very different job. Finally, he concluded that the claimant was very bright and may be capable of carrying out an alternative role if one were available.

October 2017 – consideration of alternative roles

127. On 27 October 2017 Mr McChesney asked his HR colleagues if there were any vacancies. His email stated:

I am currently searching for any suitable alternative roles for Sarah Quinnell who has been working in Andy Phillips team as eLearning Manager (PB8). Sarah is on a fixed-term contract that has until the end April 2018 before it expires, but has been unable to continue with her eLearning role as a consequence of a medical condition.

Sarah has excellent strengths in the technical aspects of course design and is very capable at using a wide variety of Web Authoring / Design tools, as well as learning management systems including Moodle, Canvas, and Blackboard. She is trained on LMS as Global Admin and can code. I have attached her CV which gives much greater detail on her skills, knowledge, and experience.

Given her strengths she might be suitable for roles within Education and Society or Arts, as well as technical developer roles within Corporate Functions

Her medical condition can be managed with reasonable adjustments, and we already have expert medical guidance from Occupational Health that recommends some straight-forward adjustments.

Please would you let me know if you have any suitable roles at PB8 that might suit Sarah?

128. Two responses were received, stating that no roles were available. Mr Griffin, Interim Global HR director, emailed the claimant on 31 October 2017 with the outcome of the appeal and confirming that unfortunately, given the significant change that the respondent was going through, with an emphasis on reducing headcount, it had not been possible to source a suitable alternative role.

Poor reference/refusal to provide a reference

129. The claim form included an allegation that the claimant had been provided with a full reference and/or that the respondent had refused to provide a reference. These claims were withdrawn, shortly before the hearing commenced.

Law

Disability (section 6)

130. A person has a disability if she has a mental or physical impairment; which is long term (i.e. has lasted 12 months or more or is likely to do so); and has a substantial adverse effect on her ability to carry out normal day to day activities (S.6 and Schedule 1 Equality Act 2010). The term 'normal day to day activities' includes the ability to participate in professional working life.

Burden of proof (section 136)

131. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.
132. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)
133. The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts 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.'

134. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary

to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Direct discrimination (section 13)

135. Claimants must demonstrate that they have been treated less favourably than an actual or hypothetical comparator who was in not materially different circumstances to the claimant, (section 23(1) EqA), save that they are “not a member of the protected class” (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL, [110]).

136. In cases of disability discrimination, the “circumstances” must include the disabled person’s abilities, (section 23(2)(a) EqA), such that the tribunal must consider how a person with the same abilities as the claimant would have been treated.

Discrimination arising from disability (section 15)

137. Section 15 Equality Act 2010 reads:

(1) *A person (A) discriminates against a disabled person (B) if—*

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

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

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

138. In a disability discrimination claim under section 15, an employment tribunal must make findings in relation to the following:

138.1. The contravention of section 39 of the Equality Act relied on – in this case either section 39(2)(c) – dismissal; or (d) - detriment.

138.2. The contravention relied on by the employee must amount to unfavourable treatment.

138.3. It must be “something arising in consequence of disability”; for example, disability related sickness absence.

138.4. The unfavourable treatment must be because of something arising in consequence of disability.

138.5. If unfavourable treatment is shown to arise for that reason, the tribunal must consider the issue of justification, that is whether the employer can show the treatment was “a proportionate means of achieving a legitimate aim”.

138.6. In addition, the employee must show that the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on. Knowledge

that the something arising led to the unfavourable treatment is not however required.

See the decisions of the EAT in *T-Systems Ltd v Lewis UKEAT0042/15* and *Pnaiser v NHS England [2016] IRLR 170 (EAT)*.

139. According to Harvey's encyclopaedia of Employment Law [Division L.3.A(4)(d), at paragraph 377.01]: 'As stated expressly in the EAT judgment in *City of York Council v Grosset UKEAT/0015/16 (1 November 2016, unreported)*, the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset ([2018] EWCA Civ 1105, [2018] IRLR 746)* upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

Indirect discrimination (section 19)

140. The indirect discrimination claims are not being proceeded with but since they formed part of the original claim, have been formally dismissed.

Reasonable adjustments (sections 20 and 21)

141. Section 39(5) of the Equality Act 2010 imposes a duty on an employer to make reasonable adjustments.

142. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. The same duty arises where the substantial disadvantage arises from a failure to provide an auxiliary aid or a physical feature of premises.

143. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated in recognition of their special needs.

144. In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4*, the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must first identify:

- (1) the PCP applied by or on behalf of the employer;
- (2) the identity of non-disabled comparators; and
- (3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison with those comparators.

Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The question is whether the PCP 'bites harder' on the claimant (*Griffiths v Secretary of State for work and Pensions* [2017] ICR 150 at #58. There just needs to be a prospect of the step alleviating the substantial disadvantage; there does not need to be not a 'good' or a 'real prospect' - *Leeds Teaching Hospital NHS Trust v Foster* [2011] UKEAT/0552/10 at #17.

145. A PCP must be more than a one-off act. In *Ishola v Transport for London* [2020] IRLR 368, Simler J held:

The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, it was difficult to see what the word 'practice' added to the words if all one-off decisions and acts necessarily qualify as PCPs.

146. The question however is whether the employer failed to make reasonable adjustments as a question of fact, not whether it simply failed to consider making any. The latter is not in itself a breach of s 20 - *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664, EAT.
147. The test of reasonableness imports an objective standard. The Statutory Code of Practice on Employment 2011 published by the Equalities and Human Rights Commission contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.
148. As for knowledge, for the S.20 EQuA duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (EQuA para 20, Schedule 8).
149. During their employment, a claimant does not need to suggest any adjustments, for the duty to arise – see *Royal Bank of Scotland plc v Ashton* [2011] ICR 632. However, when it comes to the tribunal proceedings, a tribunal will only consider the reasonable adjustments that have been suggested by the claimant and which form part of an agreed list of issues - *Newcastle City Council v Spire* UKEAT/0334/10.

Harassment (section 26)

150. Section 26 Equality Act 2010 reads:

26 Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3)
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

151. A harassment case therefore involves five questions. First, did the conduct take place at all. Second, was the conduct unwanted? Third, was the conduct related to sex? Fourth, did the person responsible for the conduct have the proscribed purpose. Fifth, if not, did the conduct have the proscribed effect, taking into account (a) the perception of B; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

152. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 in which Underhill J (as he then was) said at paragraph 15:

A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase 'having regard to ... the perception of that other person' was liable to cause confusion and to lead tribunals to apply a 'subjective' test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark

may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt

153. We also refer to Land Registry v Grant [2011] ICR 1390) in which the head note records:

When assessing the effect of a remark, the context in which it is given is always highly material. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.

Victimisation (section 27)

154. In order to succeed in a victimisation claim, a claimant must demonstrate that she did a protected act. This includes making a complaint of discrimination covered by the Equality Act. A claimant must then show that she was subjected to a detriment because of the protected act(s) (S.27 EQuA).

Conclusions

Disabled Status (Issue 1)

155. The respondent concedes that the claimant was disabled at the material time by way of a. reactive depression and anxiety; and/or b. Asperger's.

Knowledge of disability (Issue 2)

156. The respondent contends that it had knowledge of the claimant's depression / anxiety from 23 January 2017 when the OH report was received by HR. We conclude that it had knowledge from that date. We do not consider that the respondent had actual or constructive knowledge that the claimant had a disability earlier than that date. This is because the claimant had stated that her condition was not long-term; and had put down the issues leading up to and including the events of 14 December 2016 to her mixing her migraine medication with St John's Wort.

157. As for the claimant's Asperger's, the respondent contends that it had knowledge of her suffering from that condition from 4 July 2017 when the psychiatric report was sent by the respondent. The claimant contends that the respondent had actual or constructive knowledge of her Asperger's from 24 June 2017. We conclude that the respondent had knowledge of the claimant's Asperger's on 4 July 2017, when it received a copy of the psychiatrist's report, confirming the diagnosis. Whilst the respondent was on notice from 14 June 2017 that she might have that condition, it was not fixed with notice until the report containing the formal diagnosis had been communicated to it.

158. The question of knowledge of substantial disadvantage will be considered below when we consider the question of substantial disadvantage in relation to both disabilities.

Failure to make reasonable adjustments (ss. 20 and 21 Equality Act 2010)

159. The following PCPs are alleged. We list them below together with our conclusion as to whether they were applied.

- 159.1. *The required behaviour of employees and the behaviours of “connecting with others” and “working together” (Issue 3a).* The claimant required all its employees to comply with its Values which form part of its Code of Conduct. This PCP was applied to the claimant from the outset of her employment.
- 159.2. *The requirement for someone in the Claimant’s band knowing what needed to be done (Issue 3b).* The claimant was expected by the respondent, as a person on Pay Band 8, to understand what her duties were and how they should be carried out, subject to appropriate and necessary management support. This PCP did apply, again from the outset of her employment.
- 159.3. *Allowing new Line Managers to change a post holder’s deliverables (Issue 3c).* We have found as a fact above that Mr Phillips did not change the claimant’s deliverables, he simply clarified them, in an attempt to assist the claimant. There was no other evidence presented that line managers could or did change a post holders’ deliverables. We therefore find that this PCP did not exist and no such PCP was applied to the claimant. Even if we had found that the PCP did apply, we would in any event have concluded that there was not a failure to make a reasonable adjustment because the deliverables were not changed.
- 159.4. *Setting a fixed time for tasks to be delivered in a PIP (Issue 3d).* The claimant was on a fixed term contract of 18 months and was subject to a 9-month probationary period. In order to pass her probationary period, she needed to complete key tasks which formed part of her role to the respondent’s satisfaction. The PIP required her to complete particular parts of her role – the deliverables – within specified periods. We find that there was such a PCP and that it was applied to the claimant.
- 159.5. *Introducing a wider range of objectives in the performance management process (Issue 3e).* This is slightly different to point 3 above. Ms Spendlove did include more detail and more deliverables in the June PIP. We conclude that the respondent might add to performance management objectives in similar situations if they arose in future; therefore, this was not a one-off. We conclude that this PCP did exist and was applied to the claimant.
- 159.6. *Not having workplace evaluations (Issue 3f).* We find that there was no such PCP. An assessment by the National Autistic Society was planned but had not been completed by the time of the termination of the claimant’s contract of employment. Further, as we have noted in our fact findings, a stress risk assessment should have been carried out, but was not. That was not however as a result of any general PCP at the respondent, it was because Ms Spendlove neglected to do so, as a one-off.

Knowledge of substantial disadvantage/substantial disadvantage (Issues 3 and 4)

160. We turn next to the questions as to whether the PCPs alleged put the claimant at a substantial disadvantage compared to people who did not share her Asperger’s and/or anxiety/depression; and if so, when the respondent had actual or constructive knowledge of that substantial disadvantage and if so from which date. Those questions are considered in relation to both of the disabilities in turn.

Issue 3a - the PCP of the required behaviour of employees and the behaviours of “connecting with others” and “working together” placed C at a substantial

disadvantage as a result of her disabilities because she was unable to fully comply with the behaviours resulting in §4(a) to (c) below.

161. §4 (a) to (c) are that the claimant contends that the PCPs put her at the following disadvantages in relation to both disabilities:

- a. Her anxiety/depression was aggravated
- b. She was subjected to performance management
- c. She was dismissed.

162. Before turning to the individual questions in relation to each of the PCPs, we conclude that, as part of our analysis of the issues, it is not appropriate to consider 4 (a) to (c) in relation to the substantial disadvantage question. They relate to the section 39 Equality Act 2010 question – in this case, whether the treatment alleged amounted to a detriment or dismissal. As to those questions, we conclude that to the extent that the treatment led to increased anxiety/depression it would be a detriment; being subjected to performance management was a detriment; and the claimant's dismissal is plainly covered by S.39(2)(d). Those issues do not however answer the substantial disadvantage question.

163. Turning now to the first question namely, (1) did the first alleged substantial disadvantage exist in relation to anxiety and depression? We find that the claimant was not at a substantial disadvantage in relation to this PCP because of her anxiety and depression. We are not willing to assume, in the absence of expert evidence on the point, that the types of behaviour which the claimant exhibited would usually be associated with somebody suffering from such a condition.

164. In any event, on the question of (2) knowledge, relating to anxiety and depression, the claimant had represented to the respondent in December 2016 that the issues had resulted from a clash between the different medications she was taking. Further, the claimant was referred to OH and nothing in the OH report put the respondent on notice that because of her anxiety and depression, the claimant was more likely to have difficulties interacting with colleagues. In any event therefore, the respondent did not have actual or constructive knowledge of the alleged substantial disadvantage.

165. As for the disability of Asperger's, we have concluded that (1) this PCP did place the claimant at a substantial disadvantage, since she was more likely to have difficulties interacting with colleagues, as a result of that condition. As to (2) knowledge, we conclude that the respondent had actual knowledge of the substantial disadvantage on 4 July 2017 when it received the psychiatrist's report.

Issue 3b - the PCP of someone in C's band knowing what needed to be done placed C at a substantial disadvantage as a result of her disabilities because she required more assurance and support from her colleagues and/or requires more clear and thorough clarification of what is required

166. Again in relation to anxiety and depression, in the absence of any expert evidence to the contrary, we find (1) that the claimant was not put at a substantial disadvantage by the application of this PCP. In any event, as to (2) knowledge, the OH report of 23 January 2017 confirmed that the claimant was fit to carry out her duties. There was nothing in the report that suggested that the claimant would

struggle to carry out her duties or would not know what she needed to do in relation to them, because of her disability.

167. As for the claimant's Asperger's, (1) we do not consider that the claimant struggled to know what needed to be done, as a result of that condition. The difficulty for the claimant, we conclude, was in delivering what needed to be done, rather than in knowing what needed to be done in the first place. Since we have not found that there was any substantial disadvantage, we do not need to go on to consider the question of knowledge.

Issue 3c - the PCP of allowing new line managers to change a post holder's deliverables placed C at a substantial disadvantage as a result of her disabilities because C struggled with change of plans and/or routine, and therefore was less able to fully meet the deliverables

168. We have found that this PCP was not applied to the claimant, and therefore we have not considered the substantial disadvantage questions in relation to it.

Issue 3d - the PCP of setting a fixed time for tasks to be delivered in a PIP placed C at a substantial disadvantage as a result of her disabilities because C's reasonable adjustments did not have time to properly take effect, and therefore was less able to fully meet the deliverables

169. We conclude (1) that the claimant was subjected to a substantial disadvantage as a result of the fixing of time for tasks to be delivered in a PIP, because of her anxiety and depression. This is because being subjected to a PIP with dead-lined tasks would increase her levels of anxiety more than a person without her disability. As for (2) knowledge, the OH report did confirm that the claimant was able to carry out her duties. However, once the claimant was subjected to the PIP, the respondent would have had constructive knowledge that the PIP could cause her anxiety to be exacerbated.

170. As for the claimant's Asperger's condition, in our view the situation is more clear-cut. We conclude that (1) the claimant was under a substantial disadvantage as a result of the application of this PCP, because her ability to carry out tasks in a structured manner was impaired by her condition. As for (2) knowledge, the conclusions in the psychiatric report which was disclosed to the respondent on 4 July 2017 would have put the respondent on notice that the claimant would have difficulty completing the tasks in the PIP because of, amongst other things, her difficulty of working with colleagues.

Issue 3e - the PCP of introducing a wider range of objectives in the performance management process placed C at a substantial disadvantage as a result of her disabilities as defined above because C struggled with change of plans and/or routine, and therefore was less able to fully meet the deliverables

171. Our conclusions are the same as in relation to the PCP of setting a fixed time for tasks to be delivered - yes it existed and yes, the respondent had knowledge of it.

Issue 3f - the PCP of not having workplace evaluations placed C at a substantial disadvantage as a result of her disabilities because C and/or her team were not provided with proper support or understanding of C's Asperger's

172. We have found that this PCP was not applied to the claimant and therefore we have not considered the substantial disadvantage questions in relation to it.

Reasonable steps

173. The claimant contends that it would have been reasonable to take the following steps to avoid the disadvantage. In relation to each, we set our conclusions as to whether, in our view, it was a reasonable step.

173.1. *Issue 5a - Not require her to follow the behaviours of “connecting with others” and “working together” as usual or at all.* We refer to our findings above in relation to the substantial disadvantage issues. The respondent was on notice of the substantial disadvantage as a result of the claimant’s Asperger’s condition from 4 July 2017. That knowledge led to the claimant’s probationary period being extended by a month, during which time she was given further time to complete the deliverables. Significantly, the behavioural issues were taken out of the PIP that the claimant had to complete, in order to pass her probationary period. The behavioural issues did not result in the claimant’s dismissal. The dismissal resulted from the claimant’s failure to complete the technical side of her role. We conclude that the raising by Mr Phillips with the claimant of the email in which she referred to herself as a “paranoid Aspie” was appropriate. The respondent was under a duty of care to look after all of its staff. The email sent by the claimant to her colleague upset her. The email sent by Mr Phillips to the claimant amounted to words of advice or encouragement; it was not part of any formal disciplinary process and nor was it intended to be.

173.2. *Issue 5b - Not requiring her to know what needed to be done.* We refer to our conclusions above in relation to substantial disadvantage. Since we have found that the claimant was not under a substantial disadvantage in relation to this PCP, this would not have been a reasonable step to take.

173.3. *Issue 5c - Not changing her deliverables during the PIP.* We refer to our conclusion above that this did not in fact occur. The table produced by Mr Phillips was produced in order to assist the claimant and arguably was itself a reasonable adjustment. Requiring Sue Shaw to sign off on the GMC portal project was not a change; in any event, it was reasonable to require her to do so. She was the internal stakeholder and as Mr Phillips stated during cross examination, the work produced had to be useable. It was for the stakeholder to decide if it was, not Mr Phillips.

173.4. *Issue 5d - Extending time for tasks to be delivered such that C was able to deliver them.* We note that the claimant had informed Ms Spendlove that she would be able to complete the deliverables by the end of August. The period was extended to 14 September. Ms Spendlove remained highly sceptical as to whether or not the claimant would be able to complete the deliverables even within the extended time period. Nevertheless, we conclude that the respondent was entitled to put a time limit on the tasks, and that the time-limit put on those tasks was a reasonable one in all the circumstances. The circumstances include the fact that the claimant was on a fixed term contract and had been in post for over 10 months. It was envisaged that the role would have been able to be completed within that period. Key parts of the role had still not been completed satisfactorily. Progress unfortunately was too slow.

The training team was under severe pressure from its stakeholder clients to deliver more e-learning products and training material to support the Change Programme and save costs. The tasks had been outstanding for some time, some from January 2017, others from March, and still others from June. We do not consider that in all the circumstances it would have been a reasonable adjustment to extend the timescales yet further.

- 173.5. *Issue 5e - Not introducing a wider range of objectives in the performance management process.* We conclude that this would not have been a reasonable step to make. The deliverables were expanded on in the June 2017 PIP; but they were expanded because the claimant was not delivering a number of key aspects of her role, as set out in her job description. The requirements of the role had been made clear to the claimant on a number of occasions. The previous PIP had been suspended as a result of the grievance. Once it was reinstated, it was reasonable for the respondent to include in it, those aspects of the role which the claimant was not at that stage completing to a satisfactory standard or at all.
- 173.6. *Issue 5f - Providing C with a workplace evaluation after 10 August 2017.* The legal authorities in relation to a workplace place evaluation are clear. It is not in itself a reasonable step. In any event, we refer to our finding of fact above that in her discussion with Mr Phillips, the claimant had indicated that she was content to put this on hold, while she concentrated on the deliverables. A stress risk assessment was not carried out by Ms Spendlove but this the case law makes is clear that this is not in itself a reasonable step.
- 173.7. *Issue 5g - Not subjecting C to a PIP.* We refer to our conclusions in relation to 5d and e above. For the same reasons, we concluded that this would not have been a reasonable step. The claimant had been employed to carry out a time-limited role, and she was failing to carry out that role in a number of key respects. In those circumstances, the respondent was entitled to apply its performance management processes. We conclude that those processes were applied fairly. Andrew Hodge concluded that the deliverables were fair and the management of the process was not designed to trip the claimant up. We agree with that assessment. The respondent needed the job to be done and tried to assist the claimant to do it throughout her employment. The level of support being provided was not sustainable and despite that support, the claimant still failed to complete her duties to a satisfactory standard.
- 173.8. *Issue 5h - Not dismissing C.* Again, we refer to the conclusion set out in relation to 5d, e and g above. Given the amount of time that the claimant had been in the role, the level of support provided and her failure to deliver key aspects of that role during that period, it was reasonable of the respondent to dismiss her at the end of her extended probationary period.
- 173.9. *Issue 5i - Providing C with an alternative job role in October 2017.* We conclude this would have been a reasonable step but there was not a failure to take the step since there were not any roles available that the claimant could have carried out. The organisation was having to reduce headcount by 15%, against a background of budget cuts and austerity. In his email to colleagues, Mr McChesney had been at pains to set out in a positive manner the claimant's

strengths and skills. Unfortunately, there were no alternative roles at that time, given the situation which existed.

Discrimination because of something arising (s.15 Equality Act 2010)

174. The unfavourable treatment alleged is as follows (Issue 6):

174.1. *Putting C on a performance management process in February 2017.* This clearly happened and was unfavourable. It was also a detriment. It caused the claimant stress and anxiety.

174.2. *The Claimant's Line Manager on or about 27 June 2017 telling the Claimant that she was "too difficult to manage".* We have found that this did not occur. This claim therefore fails.

174.3. *Dismissing the Claimant.* Again, it is not disputed that this happened and it comes within section 39(2)(d). A dismissal is unfavourable treatment.

175. If so, was that treatment because of any of the following things (Issue 7):

175.1. *C's interpersonal skills.* The initial PIP in February 2017 did include behavioural issues. Further, in order to complete the technical aspects of her role, it was necessary for the claimant to build relationships, and work as a team, which she struggled to. Her Asperger's impaired her ability to do so. Her dismissal was therefore also because of her lack of interpersonal skills.

175.2. *C's behaviour towards colleagues.* We arrive at the same conclusions as in relation to C's interpersonal skills above, in relation to both the PMP and the claimant's dismissal.

175.3. *C's teamwork skills.* Again, we refer to para 175.1 above.

175.4. *Her difficulties in managing and communicating stress and anxiety.* We conclude it was not the difficulties in managing and communicating stress and anxiety that that led to the PMP. The claimant was exceptionally open with her emotions at work. We conclude that it was not the expressing of her emotions that was the issue, it was all the other behaviours that went with that which was the problem and which led to the PIP. We refer for example to the incidents with Steve Mitchell; with JH; and with Roz Kennedy. Further, it was not a factor in her dismissal. We conclude, given our findings of fact, that the dismissal was not because of the behavioural issues it was because of her failure to complete the other deliverables. As for the 'more data' and 'are you collating' emails, we conclude that they are evidence of an intention to performance manage the claimant. The end result of that was indeed the claimant's dismissal; but that was because the claimant was not able to produce the deliverables. Ms Spendlove continued to provide support to the claimant, in an attempt to enable her to carry out her role satisfactorily. Had the claimant been able to deliver, her employment would have continued. There was no plan to manage the claimant out of the organisation, regardless of her performance or behaviours. Ms Spendlove was under pressure to deliver to stakeholders on the project and that is what she was trying to achieve. As she told us: "I wanted the claimant to do the job she had been employed to do".

- 175.5. *Her difficulty in organising and planning tasks.* We conclude that both the PMP and the claimant's dismissal was because of her difficulty in organising and planning tasks which was partly the reason why the deliverables were not completed.
176. *If so, did any such things arise in consequence of her Asperger's and/or her anxiety (Issue 8)?* We conclude, on the basis of our findings of fact, that the things above that we conclude led to the PMP and dismissal, arose in consequence of the claimants Asperger's.
177. *If so, has R proven any such unfavourable treatment to be a proportionate means of achieving a legitimate aim (Issue 9)? The Respondent relies on the legitimate aims of:*
- 177.1. i. *compliance with British Council's Values of integrity and professionalism*
- 177.2. ii. *providing a safe work environment for all employees*
- 177.3. iii. *delivering the work the Claimant had been contracted to do.*
178. We conclude that all of the above are legitimate aims.
179. *Did the Respondent behave in a proportionate manner having sought advice from OH from December 2016, and upon being told of a diagnosis of Asperger's in June 2017, seeking further OH advice and disseminating information about the impact of Asperger's to the Claimant's team in terms the Claimant had agreed?*
180. In relation to the PMP, we refer to our above conclusions in relation to reasonable steps d, e and g. For the same reasons, we conclude that the application of the PMP/PIP was a proportionate means of achieving the legitimate aims set out above.
181. For the same reasons, we conclude that the claimant's dismissal was a proportionate means of achieving the legitimate aims set out. In particular, there was a pressure to deliver to internal stakeholders, the claimant had been employed on a fixed term contract, she had been in post of over ten months and during that time there had been little or no substantive progress in relation to key parts of her role, with no reasonable likelihood that she would ever be able to do so during the currency of the fixed term contract.

Direct discrimination (Issues 10, 11 and 12)

182. Did R subject C to the following treatment:
- 182.1. *C's Line Manager on or about 13 July 2017 telling her that R would not have hired her if they had been aware of her Asperger's condition.* We have found that this did not occur as alleged. There is therefore no need to consider the question of less favourable treatment and if so whether it was because of the claimant's disability. This claim fails.

Disability related harassment (Issues 13, 14 and 15)

183. Did R subject C to the following treatment:
- 183.1. *Being repeatedly criticised by her line manager including being told that she does not get on with anyone, she never accepts criticism/feedback and she is too difficult to manage.* We conclude that the respondent did not subject the

claimant to the treatment alleged. Ms Spendlove and other managers did raise issues with her, both about her performance and about her relationships with other colleagues. In the circumstances, the claimant's managers would have been failing in their management responsibilities towards both the claimant and the claimant's colleagues, if they had not done so. This does not amount to 'repeated criticism'; it amounts to reasonable management. Further, the claimant was not told she never accepts criticism or feedback; she was told that she finds it difficult to accept criticism and feedback. That is an important difference, and again, is a legitimate matter for a manager to raise, particularly in the circumstances of this case. Finally, we have found as a fact that the "too difficult to manage" comment was not made.

183.2. *Being told on or around 13 July 2017 that the Respondent would not have hired her if they had been aware of her Asperger's.* We refer to our factual conclusion above that this comment was not made.

183.3. *Being continually threatened with dismissal, disciplinary action, and performance reviews.* We conclude that the claimant was not continually threatened with dismissal. At appropriate points in the performance management process, she was informed that dismissal could result from a failure to pass her probationary period and/or complete the deliverables set out in the PIP. As for disciplinary action, there was one disciplinary allegation against the claimant in relation to plagiarism. That does not amount to continually threatening her with disciplinary action - it was a one-off. As for the performance reviews, it is wrong to describe it as 'continuous'. Performance reviews were regularly carried out, as part of the normal management processes.

184. *If so, did any such treatment have the proscribed purpose or effect?* We have concluded that the first and second allegations of treatment are not made out. As for the third issue above, we have again found that the treatment alleged is not made out. In any event, the purpose of subjecting the claimant to performance management process and to a disciplinary process, was not to create the proscribed effect. It was to ensure that the claimant complied with the terms of her contract. Finally, we conclude that the effect of that treatment did not have the proscribed effect either. These matters are not appropriately characterised as allegations of harassment related to disability in this case.

185. *If so, was any such treatment related to C's disability?* Even if we were wrong in our conclusions above, the treatment of the claimant was not related to her disability. It was related to her behaviours, and to her performance. Whilst those were indirectly related to her disability, that is not sufficient to demonstrate that they were related to disability.

Victimisation (Issues 16, 17 and 18)

186. We conclude that both the 22 March 2017 and 14 July 2017 grievances were protected acts. So was the appeal, alleging as it did, disability discrimination.

187. Was the Claimant subjected to the following treatment?

187.1. *Did the Respondent fail to give a proper consideration of alternative roles to be offered to the Claimant in October 2017 (in accordance with the appeal officer's recommendations)?* We refer to our conclusion above that the

respondent did give a proper consideration to alternative roles for the claimant in October 2017.

188. *If so, was the reason for that treatment because she had done or R thought she had done or may do the protected acts?* Given our conclusion above, it is not strictly necessary to consider the reason for the alleged treatment. In any event, for the sake of completeness, in his email to colleagues of 27 October 2017, Mr McChesney was at pains to stress the claimant's strengths. In no way does it indicate any bias on his part against the claimant, as a result of her raising the two grievances, or appealing against her dismissal. Indeed, since Mr McChesney's job is in HR, and grievances and appeals by employees form part and parcel of such work, it would have been surprising if he had been adversely influenced against the claimant because of that.

Indirect discrimination

189. This claim is not proceeded with and will be dismissed.

Employment Judge A James
London Central Region

Dated ...12 October 2020.....

Sent to the parties on:

12/10/2020

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.

Annex A - List of Issues

Disabled Status

1. The Respondent (R) concedes that the Claimant (C) was disabled at the material time by way of:
 - a. reactive depression and anxiety; and/or
 - b. Asperger's
2. For the purposes of C's claims under section 15 and sections 20/21 Equality Act 2010 below, when did R have actual or constructive knowledge of C's disabilities [and of the substantial disadvantage that arose from the application of the PCPs]. R contends that it had knowledge of:
 - a. C's depression/anxiety from 23 January 2017; and
 - b. C's Asperger's from 4 July 2017. C contends that R had actual or constructive knowledge of her Asperger's from 24 June 2017.

Failure to make reasonable adjustments (ss. 20 and 21 Equality Act 2010)

3. Did R apply the following PCPs?
 - a. The required behaviour of employees and the behaviours of "connecting with others" and "working together".

The PCP of the required behaviour of employees and the behaviours of "connecting with others" and "working together" placed C at a substantial disadvantage as a result of her disabilities because she was unable to fully comply with the behaviours resulting in §4(a) to (c) below.
 - b. The requirement for someone in the Claimant's band knowing what needed to be done.

The PCP of someone in C's band knowing what needed to be done placed C at a substantial disadvantage as a result of her disabilities because she required more assurance and support from her colleagues and/or requires more clear and thorough clarification of what is required, resulting in §4(a) to (c) below.
 - c. Allowing new Line Managers to change a post holder's deliverables. *The PCP of allowing new line managers to change a post holder's deliverables placed C at a substantial disadvantage as a result of her disabilities because C struggled with change of plans and/or routine, and therefore was less able to fully meet the deliverables, resulting in §4(a) to (c) below.*
 - d. Setting a fixed time for tasks to be delivered in a PCP. *The PCP of setting a fixed time for tasks to be delivered in a PIP placed C at a substantial disadvantage as a result of her disabilities because C's reasonable adjustments did not have time to properly take effect, and therefore was less able to fully meet the deliverables, resulting in §4(a) to (c) below*

e. Introducing a wider range of objectives in the performance management process. *The PCP of introducing a wider range of objectives in the performance management process placed C at a substantial disadvantage as a result of her disabilities as defined above because C struggled with change of plans and/or routine, and therefore was less able to fully meet the deliverables, resulting in §4(a) to (c) below.*

f. Not having workplace evaluations. *The PCP of not having workplace evaluations placed C at a substantial disadvantage as a result of her disabilities because C and/or her team were not provided with proper support or understanding of C's Asperger's, resulting in §4(a) to (c) below.*

4. If so, did those PCPs put C at a substantial disadvantage compared to people who did not share her Asperger's and anxiety/depression? C contends that the PCPs put her at the following disadvantages in relation to both disabilities:

- a. Her anxiety/depression was aggravated
- b. She was subjected to performance management
- c. She was dismissed.

5. If so did R take reasonable steps to avoid such disadvantage? C contends that it would have been reasonable to:

- a. Not requiring her to follow the behaviours of "connecting with others" and "working together" as usual or at all
- b. Not requiring her to know what needed to be done
- c. Not changing her deliverables during the PIP
- d. Extending time for tasks to be delivered such that C was able to deliver them
- e. Not introducing a wider range of objectives in the performance management process
- f. Providing C with a workplace evaluation after 10 August 2017
- g. Not subjecting C to a PIP
- h. Not dismissing C
- i. Providing C with an alternative job role in October 2017

Discrimination because of something in consequence of disability (s.15 Equality Act 2010)

6. Did R subject C to the following unfavourable treatment?

- a. Putting C on a performance management process in February 2017
- b. The Claimant's Line Manager on or about 27 June 2017 telling the Claimant that she was "too difficult to manage".
- c. Dismissing the Claimant.

7. If so, was that treatment because of any of the following things:

- a. C's interpersonal skills.
 - b. C's behaviour towards colleagues.
 - c. C's teamwork skills.
 - d. Her difficulties in managing and communicating stress and anxiety.
 - e. Her difficulty in organising and planning tasks.
8. If so, did any such things arise in consequence of her Asperger's and/or her anxiety?
9. If so, has R proven any such unfavourable treatment to be a proportionate means of achieving a legitimate aim?
- a. The Respondent relies on the legitimate aims of
 - i. compliance with British Council's Values of integrity and professionalism
 - ii. providing a safe work environment for all employees
 - iii. delivering the work the Claimant had been contracted to do.
 - b. The Respondent contends that it behaved in a proportionate manner having sought advice from OH from December 2016, and upon being told of a diagnosis of Asperger's in June 2017, seeking further OH advice and disseminating information about the impact of Asperger's to the Claimant's team in terms the Claimant had agreed.

Direct discrimination

10. Did R subject C to the following treatment:
- a. C's Line Manager on or about 13 July 2017 telling her that R would not have hired her if they had been aware of her Asperger's condition
11. If so, was such treatment less favourable than that which would have been done to a person who did not have the disability of Asperger's?
12. If so, was such treatment because of C's disability?

Disability related harassment

13. Did R subject C to the following treatment:
- a. Being repeatedly criticised by her line manager including being told that she does not get on with anyone, she never accepts criticism/feedback and she is too difficult to manage
 - b. Being told on or around 13 July 2017 that the Respondent would not have hired her if they had been aware of her Asperger's
 - c. Being continually threatened with dismissal, disciplinary action, and performance reviews
14. If so, did any such treatment have the proscribed purpose or effect?
15. If so, was any such treatment related to C's disability?

Victimisation

16. R concedes that C's grievance dated 14 July 2017 was a protected act. Did the Claimant's grievance dated 22 March 2017 and/or her Appeal against her dismissal amount to a protected acts?

17. Was the Claimant subjected to the following treatment:

a. Did the Respondent fail to give a proper consideration of alternative roles to be offered to the Claimant in October 2017 (in accordance with the appeal officer's recommendations)?

~~b. Did the Respondent fail to give her a reference for one role and/or give her a poor reference for another role? [withdrawn shortly before the hearing commenced]~~

18. If so, was the reason for that treatment because she had done or R thought she had done or may do the protected acts?

Remedy

19. What compensation should the Tribunal award for:

a. Injury to feelings?

b. Financial loss?

20. Should the Tribunal make a declaration or recommendations?