Case Numbers: 3331423/2018 & 3331467/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss V Scott	v	(1) BAE Systems (Operations) Limited (2) Mr J Haslam (3) Mr S Archibald

Heard at: Aylesbury Crown Court in person and in part via CVP in 2020 and in 2021 wholly via CVP

On: 2-5 November 2020, 8-12 and (in private) 15-17 February 2021

Before: Employment Judge Hyams

Members: Mr P Miller
Mr A Scott

Appearances:

For the claimant: Mr M Curtis, of counsel
For the respondent: Mr M Green, of counsel

UNANIMOUS RESERVED JUDGMENT

1. None of the claims of breaches of the Equality Act 2010 succeeds. They are accordingly all dismissed, i.e. against all three respondents.

2. The claimant resigned and was not dismissed. Her claim of unfair dismissal against the first respondent therefore does not succeed.

REASONS

Introduction; the claims and the parties

1 In these proceedings, the claimant claims that

1.1 she was discriminated against directly because of (1) her sex, and/or (2) a disability in the form of depression and/or anxiety, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA 2010");

1.2 she was harassed within the meaning of section 26(2) of the EqA 2010, the protected characteristic for that purpose being her sex, contrary to section 39 of that Act;

1.3 she was treated unfavourably because of something arising in consequence of her disability, and that that treatment was not a proportionate means of achieving a legitimate aim, contrary to sections 15 and 39 of the EqA 2010;

1.4 there was a failure to make reasonable adjustments within the meaning of section 20 of that Act, contrary to section 39 of that Act; and

1.5 she was dismissed "constructively", i.e. within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996").

2 Two claims were made by the claimant (one was presented on 18 July 2018 and the other on 20 July 2018), and they were heard together as a result of decisions made by Employment Judge ("EJ") Finlay at a case management hearing on 20 September 2019. The first respondent was the claimant's employer until the claimant resigned from that employment with immediate effect by email on 19 April 2018. The claimant had by then worked for the first respondent (treating her employment with a previous employer as part of her employment with the first respondent, since her contract of employment was transferred to the first respondent from that earlier employer under the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246) for over 16 years. The claimant went to work for the previous employer (Alenia Marconi Systems) after leaving school, and worked for that previous employer as an apprentice. The claimant has a Higher National Diploma in electrical and electronic engineering and worked for the first respondent as an engineer.

3 The second respondent had line management responsibilities for the claimant, in addition to the third respondent, who was the claimant's direct line manager, in the period before the claimant resigned. The second respondent was the third respondent's line manager.

The procedure which we followed

4 This case was listed to be heard on 2-11 November 2020 inclusive, to determine liability only. In the event, it was capable of being heard only on 2-5 November 2020 in the first instance, because of a lack of judicial resources on 6 and 9-11 November 2020. As it happened, the hearing would have had to be adjourned at the end of the 8 days originally listed, because there would not have been enough time to hear the evidence and submissions by that date. That is because when we adjourned the hearing at the end of 5 November 2020, we did so to 8-

17 February 2021 inclusive, on the basis that we would subsequently issue a reserved judgment on liability only, and on the basis that the parties would need to be present on 8-11 or 12 February 2021 (depending on how well the cross-examinations progressed). Counsel for the respondent was then unable for practical reasons to be present at the hearing from half-way through the afternoon of Tuesday 9 February to the end of the morning of Wednesday 10 February 2021, but we nevertheless were able to conclude the hearing with the parties present by the close of business on Friday 12 February 2021, albeit that we sat late in order to hear oral submissions from both parties, supplementing their helpful written submissions.

5 We then deliberated in private over a period of three days and subsequently prepared this reserved judgment.

6 The parties had, before the hearing before us, agreed a table in the form of a Scott Schedule, stating 69 separate complaints. That table separated out each and every element of the claim, when some of them could have been stated compendiously by saying, for example, that the conduct in question was harassment in the form of conduct related to the protected characteristic of sex and/or direct discrimination because of sex and/or direct disability discrimination. In some ways, the table nevertheless assisted us, because its first section was to a certain extent a statement of the factual elements of the claims in the form of a succinct chronology. In addition, it was a useful checklist of the precise way in which each element of the claim was advanced. However, we concluded that it would not be best to state our findings of fact by reference to each row in the table. That was not least because the legal issues that we had to decide depended in part on our determinations of some starkly differing factual assertions of the parties. In what follows we first state the applicable legal principles. We then state our determinations on all relevant factual matters, taking them in chronological order as much as possible consistently with the need to state how we resolved relevant conflicts of evidence. In the final part of these reasons, we state our conclusions on the claims by reference to the allegations in the Scott Schedule, taking them in turn.

The relevant legal principles

Time limits

7 The claimant was absent from work on account of sickness (her mental condition) from 7 June 2017 until the date when she resigned, i.e. 19 April 2018. Many of her claims related to events which preceded that period of absence. Others related to things about which the claimant discovered as a result of being provided with documents by the first respondent in response to a subject access request ("SAR") made under the Data Protection Act 1998 (which was the applicable Act at the time). As a result, most of the elements of the claim (assuming that they were not part of conduct extending over a period within the

meaning of section 123(3)(a) of the EqA 2010 which ended on the date of the claimant's resignation) were out of time unless either

7.1 applying *Meikle v Nottinghamshire County Council* [2004] EWCA Civ 859, [2005] ICR 1, they formed part of an accumulation which constituted a breach of the implied term of trust and confidence (to which we refer in paragraphs 27-31 below in more detail) and the claimant, by resigning, terminated the contract in response to that breach, or

7.2 we concluded that it was just and equitable to extend time for making the claim outside the primary three-month time limit imposed by section 123(1) of the EqA 2010.

8 As far as the making of a claim of a failure to make a reasonable adjustment is concerned, the failure is taken for time limit purposes to have occurred either when there was a deliberate decision not to make the adjustment, or, where there was no such decision, when, if the employer had been acting reasonably, it would have made the adjustment which it is claimed it would have been reasonable to make: *Matuszowicz V Kingston Upon Hull City Council* [2009] EWCA Civ 22, [2009] IRLR 288.

9 In deciding whether it is just and equitable to extend time, the principles discussed most recently in the decision of the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 and *Caston v Chief Constable of Lincolnshire Police* [2009] EWCA Civ 1298, [2010] IRLR 327 were applicable. As Underhill LJ said in paragraph 37 of his judgment in *Adedeji*:

> 'The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J [in *British Coal Corporation v Keeble* [1995] UKEAT 413/94)]] notes) "the length of, and the reasons for, the delay".'

10 While the following passage from *Harvey on Industrial Relations and Employment Law* (paragraph PI[279.02]) was not directly relevant, it was relevant in so far as it made it clear that if a claim is made outside the primary time limit for example because the possibility of making it became known only once that time limit had expired, it is incumbent on the claimant to act with reasonable swiftness:

> "Where a claimant asserts ignorance of the right to make a claim, the same principles that are relevant to the 'not reasonably practicable' escape clause (see para [197]ff above) apply when considering a just and equitable extension (see *Bowden v Ministry of Justice* UKEAT/0018/17 (25 August 2017, unreported), para 38; *Averns v Stagecoach in Warwickshire*

UKEAT/0065/08 (16 July 2008, unreported)). Accordingly, the assertion must be genuine and the ignorance – whether of the right to make a claim at all, or the procedure for making it, or the time within which it must be made – must be reasonable. It is not enough, in a case where ignorance is relied upon, for a tribunal to conclude that a claimant has not acted reasonably and promptly without specifically addressing the alleged lack of knowledge (see *Averns* at para 23). Nor is it correct to say that the only knowledge that is relevant when considering an extension of time is knowledge of the facts that could potentially give rise to a claim, not knowledge of the existence of a legal right to pursue compensation in respect of those facts; as a matter of law both kinds of knowledge are relevant and should be taken into account (*Bowden* at para 44 ...)."

11 Paragraph 22 of the Employment Appeal Tribunal's judgment (given by Elias P) in *Averns*, was in these terms:

> "As we have said, there is a broader discretion which can be exercised with respect to the just and equitable extension although the onus is still on the claimant to demonstrate good reason for the extension, as Mr Justice Langstaff recently had cause to observe in *Department of Constitutional Affairs v O'Brien* UKEAT/0139/07."

12 The judgment of Langstaff J in the latter case states the applicable approach in this regard in the following pellucid opening paragraphs:

> '1. Time limits are draconian. However, they are not contrary to Article 6 of the Convention of Human Rights, provided that there is a means of ameliorating the necessary harshness. A time limit of three months is familiar territory to many of the claims which come before the Employment Tribunal jurisdiction.
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> 2. In this claim, the harshness of a three-month cut off, for what might otherwise be a perfectly good claim, is ameliorated by the provision that a Tribunal may hold that it is just and equitable for the claim to proceed, notwithstanding the expiry of the relevant time limit. However, it is plain from the very nature of time limits that they are intended to have general application, subject only to legitimate exceptions; and it must follow that good reason must be shown for such exceptions.
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> 3. Thus, in giving judgment in the case of *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, Auld LJ at paragraph 25 said:
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>> "A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time."
>
> 4. But that statement comes in the course of a paragraph which needs to be read with paragraphs 23 and 24. The Court was considering whether

or not a panel of this Tribunal was entitled to overturn the decision of an Employment Tribunal which had held that an Applicant was out of time to bring a complaint of race discrimination.

5. It may be that the statement which I have quoted is comment rather than ratio though Mr Swift, who appears for the Appellant today, contends it is the latter, but it seems to me entirely consistent with general principle. It seems to me that although the words in which it is cast suggest an absence of jurisdiction, the essence of what Auld LJ was saying (and with which Chadwick LJ and Newman J for their part agreed) was that any delay in bringing proceedings must be justified. It follows too that the extent of such a period must be justified. It cannot simply be a case of a time limit having been passed with good reason, and having been passed that no further amount of delay, however short or however long, for good reason or not, is relevant.'

The relevant principles in, and the relevant case law concerning, the EqA 2010

Harassment

13 Section 26 of the EqA 2010 provides:

"(1) A person (A) harasses another (B) if–

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the 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) A also harasses B if–

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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."

Direct discrimination and whether a claim of harassment adds anything to a claim of direct discrimination

14 We return to what constitutes harassment within the meaning section 26 below, after considering the meaning of the words "conduct related to a relevant protected characteristic". In order to do the latter, it is helpful to consider the effect of section 13 of the EqA 2010, which of course was a central provision in this case. Section 13 provides:

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

15 The manner in which that section needs to be applied, given section 136 of the EqA 2010 (to which we refer in paragraphs 20-22 below), is now well-established. It may be thought that there is a fundamental difference between sections 13 and 26 of the EqA 2010, in that they use different operative words: "because of a protected characteristic" in section 13 and "unwanted conduct related to a relevant protected characteristic" in section 26.

16 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 a very helpful discussion about the impact (or otherwise) of the use of those different words. It shows that only rarely will a claim of harassment add anything to a claim of discrimination. By way of illustration, as Underhill LJ confirmed in paragraphs 83-101 of that judgment, a mental element is required in a claim of harassment as much as in a claim of direct discrimination. The approach which we needed to take here when applying section 26(1) of the EqA 2010 was shown by paragraphs 108-109 and the opening part of paragraph 110 of Underhill LJ's judgment. That passage is as follows:

> '**Harassment**

108. Mr Carr [counsel for the claimant] submitted that, even if the employed officials' conduct could not be said to be "because of" the Claimant's sex, it was on any view "related to" it within the meaning of section 26. I have already explained at paras 96-98 above why that language does not cover cases of third party liability; and for the reasons given at para 104, the present claim is, on the ET's reasoning, in substance such a case. If the employed officials, and through them the union, are to be liable for harassing the claimant because of their failure to protect her from the harassment of the lay officials, and (in the case of Mr Kavanagh) for transferring her, that can only be because of their own motivation, as to which the tribunal made no finding.

109. Mr Segal [counsel for the respondent employer, the union] sought in his post-hearing submissions to distinguish between a situation where an employer was "culpably inactive knowing that an employee is subjected to continuing harassment (as on the facts of the *Burton* case)" and one where he was "culpably inactive without [any such knowledge]"; and to show that the employment tribunal's findings established that the case was in the latter category. I am not sure of the relevance of the distinction; but since we did not hear oral submissions on it I prefer to say no more than that, on the law as I believe it to be, the employer will not be automatically liable in either situation. I repeat, to avoid any possible misunderstanding, that the key word is "automatically": it will of course be liable if the mental processes of the individual decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic.

Conclusion

110. For those reasons I agree with the appeal tribunal that the reasoning of the employment tribunal was flawed. It found the union liable on the basis of the acts and omissions of the employed officials without making any finding as to whether the claimant's sex formed part of their motivation.'

Victimisation

17 Section 27 of the EqA 2010 provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because–

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act–

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act."

18 The word "detriment" in that section is applied from the claimant's and not the alleged victimiser's perspective: *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [2007] ICR 841. Nevertheless, the alleged wrongdoer must know of the protected act for the claim to succeed; one example of a case illustrating that is *Thompson v Central London Bus Company* [2016] IRLR 9.

Sections 15 and 20 of the EqA 2010

19 Claims under sections 15 and 20 of the EqA 2010 are "closely inter-related": see paragraphs 16-27 of the judgment of Elias LJ in *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2016] IRLR 216. Section 15 is "unfavourable" treatment "because of something arising in consequence of [the claimant's] disability", which it is not "a proportionate means of achieving a legitimate aim" to impose. An obligation to make a reasonable adjustment occurs where a provision, criterion or practice ("PCP") is applied which "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled." There is then a duty "to take such steps as it is reasonable to have to take to avoid the disadvantage". A PCP must be something general, and not just a specific thing done to an individual employee: *Nottingham City Transport Ltd v Harvey* [2013] Eq LR 4, UKEAT/0032/12/JOJ, as explained in *Ishola v Transport for London* [2020] EWCA Civ 112, [2020] ICR 1204. Whether or not it would have been reasonable to make the adjustment sought is a matter for the tribunal to determine, taking an objective approach, and is not to be determined by reference to the "range of reasonable responses of a reasonable employer" approach applicable in the law of unfair dismissal: *Smith v Churchill Stairlifts plc* [2006] ICR 524.

The burden of proof

20 Section 136 of the EqA 2010 provides:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

21 There is much case law concerning the application of that provision, and we refer to some of it immediately below. However, we bore it in mind that (as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337) in some cases the best way to approach the question whether or not there has been for example direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

22 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey on Industrial Relations and Employment Law*, as follows:

> "Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010] EqLR 82). That means that the claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in *Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. A note of caution, however, is necessary against taking from *Igen* [i.e. *Igen Ltd v Wong* [2005] ICR 931] a mechanistic approach to the proof of discrimination by reference to RRA 1976 s 54A. In *Laing v Manchester City Council* [2006] IRLR 748, [2006] ICR 1519 Elias P observed as follows:
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> > ''71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises

> the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
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> 72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.
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> 73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.''
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> In *Commissioner of Police of the Metropolis v Maxwell* UKEAT/0232/12, [2013] EqLR 680 it was emphasised that particularly in cases where there are a large number of complaints the tribunal is not obliged to go through the two stage approach in relation to each and every one."

<u>Harassment in practice</u>

23 The provisions of section 26 of the EqA 2010 have been considered by appellate courts on a number of occasions in helpful ways, including (1) by the Employment Appeal Tribunal in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 and (2) by the Court of Appeal in *Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:

> "[The claimed] effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

24 In paragraph 22 of *Dhaliwal*, the Employment Appeal Tribunal (Underhill P presiding) said this:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

25 In *Betsi Cadwaladr University Health Board v Hughes* (unreported; UKEAT/0179/13/JOJ, 28 February 2014), the Employment Appeal Tribunal (Langstaff P presiding) said this in paragraphs 12 and 13 of its judgment having just set out paragraph 22 of the judgment in *Dhaliwal*:

> '12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.
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> 13. It was agreed, too, that context was very important in determining the question of environment and effect. Thus, as Elias LJ said in *Grant*, context is important. As this Tribunal said, in *Warby v Wunda Group plc*, UKEAT 0434/11, 27 January 2012:
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> > "…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;".'

26 *Dhaliwal* is authority for the proposition that the intent of the impugned conduct is relevant. That was said at the end of the following passage in the judgment of that case, the whole of which (including the footnotes, which we have integrated into the text by inserting them in square brackets and putting them into italics) was in our view helpful:

> '14. Secondly, it is important to note the formal breakdown of "element (2)" into two alternative bases of liability—"purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so) [*Those alternative forms of liability could be described, from the perpetrator's point of view, as "objective" and "subjective"; but using that terminology risks confusion with the separate question whether the effect on the victim should be judged "subjectively" or "objectively"—as to which, see para 15.*]. It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended [*We use "intend" as the equivalent verb to the noun "purpose" used in the statute: "purpose" as a verb has an archaic ring. In this context at least there is no real difference between the terms "purpose" and "intention".*] to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of "element (3)" as discussed below).
>
> 15. Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. 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. [*This is not to reintroduce a requirement of "purpose" by the back door: the point is not that the perpetrator cannot be liable unless he intended to cause offence but rather that, if he evidently did not intend to, it may not be reasonable for the claimant to have taken offence.*]'

The law of constructive dismissal

27 As we say above, the claimant relied here on the implied term of trust and confidence. That is an obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence which exists, or should exist, between employer and employee as employer and employee. The question whether that term has been breached is determined objectively: see *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481. A breach of that term is (as was confirmed in *Omilaju)* a repudiation or fundamental breach of the contract of employment, which are two separate concepts, as stated by Lord Denning in the case to which we refer in the following paragraph below. It is possible to say that it is an aspect of that term that employers will (applying *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516, Employment Appeal Tribunal ("EAT")) "reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have", although in that case Morrison J said that it was a separate implied term.

28 The law of constructive dismissal was clarified particularly helpfully by Lord Denning MR in *Western Excavating v Sharp* [1978] ICR 761, at page 769A-C:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be

> sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

29 There is this helpful passage in the notes to section 95 of the ERA 1996 in *Harvey on Industrial Relations and Employment Law* ("*Harvey*"):

> "The employee must leave in response to the breach of contract, which may mean the tribunal deciding what was the effective (but not necessarily the sole) cause of the resignation: *Jones v F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493, EAT; the employer's conduct subsequent to a resignation cannot convert that resignation into a constructive dismissal *(Gaelic Oil Co Ltd v Hamilton* [1977] IRLR 27). Earlier cases suggested that the employee must indicate clearly that he is treating the contract as repudiated: *Logabax Ltd v Titherley* [1977] IRLR 97, [1977] ICR 369, EAT; *Walker v Josiah Wedgwood & Sons* [1978] IRLR 105, [1978] ICR 744, EAT; however, the Court of Appeal held that there is no legal requirement that the departing employee must tell the employer of the reason for leaving: *Weathersfield Ltd v Sargent* [1999] 1 IRLR 94, CA (disapproving on this point *Holland v Glendale Industries Ltd* [1998] ICR 493, EAT). The acceptance of the repudiation must be unequivocal (*Hunt v British Railways Board* [1979] IRLR 379, EAT— employee filed IT 1 but continued to report for work; 'can't have his cake and eat it'). A fortiori where the termination is by mutual agreement there cannot be constructive dismissal (*L Lipton Ltd v Marlborough* [1979] IRLR 179, EAT)."

30 It is possible to rely as part of an accumulation of conduct which, taken together, constitutes a breach of the implied term of trust and confidence, conduct of the other party which was in itself a breach of that term, but the right to rely on which as such has been waived by the other party affirming the contract: *Mruke v Khan* [2018] EWCA Civ 280, [2019] ICR 1. That case is helpful not only for confirming the correctness of that proposition, but also for the clarity of the manner in which Underhill LJ stated (in paragraph 55 of his judgment, with which Singh LJ agreed) the manner in which a claim of constructive dismissal must be considered and the fact that in that case it was held by the Court of Appeal (in paragraph 75 of the judgment of Underhill LJ) that

> "the following through, in perfectly proper fashion on the face of the papers, of a disciplinary process ... cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong; but the test is objective, and a fair disciplinary process cannot, viewed

objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee."

31 In paragraph 55 of his judgment, Underhill LJ said this:

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?
>
> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

The assessment of oral evidence

32 In his closing submissions, Mr Curtis referred us to the decision of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) concerning the approach to take when assessing the weight of oral evidence. Mr Curtis's summary was helpful, but we found the full passage of Leggatt J's judgment on the issue to be even more helpful. It is this:

> "15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability

of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness

has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

The evidence which we heard

33 We heard oral evidence from the claimant on her own behalf and, on her behalf, from the following witnesses:

33.1 Mrs Belinda Scott, the claimant's mother;

33.2 Mr David Wright, a neighbour of the claimant;

33.3 Mr Jonathan Peters, who worked for the first respondent as a colleague of the claimant from 2010 to 2012; and

33.4 Mr Craig Shannon, who is currently (and has at all material times been) a Chief Petty Officer in the Royal Navy.

34 We heard oral evidence from the second and third respondents and, on behalf of the first respondent, from the following witnesses:

34.1 Dr Gareth Banks, who works and at all material times worked for the first respondent as a Project Manager;

34.2 Mrs Debora Kempton, who works for the first respondent and at the material time worked as Principal Engineer – Engineering Management;

34.3 Mr Andrew Margrett, who is and was at the material time employed by the first respondent in the role of HR Manager;

34.4 Mr Andrew Pegg, who works for the first respondent and at the material time was employed in the role of Technical Manager; he considered the detailed grievance which the claimant put before the respondent on 9 January 2018 as described below and rejected it in substance, albeit that he made several recommendations as a result of it; and

34.5 Mr Steven Markham, who currently works for and at the material time was employed by the first respondent as its "US Programme Sustainment Quality Functional Lead – Air". Mr Markham's involvement was in determining the claimant's appeal against the dismissal by Mr Pegg of her grievance of 9 January 2018.

35 We had a bundle of documents put before us at the start of the hearing in November 2020 which contained 1386 pages. It was added to at the start of the resumed hearing on 8 February 2021, and by the end of the hearing it had 1551 pages. Any reference below to a page is, unless otherwise stated, to a page of that bundle. The claimant put before us an additional bundle that the

claimant's solicitors had created, which contained 208 pages, some of which were duplicates of what was in the main bundle, but with the claimant's comments on them. We refer to that as the additional bundle. There was also what the parties referred to (and to which we refer below) as a medical bundle.

36 On the final day of the hearing with the parties present, after the evidence was as far as we were concerned closed, but before we considered the parties' written and oral submissions, the claimant sought to put before us three emails in which there were what were described as screenshots of what appeared to be WhatsApp messages of that day (12 February 2021) between the claimant and Ms Dawn Berridge about something which had happened three years previously and which the claimant knew in November 2020 was in issue. Mr Curtis introduced them on the basis that they were newly-created relevant documents. The admission of those WhatsApp messages was opposed by Mr Green on behalf of the respondents on the basis that they were plainly an attempt to get in by the back door witness statement evidence which it was unfair to the respondents to admit at that stage. We concluded (see paragraph 92 below) that we should nevertheless admit the documents as being relevant, but accord them only such weight as it appeared to us to be appropriate, bearing in mind that they were in the nature of assertions of fact which were unsupported by oral evidence from the maker of the assertions (i.e. Ms Berridge), who had also not signed them. In addition, we had not heard oral evidence from the claimant about them, which further diminished their evidential value. We set out the WhatsApp messages in paragraphs 82 and 83 below.

37 In what follows, we first state our reasons for determining the preliminary issue of whether the claimant was at the material times disabled within the meaning of section 6 of the EqA 2010. We then refer where necessary to the relevant evidence and state our findings of fact on material matters. There were (as indicated above) many conflicts of evidence on such matters. In stating our findings of fact, where necessary, we resolve those conflicts of evidence and say why we resolved them in the manner in which we did so. We add, however, that we have referred below only to the parts of the evidence before us that were of particular relevance to the issues. Thus, for example, we have not resolved a number of conflicts of evidence between the claimant and Dr Banks about what the claimant alleged Dr Banks to have said, or come to conclusions on aspects of the evidence which we regarded as being of little or no evidential weight as far as the issues in the case were concerned.

38 All documents to which we refer below were, unless we state otherwise, accepted by the parties to be what they purported to be, but not whether they were an accurate record of their content, i.e. what they purported to describe.

A preliminary issue: was the claimant disabled within the meaning of section 6 of the EqA 2010 at the material times?

39 A person is disabled for the purposes of the EqA 2010 if (applying the words of section 6 of that Act) he or she has "a physical or mental impairment, [which] has a substantial and long-term adverse effect on [that person's] ability to carry out normal day-to-day activities". Paragraph 2 of Schedule 1 to the EqA 2010 provides:

> "(1) The effect of an impairment is long-term if–
>
> (a) it has lasted for at least 12 months,
> (b) it is likely to last for at least 12 months, or
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

40 We bore in mind the fact that where it is claimed that a mental condition amounted to an impairment within the meaning of section 6 of the EqA 2010, any doctor or other professional person who is asked to give an opinion on the impact of the condition on the claimant's ability to carry out normal day to day activities, and the tribunal in assessing that impact, will be dependent on what the claimant says about that impact.

41 The claimant put before us a disability impact statement. It was not formally proved by her, and she was not cross-examined on it. It was in some respects repetitious. Nevertheless, it did contain sufficient by way of evidence which was consistent with the claimant's oral evidence and the notes of her General Medical Practitioner ("GP") concerning her (the claimant's) mental health condition for us to conclude that at all times from the summer of 2016 onwards at least, the claimant was suffering from an impairment within the meaning of section 6 of the EqA 2010, and that she was therefore for the purposes of these proceedings disabled within the meaning of that Act. That impairment was best described as a combination of anxiety and depression.

42 We pause here to say that we were of the view that the claimant's disability resulted from the stress that she experienced as a result of being employed by the first respondent. Stress is not a medical condition: it may be the cause of a medical condition, or of an impairment within the meaning of section 6 of the EqA 2010, but that is another matter. That which is for some people stressful may for others be a challenge to be relished. People's reactions to pressure vary widely. Here, the claimant's reaction to the circumstances in which she found herself led to her being depressed and anxious.

43 It was in our view of critical importance to decide whether or not the second and third respondents (to whom we refer below respectively as Mr Haslam and Mr Archibald) had objective justification for their actions in addressing what they said were genuine concerns relating to the claimant's capability and conduct. The stated capability issue concerned the claimant's ability to do work of UKLI Admin Theme Lead effectively, and the stated conduct issue related to the claimant's refusal to accept set working hours. We state our factual findings in those regards in paragraphs 113 and 148 below. Because of those factual findings, we concluded that Mr Haslam's and Mr Archibald's concerns in those respects were genuinely held and objectively justified. That in turn led us to conclude that the claimant's refusal to accept that those concerns were genuinely held and objectively justified may have led to a worsening of her mental health condition. In addition, and in any event, we understood from past experience of cases concerning employees with depression and anxiety that the claimant's mental condition was likely in the future to improve, possibly dramatically, as a result of the determination of her claims made in these proceedings (even though, ultimately, we found in the respondents' favour). We considered whether that could affect our conclusion that the claimant was disabled for the purpose of these proceedings by reason of her depression and anxiety, and concluded that it did not do so. We did, however, conclude that the claimant's depression and anxiety affected her ability to see her own situation objectively. That conclusion was relevant when determining the claimant's claims in relation to the capability issues which were raised by Mr Haslam (and as a result Mr Archibald).

The facts

Line management responsibility for the claimant in the period before and at the time of her resignation

44 Mr Haslam started to be the claimant's line manager in about March 2015, as he described in paragraph 3 of his witness statement:

> 'Vicki joined the UKLI [i.e. the UK Lightning Integration] project in or around March 2015, in the role of Facilities Engineer. Vicki joined the Lightning System Integration Facility ("LSIF") team, working for Andy Green (Facility Lead), who in turn reported to me. The LSIF team's role was to maintain and develop the computing and networking facilities used by the UKLI project within the BAE Systems Maritime Integration Support Centre ("MISC") building in Portsmouth, in which Vicki and the rest of the facilities team were based.'

45 Mr Haslam was based at the first respondent's offices at Frimley, Surrey, which was about an hour's drive from the MISC.

46 Mr Archibald began to be the claimant's line manager when he joined the UKLI as (as he said in paragraph 1 of his witness statement) "the UK Event Lead

responsible for customer events designed to help bring the F35 aircraft into service in the UK." That was in November 2016. Mr Archibald's witness statement continued (helpfully from the point of view of explaining what that role and that of the claimant involved):

> "The Event Lead organises themed events to test the integration of ALIS (the Automated Lightening Integration System) into the customer's existing infrastructure."

The circumstances in which the claimant returned to work after her lengthy period of absence in 2016

47 The claimant's employment history with the first respondent was not directly relevant to the claims of discrimination because of sex or victimisation. It was not relevant at all to the question whether or not she was objectively perceived by Mr Haslam and Mr Archibald to be under-performing in the final period of her employment, before she started the period of absence because of sickness. It is however necessary to record that the claimant was absent from work because of "low mood" (as recorded in the fitness certificate at page 19 of the medical bundle) from 19 February 2016 onwards until 24 August 2016, when she returned to a role called "Event Lead Support" in the team based at the MISC.

48 The manner in which she returned to full-time work is not material. It is material that the claimant claimed that she was overloaded when she returned, by being given in effect the work of two people to do. Mr Haslam's evidence on this was in paragraphs 5-11 of his witness statement, to the material parts of which we refer further below. That passage refers in addition to the email which was the subject of the first of the allegations listed in the Scott Schedule, in which Dr Banks wrote in response to Mr Haslam saying "FYI. Andy referred Vicki to occ health earlier in the week and the appointment was today":

> "Maybe she's got a bun in the oven?
> I'd blame Luke Grey but the dates don't line up..."

49 Both emails were on page 189. Mr Haslam said this about the exchange:

> "I note that at paragraph 10 of her Grounds of Claim, Vicki refers to an email sent to me by Gareth Banks (Project Manager) in relation to her sickness absence. The Business carried out an internal investigation into this matter, which resulted in disciplinary procedures for Gareth Banks. I did not reply to the email in question, but in retrospect, I wish I had challenged the unprofessional content of the email at the time."

50 Dr Banks told us that he had nearly lost his job as a result of sending that email. He clearly regretted sending it, and not just because it nearly cost him his job with the first respondent.

51 Mr Haslam was pressed in cross-examination on why he did not "call it out" as discriminatory. He was in our view genuinely regretful that he did not call it out. We bore in mind in determining the claimant's claims against him of discrimination and harassment the fact that he did not call it out. The outcome of those claims was more dependent on the factual issues to which we refer below than that failure, but we nevertheless bore it in mind.

52 Returning to the manner in which the claimant came to return to work, we accepted the following passage in the witness statement of Mr Haslam:

> 5. ... I would check in with the Portsmouth based team whenever I'd visit, and probably by the end of 2015, my understanding from conversations with both Vicki and Andy [Green] during that time was that their working relationship was not great. Vicki told me she didn't like Andy's management style (which she characterised as micromanagement), and that Andy reported to me that he often had to check and re-do some of Vicki's work.
>
> ...
>
> 9 Once Event 3.3.1 in September 2016 finished, we gave a lot more thought to the most suitable role for Vicki within the team. Subsequently, in September 2016, Vicki took on the role of It [sic] ALIS Admin Theme Lead. This role was not an amalgamation [of] three full time roles as Vicki alleges in her Grounds of Claim (paragraph 7), but was an established, interesting role with customer interaction, and the opportunity to own a whole area of the project and design and run the activities in the system test events which run a few times a year. I thought that as Vicki had IT administration experience as a facilities engineer, with some exposure to ALIS in her previous role on the team, and as the ALIS admin theme lead is best placed in the MISC where Vicki already worked, the ALIS Admin Theme Lead was the logical and appropriate fit for her. I saw it as a good opportunity for Vicki to build on her skills and experience and really make it her own.
>
> 10 I helped Ash [i.e. Ashley Straw, to whom we refer further in paragraph 126 below] think about the tasks that Vicki could complete as part of her new role and provided some thoughts about some potential suitable objectives (pages 197 – 199). Clearly the list I included within my email was too much for one person, and I stated as much in my email, but the idea was that Ash and Vicki would have a Performance Development Review ("PDR") objective setting discussion to agree the specific objectives. I was not involved in Vicki's PDR (held between her and Ash), and did not see the output of the objective setting session, but understood that Vicki had agreed to perform the

ALIS Admin Theme Lead role. If Vicki had any problems with the role or objectives being suggested, she could have raised them with Ash or me, but I do not recall this happening.

11 In relation to Vicki's allegation in her Grounds of Claim that she appeared on the organisation chart to be undertaking two full time roles (paragraph 7), I am not able to find the specific chart Vicki refers to, but it is not unusual to show secondary roles on such charts. Vicki would have probably been shown as the ALIS Admin Theme Lead and also temporarily in the event support role to the Event Lead that she had performed on her return to work in August 2016. That did not mean she was performing two full time roles."

53 We considered that passage very carefully when deliberating. We also considered how Mr Haslam presented as a witness, how he was perceived by those whom he managed, and whether or not there was any evidence of him discriminating against the claimant as a woman. He gave evidence very carefully and thoroughly, and he struck us as a very methodical and intelligent man who was probably demanding of those whom he managed, but not necessarily unduly so. Of considerable importance in this regard was the fact that Mr Markham had interviewed Mr Simon Bush, who had been managed by Mr Haslam and was critical of Mr Haslam's management. At pages 1196-1198 there was a record of what Mr Bush had said to Mr Markham in the interview, which took place on 5 July 2018. It included this revealing passage ("SM" being Mr Markham):

"SM — Ok no further questions on that then as you weren't in the office at the time. The next point I want to discuss is around whether you have seen any victimisation towards Vicki Scott?

SB — I have witnessed a couple of comments from Jim Haslam the Engineering manager, I have been on the receiving end of him, he has very high standards and I actually wrote an email to him stating the grievances I had against him. He asked me to raise a Grievance; I said I wouldn't because of what he does for the project. When I was off sick I know Vicki got hassle from Jim about one of my expenses, he can be direct and blunt at times and he has a dictatorial management style.

SM —Does Steve Archibald mirror those behaviours?

SB — No, he doesn't came across that way. Steve has a good working relationship with his Engineers.

SM —Thanks for that Simon. I appreciate the fact that you have been in a different office to Jim Haslam. You spoke there about the environment. Is that an area where if needed compassion is shown?

SB — He needs to think about what he is doing. I am an ex-serviceman and the way he has spoken to me before, if it had been serviceman to serviceman I would have raised it. He has a habit of upsetting the apple cart; everything goes fine until he gets involved and then leaves me or someone else to pickup the pieces. Just after Christmas we were all working great but he near enough caused a mutiny because of the way he was dealing with things and that was causing conflict. Too many chiefs and not enough Indians. I don't want people to be on the receiving end of what I have been on. Jim has been on a lot of courses but management skills take practice and experience which he hasn't got. Technically he is brilliant.

SM — So he doesn't have the natural emotional intelligence to address people?

SB — He thinks about what he is doing to people, he is calculated. Other people in the MISC are of the same opinion; he is very dictatorial and thinks about what he is doing.

SM — Who are they?

SB - David Clayton and Jonathan Rose. We had a Sub Contractor in the team and he was given a weeks' notice by Jim and there is also Kos and we have all been on the receiving end of Jim. Technically he is fantastic, very process driven but he has a dictatorial and calculated style. That email I sent to him, took a lot of balls to write and confront him. You confront them but then it all happens again. I was put on Ill Health Capability and given inconsistent at the end of the year, I have never been inconsistent, I will take the hit but the reason that he gave was that I had mis-spelt something on a workspace site and he only received a good and expected more. I am only saying these things as I see it as a true reflection.

SM — Do you think there is a tendency for Jim to force his managers to work in the same way?

SB —Yes he forces them. It's his way or no way. The managers have got to a stage where Jim gets so far down into the reeds he was moaning that he doesn't have time to do his own jab. ALIS familiarisation courses for example, Jim was overpowering and trying to do that himself instead of letting the Subcontractor do it and then he gave him a weeks notice."

54 That passage accorded with our own view of Mr Haslam: a demanding manager who was as demanding of, and if he was lacking in empathy (which if it occurred was not intentional, we concluded) then he was so lacking towards, employees of both genders.

The manner in which Mr Haslam spoke to Mr Archibald about the claimant when Mr Archibald became the claimant's line manager

55 The second matter on the Scott Schedule about which the claimant complained was something else which she did not personally see or hear. It was described in paragraph 81 of the claimant's witness statement, which was helpful because, in addition to describing the manner in which she came to know of the matter, it showed the relative infrequency with which Mr Archibald visited the MISC:

> "In or around November 2016, Steve Archibald, Event Lead was appointed as my manager. SA was based in Yeovil and managed me remotely. I would see SA about once a month, when he would visit MISC. Whilst I was not aware at the time, I understand from SA interview record in relation to my grievance that JH said to SA around this ... time that I had '*had problems*', referring to my mental health (AD 166)."

56 That page (which was page 166 of the additional bundle and was part of the record of Mr Pegg's interview of Mr Archibald of 6 March 2018 of which there was a copy in the main bundle, at pages 1046-1053; the relevant words were on page 1053) had this on it:

> "SA – I joined the project in the end of November 2016 and Jim suggested that Vicki had problems but wouldn't tell me why."

57 In paragraph 2 of his witness statement, Mr Archibald described that conversation in the following way:

> "Prior to meeting with Vicki I had been given a handover by Jim Haslam, my line manager. Jim did not mention any mental health issues in relation to Vicki, he did however raise performance issues and mentioned a recent period of absence. I was happy and said so, to make up my own mind about Vicki."

58 Mr Archibald's witness statement continued: *"I considered that Vicki and I initially had a perfectly good relationship*." However, in the final paragraph of his witness statement he said this:

> "At all times I tried my best to manage what I considered to be a difficult performance management situation. I tried to help Vicki to achieve the required level of performance and attendance but the relationship between us became strained because, in my view Vicki would not accept, that she was not performing at the required standard or that I had to manage her hours as her line manager."

59 In oral evidence, Mr Archibald went rather further than that. When asked as a supplementary question in examination in chief how he found the claimant as an employee whom he managed, he said this:

> "[She was the] most difficult person in my 20-year career that I have had to manage."

60 When he was asked whether or not he was alone in that view, he said this:

> "No; before the PDR [i.e. the Performance and Development Review that he carried out with the claimant] on 6 April [2017] I talked to Andy Green and he confirmed that she was difficult to manage and I talked to another Project Manager, Grant Emslie."

61 Mr Curtis then objected to that line of questioning as he contended that Mr Archibald's witness statement should simply be taken as it stood. After considering the objection, we concluded that the questions should be permitted to continue, and if there was a need for the claimant to respond by way of further evidence, then she could be recalled to deal with the matter. Mr Curtis did not recall the claimant. In fact, we saw that on the same page of the notes of the interview carried out by Mr Pegg to which we refer in paragraph 56 above (1053; the words were also in the record at the top of page 167 of the claimant's additional bundle) there was this record of what Mr Archibald said to Mr Pegg:

> "We were reviewing Vicki's performance with Jayne [Bryant] so there's a whole history, for me it's relatively new. I'd spoken to previous line managers of hers and their view of Vicki's that she is very difficult to manage. That was the view of Grant Emsley [sic], and she is. She is extremely difficult to deal with, to the point in my whole experience of BAE systems, probably the hardest person to manage. It's not very nice."

62 In paragraph 28 of his witness statement, Mr Archibald said (see paragraph 184 below) this: "*I should say that I was not aware that Vicki suffered from a particular mental health issue during the period when I was her line manager only becoming aware of this at the second grievance meeting in June 2018.*" In contrast, when Mr Markham interviewed Mr Archibald on 27 June 2018, he asked Mr Archibald whether he agreed that the claimant "was suffering mental health issues", and Mr Archibald said (as recorded on page 1187):

> "SA — I've never been officially told but we all knew.
>
> SM — So you agree with Vicki suffering mental health issues?
>
> SA — Yes."

63 Mr Haslam's witness statement dealt with this issue in paragraph 13, where he said this:

> 'After Steve started, I had a handover discussion with him. Although I do not recall the specifics of that conversation, I know that I gave Steve what I would describe as a "need-to-know" briefing about Vicki. As part of this, I explained the difficulties that Vicki and Andy Green had had in working together, and that Vicki had then had a long period of sickness absence. Vicki alleges at paragraph 12 of her Ground of Claim that I told Steve she "had problems". I would not have told Steve about Vicki's health condition, as at the time I did not know the details of her condition."

64 He was pressed on this in cross-examination and he eventually said that it was possible that he was "in [his] head" referring to the claimant's absence through stress, but that he could not recall the conversation.

65 In those circumstances, we accepted what Mr Archibald said in paragraph 2 of his witness statement, which we have set out in paragraph 57 above, about the conversation that he had with Mr Haslam about the claimant and about which the claimant complained in paragraph 2 of the Scott Schedule. We came to that conclusion having taken into account the fact that Mr Archibald later came to know that the claimant had "mental health issues" and could be taken from what we say in paragraph 62 above to have been less than fully frank about that subsequently-acquired knowledge.

The third allegation in the Scott Schedule; the claim of the claimant that Mr Haslam stroked her hand

66 The third factual allegation in the Scott Schedule took the most time to determine. The allegation was the subject of a stark conflict of evidence between the claimant and Mr Haslam and its resolution affected our view of those parties' evidence as well as (for the reasons stated in paragraph 87 below) the outcome of a number of the claims in the Scott Schedule.

<u>The manner in which the claimant described the event in question in her witness statement</u>

67 In paragraphs 84-91 of her witness statement, the claimant said this:

> "84. In or around early November 2016, a Code of Conduct training session had been arranged with the whole team concerning professional conduct in the work place. I think that this meeting had originally been arranged for 4 November 2016, but may have been delayed by a week or so.
>
> 85. Around this time, I attended the Code of Conduct training that took place in Portsmouth. JH and the rest of the team attended this training. The training provided examples of inappropriate behaviour.

86. JH had some months earlier put my personal mobile number on a list that was sent to customers. I had been receiving inappropriate and unwanted text messages from an RAF customer who was married. I had known this customer in passing since 2015. The text messages were initially of a work/ friendly nature but progressed to being inappropriate around this time. Some of these messages were received at 2.00am and became more frequent.

87. I was unsure as [to] how I should handle this situation as on the one hand, I wanted the unwelcome text messages to stop, but at the same time I did not want to upset an important customer of BAE. The Code of Conduct training gave me the confidence and courage to raise this issue with JH. During the training I asked to have a chat with him as there was an issue that I wanted to discuss with him.

88. JH and I stayed in the meeting room that the Code of Conduct training had taken place in after everyone else had gone, to discuss my concerns regarding this customer's text messages. I asked Jim what would be an appropriate response in line with the Code of Conduct as I was aware it could cause or be a conflict of interest. JH said that I should respond to the text messages however I felt was appropriate, as it was outside of working hours. JH said that he did not want to know who the customer was and I did not want to tell JH as I felt I could handle the situation and did not want repercussions for myself, or for the customer. He commented that I could date people from BAE if I wanted too, further commenting 'how else are we meant to meet people' JH was stroking my hand in a suggestive way whilst saying this to me. He also said that I ' ... could use my body however I wanted'.

89. I felt really uncomfortable and moved my hand away in an exaggerated motion. I got the feeling he was implying that I could date him. I felt this was creepy and inappropriate, especially as I had gone to him for help. From my reaction, I think I had made it very clear to JH that I was not interested in him that way. I felt degraded in that JH thought that because a customer had sent me inappropriate messages that I was in some way 'available' and wanted that type of attention.

90. I believe JH and I were both single at the time. I was 31 and JH was around 34.

91. I left the meeting and told AG what had just happened."

68 Mr Haslam accepted that he had had a conversation with the claimant about what was described in paragraph 13 of the particulars of the claim as "a

customer that had been flirting with her", but his recollection of the conversation was somewhat different. What he said about that paragraph was in paragraphs 20-23 of his witness statement, which were in the following terms:

> '20 Vicki alleges a[t] paragraph 13 of her Grounds of Claim that following this conversation about her performance, we had a discussion about a customer that Vicki alleged had been flirting with her and that during this conversation, I implied that it was fine for colleagues to be in relationships with each other and "*proceeded to stroke [her] hand in a suggestive manner*".
>
> 21 I remember very clearly the conversation I had with Vicki when she reported to me that an unnamed customer had been flirting with her. I am very confident that it was not at the same time as the "good" rating conversation. My recollection of the conversation was that initially I was confused, as I thought Vicki was asking about or notifying me/the Business of a potential relationship with a customer or event visitor. I initially made a statement to the effect of "what people do in their private lives / outside of work is non-work related", but then Vicki explained that the flirty advances from the customer were not welcome. I then did understand the nature of the conversation and said that unwanted advances were not OK and Vicki should try to shut them down by telling the person to stop contacting her in that way, and not to contact her unless it was about work. I suggested that Vicki should be very direct and clear in the rejection of the advances, as being polite or friendly could be interpreted as a green light to continue flirting.
>
> 22 Vicki asked me whether her asking for the flirty advances to stop could hurt the project or the Business. I was really surprised at this and said that that is not at all the consideration; I would rather have an upset customer than have any of my team in an uncomfortable position. I clarified that there was absolutely no expectation for Vicki to interact with this customer in anything other than a professional capacity. We finished the conversation with me asking Vicki if she was happy that I had answered her concerns and that if she had any further problems with this individual she should tell me. I left the conversation feeling as though I had given good guidance that Vicki should act to stop the unwanted advances and should not be intimidated by the fact it was someone in the customer community. Vicki never told me who the person was and did not mention it again, so I thought the matter was closed.
>
> 23 I refute in the strongest possible terms that I stroked Vicki's hand "*in a suggestive manner*". This simply did not happen on this, or any other, occasion. The first I learned of this accusation was when I saw Vicki's

> Grounds of Claim and I find it very upsetting to be accused of such a thing that is simply not true.'

69 When Mr Haslam was cross-examined on this issue, he said that he remembered the key points of the conversation and that it was a strange one, that (as noted by EJ Hyams) he had "never had one like it anywhere else." He continued:

> "I very much remember that I was so surprised by what Ms Scott was asking me; it sounded to me that she was saying should she date or entertain this customer for the good of the project, and it was not something I would ask anyone on the team to do. It was so surprising to me that I gave very clear advice."

70 We have referred in paragraph 34.4 above to the grievance that the claimant sent to the first respondent on 9 January 2018. We return to it below, but it was central to our determination of whom to believe in regard to the allegation of the stroking by Mr Haslam of the claimant's hand, because it did not include an allegation of the stroking by Mr Haslam of the claimant's hand, whereas it did include many other detailed allegations about wrongdoing by, among others but in particular, Mr Haslam.

71 The claimant was cross-examined by reference to the lack of any allegation in the grievance to an incident in which Mr Haslam stroked the claimant's hand, and we record in paragraph 75 below what she said in response. At this point we pause to say that after making the pdf bundles before us fully searchable and looking for instances of the word "hand" and "stroke" or "stroking", we could find no reference to such an incident in any document in those bundles which was created before these proceedings were commenced. In addition, and more importantly, it was not suggested by or on behalf of the claimant that she had made any reference to such stroking in any such document.

72 In paragraph 91 of her witness statement, which we have set out at the end of paragraph 67 above, the claimant said: "I left the meeting and told AG what had just happened." However, Mr Green was interviewed by Mr Markham on 12 June 2018 with the assistance of Ms Amy Dewhurst and a separate note-taker, Ms Stacy Keeton. The notes of the interview were at pages 1170-1175. Mr Markham started the substantive part of the interview with this question (on page 1170):

> "In the notes created by Stacey in the meeting with Vicki [i.e. in the course of Mr Markham's investigation carried out for the purpose of considering the claimant's appeal against the dismissal of her grievance by Mr Pegg], there are a substantive set of notes. There are 6 things she has spoken about, some of which were unfair treatment, being singled out, sexual discrimination, harassment, bullying, verbal and physical assault. We wanted to see if you had witnessed any of that with Vicki Scott?"

73 On the next page, 1171, there was this record:

> "SM - With conversations with Vicki, what was the nature of the cause of the upset?
>
> AG - This is difficult. I spoke to Jim about this as when Vicki joined the team she had a lot of history with Christchurch that came with her. I said to Jim that you have to be careful with Vicki. If you criticise her work she can take it hard. You may feel it is minor criticism, but she would take it very hard. It's difficult to manage that at Team Leader level. It's because of the history that came with her.
>
> SM — Do you think maybe in some of those circumstances that Vicki took the criticism very personal?
>
> AG - I think she did, but I can also understand why she did if what she said happened at Christchurch happened. She was defensive and I could understand why she would react like that. I had some sympathy with her.
>
> SM - To make sure we are on the same lines, what are you referring to in terms of the history at Christchurch?
>
> AG —She was telling me stories from Christchurch about pay rises being declined, she was accused of fraud, put across someone's knee and someone spanked her, I didn't witness any of those events but if they took place I could see why she would react that way."

74 In no place in the detailed notes at pages 1170-1175 was there a mention of the claimant having told Mr Green about Mr Haslam stroking her hand.

75 When it was put to the claimant by Mr Green that the reason why she did not make an allegation of hand-stroking by Mr Haslam when stating her grievance of 9 January 2018 was that that event had not in fact happened, she asserted that she had in fact referred to the hand-stroking during the hearing of her grievance by Mr Pegg, and that she had demonstrated it on the hand of her companion at that hearing, Ms Dawn Berridge. EJ Hyams' notes of the exchange (tidied up) were as follows:

> "Q: You did not mention hand stroking in your grievance?
> A: I did in the grievance hearing that I attended. I did demonstrate what had happened. I asked Dawn Berridge; she was in the same meeting.
>
> Q: It is not in the notes of the grievance hearing?
> A: I still have not read them; I read the first page and they were not accurate at all; they were not a true reflection of what happened in those meetings. So I did not make any changes.

Q: Where have you said that before now?
A: I think I said it to Amy [Dewhurst, of the first respondent's HR team, who assisted Mr Pegg in regard to the grievance] in an email; and I said I was going to have to rewrite in my own words the meeting as I found it hard.

Q: Did you record that meeting?
A: No.

Q: At the bottom of page 785 to the top of next page, you do not mention there anything about the stroking of Mr Haslam's hand do you?
A: There is a reason for that; I had been; and I am not saying what Jim did was the same as before but I had been assaulted in the workplace before and I did not feel comfortable saying the entirety of what happened at that time as I had to work with Jim Haslam again.

Q: But you were comfortable about making a very serious grievance against Mr Haslam?
A: Yes, but it was an extra thing that makes it so much worse.

Q: But it is not an extra thing; your case is that the hand-stroking was the central problem?
A: I did not have [the response to my] SAR when I wrote my grievance.

Q: That does not have anything to do with the stroking of Mr Haslam's hand, does it?
A: I did not know all of the stuff that had happened behind my back until I got the bad PDR rating in April [2017] and it was only after I received that that I saw it as a retaliation for my rejection of Mr Haslam."

76 We were puzzled by some of the things that the claimant said there. Firstly, we could not understand why the fact that the claimant had not received the response to her SAR when she stated her grievance on 9 January 2018 was thought by the claimant to be in any way an explanation for her not referring in her grievance to the stroking by Mr Haslam of her hand, if it had in fact occurred and was in fact a concern to her. Secondly, the claimant's grievance was plainly aimed at getting her moved away from the management of Mr Haslam. That was not stated as such in the grievance, but it was clear from for example the email from the claimant at page 736, which she sent on 10 November 2017 to Mr Wilding and Ms Kempton, in which she made it clear that she saw the cause of her ill health as being her line management, from whose management she sought to be moved. (It was also clear from the email at pages 752-753 to which we refer in paragraph 186 below.) Thirdly, the claimant did not need to see what was in her SAR to know that it was said to her in April 2017 that she was on track to receive a less than good rating in her PDR for that year (2017) if she continued to perform in the manner that she had

performed so far in that year (2017). Fourthly, the claimant said in the place in her grievance where one would have expected it to be, i.e. at page 785, several things about the meeting at which she discussed the flirty customer that Mr Haslam agreed she had raised with him, but made no reference at all to the alleged hand-stroking, and yet made strident criticisms of Mr Haslam. The passage was in these terms (the bold font being in the original):

> "I was receiving harassing, unwarranted and unwanted texts of a romantic nature from a customer. I didn't respond to the messages as I didn't know how I was able to respond acting as a BAE employee. This customer was significant to our contract. I approached Jim Haslam about this after a code of conduct brief and asked him what I should do. The response was to handle it however I felt was appropriate as it was outside of working hours. He commented that I could date people from BAE if I wanted too, how else are we meant to meet people. I felt this was very inappropriate and not relevant to my query. I felt very uncomfortable. I got the feeling he was implying that I could date him, by the tone used and as we are the only two single people in our age range.
>
> **I felt this was insulting and harassing behaviour and would not have been said if I was male. This is an act of discrimination and is unlawful under the Equality Act 2010**
> **Witnesses – Andrew Green (Andrew Green was not in the meeting when this occurred but I discussed with him what had happened when I came out of the meeting)**"

77 Also, the claimant referred in her grievance to an assault by spanking which she interpreted at the time (which she said was in 2012) and subsequently as a sexual assault which must have been traumatic. At page 794, as part of her grievance, she wrote this:

> "Whilst on secondment at Christchurch a customer serving in the Army [name given], violently grabbed me by the arm pulled over a chair and slapped me hard several times on my backside, causing me to scream in pain and distress. I went to HR in tears about the abuse and what I felt was a sexual assault and I was told there was nothing the business would do about this and if I went to the police they wouldn't support me, that I should think about what it could do to my career. No one intervened. I felt and still feel violated abused and humiliated about this attack. There were several witnesses to this assault."

78 Thus, another of the justifications given by the claimant in cross-examination for not referring in the grievance to the hand-stroking by Mr Haslam that she said had occurred, namely that she did not feel comfortable referring to it, was inconsistent with her reference to what had been comparatively speaking a much more obvious and obviously distressing sexual assault.

79 Mr Green then put it to the claimant that there was nothing in the detailed notes of the grievance hearing conducted by Mr Pegg recording anything remotely like an allegation of hand-stroking by Mr Haslam. The (only) relevant part of the notes was at pages 968-970. There was indeed nothing there to the effect that the claimant had referred to Mr Haslam stroking the claimant's hand, despite there being a record there of the claimant having referred in detail to the alleged text message of the customer. When Mr Green put it to her that there was at that point the possibility of referring to the hand-stroking but that she did not do so, she said this (as noted by EJ Hyams):

> "I did. I demonstrated with the permission of Dawn Berridge what happened."

80 When Mr Pegg gave evidence, we asked him how detailed and accurate the notes of his grievance hearing with the claimant were, and he said that they were "highly accurate". The hearing had commenced on 23 January 2018, had then (see paragraph 213.1 below) been adjourned so that the claimant could complete her reading of the material that had at that time only recently (see paragraph 232 below) been disclosed by the first respondent in response to the claimant's SAR, and had then resumed on 8 February 2018. Mr Pegg said that he had gone through all of the notes made of meetings he had conducted, which of course included the hearing of 23 January and 8 February 2018. The notes had been made by Ms Keeton, who was the note-taker for his interviews as well as those of Mr Markham, and the note-taker at the hearings of 23 January and 8 February 2018. Mr Pegg said that he had had to make only one correction to them, which was to swap one reference to AD (Ms Dewhurst) to one to AP (him). He said that he gave the claimant the final version of the notes of the meetings that he had conducted when he gave her in person the outcome of his investigation of her grievance. The claimant could not recall whether or not she had received the notes with the outcome letter, but she did subsequently (on the final day of the hearing with the parties present, after closing submissions had been exchanged) produce an email from her dated 2 February 2018 in response to one to her enclosing the notes of the hearing of 23 January 2018, in which she said:

> "I don't agree with the notes sent. I need time to make corrections. I will meet with Dawn Berridge to identify the missing quotes and inaccurate quotes, also I think there are a few people's names that were misheard. There is quite a lot that needs to be done on this I will get back to you in due course".

81 However, she did not (the parties agreed) ever produce any corrections in writing (or otherwise) of those notes. The notes of Mr Pegg's resumed hearing of the claimant's grievance on 8 February 2018 were at pages 1009-1040, and they did not include any reference to the notes of the hearing of 23 January 2018.

82 At the same time as producing the email exchange to which we refer at the end of paragraph 80 above, as described in paragraph 36 above, the claimant "disclosed" (to use the word used by Mr Curtis, who was the conduit for the disclosure), what appeared to us to be two separate WhatsApp message exchanges of that day, 12 February 2021, between the claimant and Ms Berridge. The first was in these terms (and these terms only; we refer to the claimant as "C" and Ms Berridge as "DB"):

> "C: Can you talk? X
>
> DB: Yes
>
> C: Hey dawn Andy Pegg has testified to me not demonstrating on you what happened with Jim Haslam.
>
> (Missed video chat
> Tap call back)
>
> DB: Hi Vicki, I'm confused as to what that means hun. Are you ok?
>
> C: Do you remember when I stroked your hand in the grievance to demonstrate what happened with Jim
>
> DB: Oh yes. He's saying you didn't do that? [Emoji indicating negative surprise]
>
> C: Yep!
>
> DB: [Five emojis indicating angry swearing.]
>
> C: I know
>
> DB: Begs the question of how reliable the rest of his testimony is? How much more has he apparently forgotten?
>
> C: He has just stated under oath that it did not happen."

83 The second exchange was in these terms:

> "DB: [Ms Berridge's personal email address]
>
> C: Would you be happy for me to use the messages between us about we just [sic] discussed
>
> (Audio call
> 2 mins)

C: Thank you dawn for letting me use the messages I will only submit if you are sure? Xx

DB: Absolutely, I haven't said anything untrue to so nothing to hide."

84 The claimant had procured the giving of evidence by her mother, Mrs Belinda Scott, and a neighbour, Mr David Wright, to support her evidence that Mr Haslam had stroked her (the claimant's) hand. Mrs Scott's witness statement (which she signed on 22 October 2020) contained this passage:

"11. When Vicki was around 31 years old, I recall a time in November 2016 when Vicki came around to our house again unexpectedly. She was very quiet and after her dad had gone to bed she told me that her senior boss, Jim Haslam, had touched her hand in a provocative manner earlier that week and made inappropriate suggestive comments. She told me that she had asked Jim for his advice regarding an issue with a customer. She appeared bewildered and said she didn't know what she thought or felt about it apart from how awkward it was. We discussed how inappropriate it was and how uncomfortable it made her feel. She said she was very confused as to why he thought it was okay to touch her and why he was talking about dating people, let alone people in the company. I remember it being around bonfire night as our dog was cowering next to us because of fireworks.

12. Vicki asked me not to tell her father as she didn't think he would react well to yet another incident that wouldn't have happen[ed] to a man.

13. I agreed that it probably wouldn't be the best idea to tell her father as I thought he would be angry. I told her that she really needed to report it or leave. She said she didn't want to report it as every time she had reported any issues things were never resolved and ended up being worse, often ending with threats either on her career or even criminal action against her."

85 Mr Wright's witness statement (which he signed on 22 October 2020) contained this passage (references to "Dan" being to Mr Wright's partner, with whom and whose parents Mr Wright lived next door to the claimant's house):

"4. In November 2016 Dan's father was helping Vicki remove an old shed from her garden. Vicki called me from her car on the way back from work. She told me that her senior boss, Jim, had touched her hand in a provocative manner earlier that day. In response, Vicki pulled her hand away. Vicki said that she had no interest in Jim in that way and was surprised that he had done this, as she had given him no reason to think that she liked him in that way.

5. I was shocked by what Vicki had told me and suggested that she should tell someone at work as this was inappropriate. Vicki stated that she hoped it would not happen again and wanted to forget about it as if she made a complaint nothing would be done about it and this would make her situation at work unbearable.

6. When Vicki got home, we had a bonfire in her back garden to burn her old wooden shed. We discussed what had happened between her and Jim in a lot more detail and Vicki was in shock and confused about what had happened and repeated a few times that she really did not know what to do about it. She told me then that the context of her meeting with Jim was to discuss that a customer had been contacting her outside of working hours regarding non-work matters and that this had gotten out-of-hand. She also told me that when Jim stroked her hand, he had said words to the effect of 'how else are we supposed to meet people if we cannot date people at work'.

7. Dan, his parents and Vicki were at this bonfire. Whilst they were around, Vicki did not discuss this incident with them, although I told my partner about it later knowing that Vicki would not object to me doing so as she and Dan are also friends, although not as close as Vicki and I."

86 In addition, the claimant said this in paragraph 94 of her witness statement (which she signed on 26 October 2020):

> "I never put this in writing as I was so nervous what people would think of me. I did explain and demonstrate what happened at the meeting with JH during my grievance hearing on 23 January 2018."

A discussion

87 A number of the claimant's claims relied on the proposition that Mr Haslam had by way of a sexual advance stroked the claimant's hand in a meeting towards the end of 2016. That had led to a claim of sexual harassment within the meaning of section 26(2) of the EqA 2010 but in addition it was asserted by the claimant that a number of the things that Mr Haslam (and, surprisingly, Mr Archibald) had done had been influenced by the claimant's rejection of Mr Haslam's claimed advance and were therefore harassment within the meaning of section 26(3) of that Act.

88 We were therefore initially surprised that the claimant was saying that Mr Haslam had stroked her hand towards the end of 2016 but had not included it in her detailed grievance (which was at pages 782-796, in a single document with single line-spacing, and which enclosed 127 pages of copies of documents to which in some cases the grievance document referred only briefly, thereby

simply incorporating what was in those further documents), especially given the factors to which we refer in paragraphs 76-78 above. The claimant's explanation for not including it in her grievance did not make sense to us, given the factors to which we refer in those paragraphs.

89 In addition, the factors to which we refer in paragraphs 79-81 above added to our doubt about the accuracy of the claimant's evidence on this issue but introduced a further factor, which was that the claimant was now asserting that a highly material matter was not recorded in the detailed notes of the grievance hearing conducted by Mr Pegg. We therefore ensured that when he gave oral evidence, which was during the morning of Friday 12 February 2021, Mr Pegg was asked (1) whether or not the notes were accurate, and to what extent they were a complete record of what had been said during the grievance hearing, and (2) whether or not he recalled the claimant describing Mr Haslam stroking her hand. We have in paragraph 80 above recorded Mr Pegg's positive answer to the first question. His answer to the second question was (as noted by EJ Hyams) and was only: "*No, that was never mentioned*". The claimant justified the introduction of the WhatsApp messages set out in paragraphs 82 and 83 above on the basis that she did not realise until Mr Pegg gave evidence orally that he was saying that she did not say during the grievance hearing that Mr Haslam had stroked her hand.

90 In fact, the claimant knew from the time when she was cross-examined in November 2020 onwards that the first respondent was challenging her evidence, in paragraph 94 of her witness statement as expanded on by her orally in cross-examination, of what had occurred during the grievance hearing conducted by Mr Pegg on 23 January 2018. She also knew that there was no record in the notes of that hearing which indicated in any way what she was now (in her witness statement and her oral evidence given to us) saying had happened in that hearing by way of her referring to Mr Haslam stroking her hand and demonstrating on Ms Berridge how he had done so. The claimant must therefore have known, or at least with reasonable diligence would have realised, that it was necessary, if she wanted Ms Berridge to give evidence to support her (the claimant's) evidence in this regard, to call Ms Berridge to give evidence in person if Ms Berridge's evidence were to carry any weight.

91 Thus, we could see the force of the assertion of Mr Green on behalf of the respondents that the claimant was attempting to put before us a document (the message exchange) which was on its face corroboratory and which the claimant could not reasonably have asked us to admit by way of oral evidence at the late stage of the proceedings when the message exchange was introduced, i.e. the last day of the hearing with the parties present.

92 However, as we say in paragraph 36, above, we decided to admit the evidence and to assess its weight in the light of that factor as well as in the light of the fact that the evidence was in the nature of a witness statement which was not signed, the maker of which was not cross-examined.

93 When, however, we examined it closely, we were struck by the fact that the exchange showed the manner in which the claimant had sought the assistance of Ms Berridge, and that it showed that she had not asked a relatively neutral question of Ms Berridge, such as whether or not Ms Berridge recalled the claimant saying anything at the grievance hearing before Mr Pegg about Mr Haslam stroking her (the claimant's) hand. Rather, she had immediately said what it was that Mr Pegg was denying, and in respect of which she wanted Ms Berridge to give some indication which supported her (the claimant's) evidence. In addition, the claimant was saying something about demonstrating on Ms Berridge's hand, which Mr Pegg was not (if EJ Hyams' notes were accurate) asked about.

94 In any event, the claimant's request to Ms Berridge to cast her mind back to the grievance hearing at which it was now being said by the claimant she had referred to Mr Haslam stroking her hand, was made more than three years after that hearing. The claimant had suggested to Ms Berridge what she wanted Ms Berridge to remember, and Ms Berridge had then "remembered" it.

95 That in itself showed that what Ms Berridge had said in the message exchange and on which the claimant relied was of dubious evidential value. It also indicated the manner in which the claimant might have sought the evidential support from her mother (Mrs Scott) and neighbour (Mr Wright) to which we refer in paragraphs 84 and 85 above. When he was cross-examined, Mr Wright agreed that he was a good friend of the claimant and that he was trying to help her. He was not asked, and therefore did not say, when the claimant asked him to make a witness statement and how she did so. Those questions might well have been precluded by litigation privilege, of course, but in any event there was no evidence before us about those things. The same was true of the evidence of Mrs Scott.

96 Mr Haslam was adamant in cross-examination that he did not stroke the claimant's hand, either on the date alleged or otherwise.

97 When considering whom to believe here, we found what Leggatt J said in Leggatt J in *Gestmin* as set out in paragraph 32 above to be supportive of our own initial conclusion on the matter, which was that if Mr Haslam had indeed stroked the claimant's hand in November or December 2016, then the claimant would have referred to it in her grievance of 9 January 2018 and that she had created the memory of referring to it in the grievance hearing before Mr Pegg. We found Mr Pegg to be an honest witness, doing his best to tell the truth, and we accepted his evidence that he had no recollection of the claimant referring at any time to Mr Haslam stroking the claimant's hand. We also accepted his evidence that the grievance hearing notes were accurate and sufficiently comprehensive. Thus, those notes strongly supported the proposition that the claimant did not in fact say during the grievance hearing that Mr Haslam had stroked her hand.

Our conclusion on the factual issue raised in paragraph 3 of the Scott Schedule

98 In fact, we found Mr Haslam also to be an honest witness, doing his best to tell us the truth, but in this context the factors to which we refer in the preceding paragraph above were determinative of the third allegation in the Scott Schedule: we concluded on the balance of probabilities, given those factors, that Mr Haslam did not stroke the claimant's hand as claimed in that paragraph. The fact that we found Mr Haslam to be an honest witness, doing his best to tell us the truth, merely confirmed that conclusion.

The fourth allegation in the Scott Schedule: Mr Archibald's sending a text to the claimant's emergency mobile telephone contact number on 1 February 2017

99 The fourth allegation in the Scott Schedule related to the agreed fact that Mr Archibald had contacted the claimant's mother while the claimant was absent from work because of sickness on 1 February 2017. The parties agreed that the contact took place by a mobile text message (only) via the mobile telephone number in the first respondent's HR records as the claimant's emergency contact number, and that the text message was responded to by the claimant's mother. The issue here was whether in contacting the claimant on that day in that way, Mr Archibald treated the claimant less favourably than he would have treated a man (that was the way that the claim was put in paragraph 42 of the Scott Schedule, and we saw nothing additional in the claim stated in paragraph 4 of that schedule, which was of harassment, the protected characteristic being the claimant's sex; in what follows, for the reason given in paragraph 238 below, unless otherwise stated we treat the two claims of harassment and direct discrimination concerning the same protected characteristic interchangeably as they were in our view here in most cases equivalent). The only possible criticism that might be levelled at Mr Archibald in the circumstances was that before contacting the claimant's emergency contact number, Mr Archibald had missed out the step of contacting Occupational Health (the penultimate bullet point on page 1276) to see whether there were any "welfare concerns which could explain the un-notified absence". The full sequence of events was shown at pages 221 and 222. Mr Archibald's evidence was firmly to the effect that he would have treated a male employee in precisely the same way. There was nothing in the circumstances which would have justified drawing the inference to the contrary. As a result, but also because we accepted Mr Archibald's evidence in this regard, especially when seen against the background of the documents at pages 221 and 222, we accepted that when he contacted the claimant's emergency contact mobile number by text, Mr Archibald treated the claimant in precisely the same way as he would have treated a man.

Allegations numbered 5, 6, 7, 11, 12 and 24 in the Scott Schedule; the ALIS event of February 2017 and the subsequent criticisms of the claimant's performance made by Mr Haslam and Mr Archibald

100 Mr Haslam's witness statement contained the following description (which we accepted) of the background to the allegations numbered 5, 6, 7, 11 and 12 in the Scott Schedule:

> '**February 2017 Event and performance concerns**
>
> 15 One of the key functions of UKLI team is to run "events". These events are a series of workshops/simulations of real-life incidents that test the ALIS system. Representatives of Customer [sic] work through the simulations to see how ALIS is integrated into Customer systems, regulations and processes. The UKLI team then compose a comprehensive report containing all of the observations from the event, feedback received from the attendees, and provide this to the Customer for their consideration. The team typically run two 4.5 day events per year which last for around one week each, with about 12 weeks of preparation and typically 4 weeks of write up. Several smaller events of typically 2 days are also designed and run which focus on specific aspects a small number of attendees. [Sic]
>
> 16 At the time of these events, 100-150 people (including UKLI team personnel) travel from all over the world to attend these events and a lot of time goes into the planning to make sure that they are successful. I have been involved in organising and delivering around 20 of these events, and there is a structured process in place for their design."

101 The relevant allegations summarised in the Scott Schedule (numbered 5, 6, 7, 11, 12 and 24) were, in order, in these terms (all of which were claimed to be harassment within the meaning of section 26(1) with the protected characteristic being sex; the first three, because they were separately referred to in paragraphs 43, 44, and 45 of the Scott Schedule, were also claimed to have been directly discriminatory because of the claimant's sex; the final one (number 24) was in substance if not in precise terms repeated in paragraph 50, as being also direct discrimination because of sex, and paragraph 54 as being also direct discrimination because of disability):

> 101.1 "Mr Haslam chastised the Claimant in relation to the attendee log-in sheet."
>
> 101.2 "Mr Haslam said to the Claimant 'Keep your hair on' and 'Oooo is it that girl time, put your handbag away'."

101.3 "Mr Archibald told the Claimant that she should have been cleaning up the tea and coffee after the delegates."

101.4 "The Claimant only been provided with two days by Mr Haslam to complete the Event Report." (Sic)

101.5 "Mr Haslam unfairly criticised the Claimant in relation to her work on the Event Report within her PDR."

101.6 "The Claimant was singled out and subjected to a Performance Development Review" on or from 6 April 2017 to 19 April 2018.

102 Mr Haslam's witness statement contained the following paragraphs concerning the first two of those allegations:

'29 I note that at paragraph 17 of her Grounds of Claim, Vicki alleges that I "chastised" her for failing to complete the attendee spreadsheet during the event. There were two spreadsheets in operation during the event, one for recording attendee details (such as contact details, lunch orders, and which days participants were attending) and a separate one containing the IT ALIS account details each event attendee would need. The responsibility for this second spreadsheet lay with Vicki as the ALIS Admin Theme Lead. Given the lapse of time, I cannot remember the exact details, but it is likely that Adam Garner (a graduate placement employee) was working on the attendee spreadsheet and Vicki was working on the ALIS accounts spreadsheet. It is possible that I got confused as to who was working on which spreadsheet, and in reviewing them with Vicki, I may have pointed out some errors or omissions that were in-fact [sic] Adam's. I would not characterise this as "chastising" though.

30 In relation to Vicki's allegations that only certain employees with permanent staff badges (including Vicki) were allowed to escort foreign national attendees between the security gatehouse and the event, usually at least two members of staff were responsible for this, but due to a communication issue, Vicki initially had to do this on her own on the first day of the event. The first time I saw Vicki that morning, she was upset and told me that she had been under a lot of pressure and someone on the team had been rude to her. I did not say to Vicki "keep your hair on" or "Ooo, is it that girl time, put your handbag away". These are simply not the sort of phrases I would use whether in work or in my personal life. I was actually supportive of Vicki and made sure immediately that other people went to assist her. At the end of day debrief, the issue of escorting people was raised, and we made improvements to resolve the issue for the rest of the week."

103 Having heard and seen Mr Haslam give evidence, and having taken into account (1) what Mr Bush was recorded to have said to Mr Markham as set out in paragraph 53 above, and (2) our perception of Mr Haslam recorded in paragraph 54 above, we came to the conclusion that whatever Mr Haslam said to the claimant about completing the signing-in sheet as complained about in paragraphs 17 and 18 of the particulars of claim and paragraph 5 of the Scott Schedule, it had nothing whatsoever to do with the claimant's sex. He treated her in precisely the same way as he would have treated a man in that regard.

104 As for the next allegation, we saw that at pages 278-279 there was an email which the claimant had sent to Dr Banks on 22 March 2017 in which she had written this:

> "Hi Gareth,
>
> As you know I am not happy at work at the moment, I dread coming into work each day and it is only getting worse!
>
> I feel like I no matter what I do, or don't do, I will have done something totally unacceptable in someone's view. A prime example of this was the first day of the event when I was running round in the rain trying to greet, check in, give directions, escort and welcome over 100 guests to the site alone. After several calls to the MISC, to individuals in the MISC from myself and reception I was still being left an my own. Only then to be told it was my fault as I didn't communicate properly. When I finally made it into the MISC I was told that the Sign in sheets were wrong and I needed to sort them. When I explained that I didn't do them I was confronted with, well you know how to do them, so you should do it. I replied with sorry I haven't got time maybe you could do it or ask someone else to help, was told to keep my hair on and Ooooo is it that girl time put your handbag away."

105 We agreed with Mr Haslam that those were not the sort of words he would have used, and we accepted his evidence that he did not use those words. That was troubling, because it suggested that the claimant had created a memory of something that had not happened not long after the event when it was supposed to have happened. It was submitted to us by Mr Green that the claimant had a tendency to think of something as having been said in a particular way, by way of almost a characterisation of it, or a paraphrase of it, and then to believe that the characterisation or paraphrase was the reality. We accepted that submission.

106 In fact, the exchange, even if it occurred precisely as the claimant said in the email at pages 278-279, showed that the claimant refused to change the sign-in sheets because she had not created them, which was a rather surprisingly unhelpful approach to take, and certainly showed that the claimant was in no way intimidated by Mr Haslam's request to "sort them". In any event, we were

satisfied on the balance of probabilities that the manner in which Mr Haslam spoke to the claimant about the signing-in sheets had nothing whatsoever to do with her sex, and that he would have said the same thing in the same way to man.

107 Mr Archibald's response to the allegation numbered 7 in the Scott Schedule, set out in paragraph 101.3 above, was in paragraph 15 of his witness statement, which was in these terms:

> "An Event took place in February 2017 and I thought it had gone well. I did not and would not have told Vicki that she should be cleaning up after the delegates. We had a four person facilities team who were responsible for clearing up at each coffee break and at the end of their day as their main task. It is possible that I may have said something along the lines of that team leads should ensure that they kept their rooms tidy but this would not have been specifically directed at Vicki but would have been addressed to all 5 theme leads."

108 We accepted that evidence of Mr Archibald, whom we also found to be an honest witness, doing his best to tell the truth. We saw that the claimant's witness statement contained, in paragraph 142, her evidence that during the event, she was "very busy" and that Mr Archibald said to her that she should clean up after the one hundred plus delegates had finished their tea and coffee by taking the empty cups to the kitchen, even though she was extremely busy ensuring more important tasks were completed in relation to the event. We concluded that the claimant had in saying that misunderstood the position. Both Mr Archibald and the claimant repeated the effect of what was in their witness statements on this issue when cross-examined. We concluded in this regard that what Mr Archibald said was as he remembered it, and had nothing whatsoever to do with the claimant's sex.

<u>The completion of the event report</u>

109 As for the completion of the event report, which was the subject of paragraph 11 of the Scott Schedule, that issue was linked with the next one, in paragraph 12 of that schedule. Those allegations are set out in paragraphs 101.4 and 101.5 above. The claimant's evidence in this regard was not borne out by the documentary evidence, as referred to by Mr Haslam in paragraph 36 of his witness statement. Paragraphs 40 and 41 of Mr Haslam's witness statement were in these terms:

> "40 After many requests by me, Vicki finally checked in the Report on Wednesday 29 March 2017, at which point I saw that there were large sections that Vicki could and should have completed that were unfinished or hadn't been started. I took the Report over from Vicki and finished it by working until the early hours of that morning and most of the next day, getting it reviewed and signed so that we could

make the contractual delivery deadline for the whole report, Friday 31st March.

41 In conclusion, I believe that Vicki did have the time to complete the work (certainly not just 2 days as she suggests), but did not communicate properly or to the expected level, did not ask for help, and did not finish the Report until the day before it needed to be delivered to the Customer, despite many polite but direct requests."

110 That led us to ask at the end of the four days in November 2020 when we first heard evidence in the case, i.e. on 5 November 2020, whether the first respondent could disclose and put before us the report in the form in which the claimant sent it to Mr Haslam on 29 March 2017. That was done, or at least it was the first respondent's case that it was done, between then and the resumption of the hearing on 8 February 2021. Mr Haslam was cross-examined on the document that he said was the one that the claimant had sent. That document was at page 1387 onwards.

111 Mr Shannon said that he had seen the version that the claimant was working on in March 2017 and that (from memory) it was much more complete than the document at page 1387 onwards. The claimant agreed that the document at page 1387 was indeed incomplete. It was her evidence that she had sent Mr Haslam another one, although she did acknowledge in cross-examination that it was "not [her] best work".

112 Mr Haslam pointed out that it had been very much in his own interests for the version that he worked on from 29 March 2017 onwards to be as complete as possible, and he said that the one that he put before us, at page 1387 onwards, had been saved by him in the first respondent's Workspace digital storage and sharing area. He said too that while it was the claimant's case that she needed his input into the report before she could do what she needed to do, she did not need his final input, which was going to be appended in the form of Excel spreadsheets at the end of the report, in order to work on the body of the report, which was in the form of a Word document. He also said that the claimant could without having in her possession those spreadsheets and, if she had been performing competently, would without having in her possession those spreadsheets have completed her draft of the report to a far higher standard than that of the document at page 1387 onwards.

113 Having

113.1 heard that evidence and seen the documents referred to in paragraph 36 of Mr Haslam's witness statement,

113.2 considered with care what the claimant said about the circumstances in paragraphs 155, 163, and 166-171, 177-180, and 193 of her witness statement, and

113.3 heard oral evidence on the matter from Mr Haslam, the claimant and Mr Shannon,

we concluded that Mr Haslam genuinely and with objective justification believed that he had given the claimant much more than two days to complete the event report, and that his criticism of her performance in doing what she did towards the completion of that report was objectively justified and had nothing to do in any way with the claimant's sex, or her disability. For the avoidance of doubt, we accepted Mr Haslam's evidence that the document at page 1387 onwards was the actual version that the claimant sent him on 29 March 2017 and that she did not need to have in her possession the spreadsheets that he was going to insert at the end of the report as appendices, containing his detailed input, in order to complete the Word document which was the event report.

Allegation 8 (and 46) in the Scott Schedule; saying in front of a customer "nobody said the project would keep you on" was discriminatory because of sex

114 The eighth allegation in the Scott Schedule was that on 27 February 2017, "Mr Archibald said to the Claimant in front of a customer 'nobody said the project would keep you on'." This was the subject of paragraph 130 of the claimant's witness statement, which bears repeating in full:

> 'The two week period between 6 and 17 February 2017 was known as 'engineering week'. I was working with two of our naval customers CPO Craig 'Taff' Shannon and PO Kyle Hope. One of the days I went over to lunch with them at the canteen. SA joined us at the table. PO Kyle Hope and CPO Craig 'Shannon (Taff), where [sic] discussing the possible relocation of the next event. I stated to the customers that I would like to move with the project, to which SA responded, 'nobody said the project would keep you on'. This was very embarrassing and made me feel extremely uncomfortable and worthless. I don't think that SA would have made similar comments to a male engineer in front of customers. When we were returning to the office PO Kyle Hope commented on SA's behaviour towards me asking if I was ok. He said that he thought he was very condescending towards me, and that SA clearly didn't like me. I was very upset and embarrassed. His exact words were "what a condescending prick". See text messages between PO Kyle Hope and myself (AD 204 - 205).'

115 In fact, the text exchange which was copied at pages 204-205 of the additional bundle showed that it was the claimant who had first written to Mr Hope the words "condescending prick". She wrote "do you remember telling me you thought Steve was a condescending prick after he was horrible in the canteen". The exchange was initiated (it was possible to see from one of the texts on page 205) just before the hearing by Mr Markham of the claimant's appeal

against the dismissal of her grievance, which took place on 9 May 2018, i.e. long after the alleged event. Mr Hope's responses in no place on pages 204-205 of the additional bundle confirmed that he had in fact said that Mr Archibald was a "condescending prick".

116 Mr Archibald's evidence in his witness statement on this was in paragraph 26, which was in these terms:

> 'I am aware that Vicki alleges during a conversation that involved two members of the customer on 22 February 2017 that I said "nobody said the project would keep you on". I do not remember this conversation on that date. I do remember a conversation in the theme room a week or so later at which two members of the customer were present. We had a general chat about when the next Event would be and I said something like "we are not on a contract and the first thing we need to get is a new contract". We discussed where the next Event could be, possibly somewhere in Portsmouth or Yeovil or even in the United States. I said something similar to "it may not matter where the next one is as we may all be out of a job if we don't get the new contract" suggesting that if we did not get a new contract we would have to be redeployed as is normal within the Business. The Project Manager had also previously briefed that the customer was not fully aware of all the refurbishment delays etc. so we should be careful what was said in front of them, so that conversation with them present may have sounded a bit vague to them.'

117 Mr Archibald's oral evidence was entirely consistent with that paragraph. Mr Haslam said that the contract's renewal was not agreed until long after the event of February 2017 and that he had been heavily involved in its renegotiation.

118 Having considered all of the evidence on this issue, we concluded that Mr Archibald's recollection in paragraph 26 of his witness statement was accurate, and that what he said about the situation had nothing whatsoever to do with the claimant's sex.

Allegation 9 (and 47) in the Scott Schedule; return to work interview

119 Allegation 9 was in these terms: "Unfairly criticised by Mr Archibald for having not completed the return to work meeting" in February 2017. Mr Archibald's witness statement evidence on this allegation was in paragraph 4, which was in these terms:

> "I never inappropriately criticised her for not completing self-certification forms. At no time whilst I was her Line Manger did she complete her self-certification (which is company policy) which would have formed the basis of any return to work discussion. I did on occasion remind her that she must complete self- certification forms."

120 In this regard, we looked at the documents at the following pages:

120.1 257, where Mr Archibald asked the claimant to provide self-certification forms for a number of absences in the following manner:

> "Can you please provide self-certification forms for the following as soon as possible. We also need to do return to work so that we have all this squared away so there are no comebacks on us.
>
> Can you book one of the rooms for an hour today/tomorrow and we will go through this on the phone";

120.2 161 and 179, which were pages from the claimant's contract of employment, where this was said:

> "6.2 You (or someone on your behalf) must notify the person to whom you report (or such other person, entity or third party service provider as the Company may direct) as soon as reasonably possible on your first working day of absence. You must state the reason for absence and the date on which you expect to return.
>
> 6.3 On your return you must submit a self-certification form in accordance with current Company guidelines.";

120.3 279, where the claimant wrote on 22 March 2017 to Dr Banks that "Even though the reason my sickness forms have not yet been received by Steve is due to not having had a RTW interview"; and

120.4 1280-1281, where this was said under the heading "5.5.3 Return to Work Discussions":

> "Each Business will establish a process to support return to work discussions when employees return to work after a period of sickness absence. The minimum requirements of such processes are:
>
> o The line manager meets the employee to discuss the sickness absence and the employee's fitness to return to work as soon as possible upon the employee's return to work, or in any event within the first 48 hours of the employee returning to work. If the line manager is unavailable during this period, the line manager should make arrangements for a suitable alternative manager to conduct the return to work discussion.

- Typically, a structured process is followed and a Return to Work Discussion form is completed, using standard form SA7 which is available in the UK Sickness Absence & Ill Health Capability Supporting Materials, and forwarded to a Business nominated point of return. However, where the absence has been short in duration and there are no issues regarding absence, this may be a quick discussion between line manager and employee and the standard form SA7 is completed."

121 There was no "SA7" form in the bundle. There were, however, at pages 201 and 202 copies of a "Company sickness absence self certification form" that had evidently been completed by the claimant and her line manager (who would not have been Mr Archibald; the manager's signature was in fact indecipherable) on 10 October 2016. The period of sickness was 3-4 October 2016, so the claimant's belief that a self-certification form was completed at the return to work interview was supported by that document. In addition, the documents to which we refer in the preceding paragraph above were not at all conclusive about the process to be followed.

122 The problem as far as we were concerned was that one would expect a self-certification form to be completed by an employee immediately on his or her return to work, and before a "return to work" interview to enable the interviewer to know in advance of the interview what it was that the employee was certifying was the cause of the absence. We would not expect to see a self-certification form of illness to be completed in collaboration with a line manager.

123 We therefore concluded that Mr Archibald's request to the claimant for completed self-certification forms before he carried out a return to work interview was entirely in accordance with what we would have expected to happen and, so far as it was relevant, common sense. As a result, and having heard and seen Mr Archibald give evidence, we were satisfied on the balance of probabilities that what he did in regard to the claimant's return from sickness absences, by reference to the completion of self certification forms and arranging a return to work meeting, had nothing whatsoever to do with the claimant's sex. It was also in no way wrongful.

Allegation 13 (and 51) in the Scott Schedule: reference to leaving to get promotion was discriminatory because of the claimant's sex

124 The thirteenth allegation in the Scott Schedule was in these terms: "In response to the Claimant suggesting that she wanted a promotion, Mr Archibald suggested that the Claimant could leave the Respondent's employment." That was stated in the following way in paragraph 158 of the claimant's witness statement:

> "[On 8 March 2017] SA and I were having lunch and I asked SA about my grade, indicating that I wanted to be considered for promotion. In response SA suggested that if I wanted a promotion I could leave BAE. I felt completely humiliated and worthless by SA comment. I was also surprised as he had just given me a positive PDR and DV Report. I do not think that SA would have dismissed a male engineers request for a promotion in the same circumstances."

125 Mr Archibald's response to this allegation was in paragraph 27 of his witness statement, which was in these terms:

> "I did not tell Vicki on 8 March 2017 that if she wanted a promotion she should leave the Business. My recollection of the discussion is that Vicki was looking for a promotion in her existing role. The UKLI project itself did not generally generate many opportunities for promotion so I said to get a promotion she might have to move roles and that some people moved companies to get promotions. I did not say that she would have to".

126 In fact, there was in the bundle a message exchange between the claimant and Ashley Straw which took place on 22 March 2017, in which at pages 270-271 the claimant is shown to have acknowledged to Mr Straw that while she thought that Mr Archibald had said it in a way that she did not like, it was "true" that "the best way to get a grade rise is to move [roles]", and, by implication given the words used at the bottom of page 270, at least sometimes by leaving one employer's employment and going to another employer.

127 Taking all that evidence into account, we came to the conclusion on the balance of probabilities that what Mr Archibald said in paragraph 27 of his witness statement was true and that he had been in no way influenced, in saying what he did as recorded there, by the claimant's sex.

Allegation 14 (and 52): instant message sent by Mr Haslam to the claimant on 22 March 2017 was discriminatory because of the claimant's sex

128 Allegation 14 was about the following exchange by the first respondent's "instant messaging" system:

> "**Haslam, Jim (UK) 10:44:**
>
> > hi vicki, everything ok? i was expecting you in frimley by now and i can't see any of those files in workspace yet. i suggest you put them in workspace immediately in whatever state they're in and then head up here
>
> **Scott, Vicki (UK) 10:46:**

> Yeah sorry I havent done anything to them this morning just got caught up in other things all those 5 min jobs time has just run away with me.
>
> **Haslam, Jim (UK) 10:47:**
>
> what 5 min jobs? the event report is your only priority"

129 We could not see, in the circumstances as we found them to be, i.e. that there was a need for the claimant to prioritise the completion of the February 2017 Event report (given in particular but not only what we say in paragraph 113 above), anything that was inappropriate in what Mr Haslam said in that exchange. In addition, we concluded on the balance of probabilities that Mr Haslam would have said the same things in the same way to the claimant if she had been a man.

Allegations of harassment, the protected characteristic being sex, and where indicated also direct discrimination, made in paragraphs 10 (and 48), 15, 16, 17 (and 49), 18, 19, 21 (and 40), 22 (and 41), 23 (said to be harassment with the protected characteristic being in addition to sex, disability), 25, 39, 55 (direct disability discrimination concerning the subject matter of paragraph 23) and 64-69 (which were claims of victimisation) of the Scott Schedule: concerning (1) the claimant's working hours, (2) the meeting of 6 April 2017 and the proposed informal capability action plan and related issues, and (3) the investigation into the question whether the claimant, by recording two meetings, had breached e.g. the OSA

130 Allegation 10 was that "The Claimant was [from February 2017 onwards] inappropriately questioned about her working times by Mr Archibald." Allegation 17 was that "[On or around 20 April 2017 t]he Claimant was inappropriately threatened with disciplinary action in relation to her working hours by Mr Archibald." This allegation stemmed from the refusal by the claimant to agree working hours with Mr Archibald (or anyone else on behalf of the first respondent), despite the wording in paragraph 8.1 of her contract of employment at pages 155 and 173, which was this:

> "8.1 You are required to work a minimum 37.0 hour week. Your normal hours of work will be communicated to you separately by the person to whom you report and will be available from your HR department. Lunch breaks will be unpaid and subject to local arrangement. The Company reserves the right to vary your working hours as necessary to meet the changing needs of the business."

131 The claimant argued that she was required to be present at the first respondent's workplace only during the core hours of 10:00 to 16:00, and she refused to accept that she was required to work set hours. This issue was then joined with the issue of the claimant's performance in relation to the February

2017 Event. Mr Haslam initiated the procedure relating to the latter, and the issue of the claimant's contracted hours was dealt with in the same procedure. Allegations 15, 16, and 19 (and, in fact, 24, the factual background to which we consider in paragraphs 109-113 above) in the Scott Schedule concerned that procedure and what occurred up to and including 16 May 2017. Allegation 18 was closely related and was that Mr Haslam's decision to cause the claimant's name to be added on 20 April 2017 to a list of employees with absence or performance issues was tainted by (in effect: see paragraph 238 below) sex discrimination. Allegation 21 was that on 16 May 2017, Mr Archibald told the claimant to "Shush". Allegation 22 was that Mr Archibald had said to the claimant that she was "not a proper engineer". We consider the factual elements of those allegations below in the course of considering the allegations concerning the performance management of the claimant.

132 Allegation 16 included an allegation that Mr Archibald told the claimant that a negative PDR would impede her employment prospects. Allegation 39 concerned the email at pages 315-316 and whether it was a grievance which Dr Banks had failed to deal with because of the claimant's sex. Given the reference in the email at pages 315-316 to the alleged statement of Mr Archibald which was the subject of allegation 16 of the Scott Schedule, we consider those issues (numbers 16 and 39) together below.

133 Allegation 25 was that when discussing the issue of her working hours over the telephone with Mr Margrett on 2 June 2017, when the claimant said that she had recorded the meetings of 16 and 30 May 2017, Mr Margrett called her "the vilest, most disgusting, immoral rude human being". We consider that issue after stating our findings on the factual parts of allegations 16 and 39 below.

<u>The circumstances which led to Mr Archibald having a meeting with the claimant on 6 April 2017 to discuss her performance</u>

134 In paragraphs 43-45 of Mr Haslam's witness statement he described what had happened before the claimant's meeting with Mr Archibald of 6 April 2017. We accepted those paragraphs in full, in part because of our conclusions stated in paragraph 113 above but also because we accepted Mr Haslam's evidence in them. They were as follows.

> "43. Following the February event and report write up in March, I asked Steve to conduct an objectives review with Vicki in April and provide feedback on her performance, as she had now been through a whole event planning, execution and write up cycle in the role of ALIS Admin Theme Lead, and had demonstrated performance and behaviours which Steve and I determined to be below the standard required for the role. The Company's Performance Capability Procedure requires the line manager to have performance discussions with the employee, and a discussion based around the PDR objectives was an appropriate way of doing this. At that time, all employees could expect

a mid-year PDR check-in with their line manager around July each year.

44 The main trigger for the performance concern was that Vicki had failed to deliver the ALIS admin Event Report annex in time and nearly caused us to miss a contractual delivery date to the customer. Vicki had also not communicated any problems she was having with the report. Steve and I had been talking to Andy Margrett (HR Manager) about the performance management process, and we were just starting to apply this. Although Vicki may feel that she was singled out, this was purely on the basis of her performance and was actually done with the intention of helping Vicki improve her performance going forward.

45 The performance review meeting itself was held on 6 April 2017 and was between Steve and Vicki. Steve was careful to get HR's comments on the summary of the meeting to send to Vicki the following day (pages 292 – 294). Vicki's overall PDR performance ratings would not have been entered into the system until the end of the year, this performance review meeting was intended to give her an indication of her current rating, and discuss how she could improve her performance and what the Business could do to support her in that so that hopefully she would improve and her mid-year and final year review rating would reflect that."

The meeting of 6 April 2017 and some related events after it up to and including 17 May 2017

135 While the first two sentences of paragraph 45 in that sequence were hearsay, they were consistent with Mr Archibald's evidence about the meeting of 6 April 2017, which was in paragraphs 6-8 of his witness statement. The subsequent paragraphs of his witness statement, up to and including paragraph 14, were relevant also to the events which occurred after 6 April 2017 and up to and including 16 May 2017. The whole of that passage was as follows.

"6 After the Event, I took some holiday. When I returned Jim Haslam communicated to me some of the issues he had faced in compiling the Admin Theme part of the Event report and in particular that Vicki had not done what he considered was necessary to enable him to complete it. He asked me to conduct a Performance Development Review ('PDR') with Vicki so that his concerns could be addressed with her.

7 As her line manager it was of course for me to conduct the PDR discussion. Before that discussion I took advice from Andy Margrett in HR and also, aware that Vicki had had a lengthy period of absence, contacted Occupational Health to discuss if there was anything that I

needed to be aware of. Occupational Health obviously could not provide any detailed insight but did suggest that they were available to help if required.

8 The notes of the PDR discussion are at pages 288 – 289 of the bundle. My objective was to understand with Vicki what the issues were which were preventing her from performing at the required standard and to put in place whatever steps were necessary to ensure that she did, including an Occupational Health referral if that is what she wanted. Vicki was not happy with the review in that she did not accept that she had a performance issue. I followed the review up with an email summarising what we went through.

9 Vicki was contracted to work 37 hours a week. In the PDR it was my understanding that we had agreed that her normal working hours should be Monday – Thursday 8.30am to 5pm and Friday 8.30am to 1.30pm. Each week line managers receive an automated email from our time management system, Open Options, which contains a weekly management report. In mid-April this report highlighted that Vicki owed 4.07 hours. As is my normal practice, if hours are owing, I sent an email to Vicki asking her to make up the time (pages 298 – 299). In my view this is perfectly normal management practice.

10 At the PDR Vicki did not accept that there was a performance issue and would not confirm what we discussed. HR had advised that the next step was for me to prepare a performance improvement plan and agree it with Vicki. Together with Jo Neary of our HR Case Coaching team we created a performance improvement plan ('PIP'). Jo specifically suggested adding a task around Vicki's presence/hours in the office and confirming that we were at the informal stage. On 11 May Jo reviewed and confirmed that the plan was ready and confirmed the process. I met with Vicki on 16 May to discuss the plan. The notes of that meeting are at page 318 of the bundle. The meeting did not go well. I explained to Vicki that following on from her PDR the next stage was to agree the PIP. I explained that we were at an informal stage and hopefully we would never need to get to any formal stage. She did ask what would happen if she did not agree the plan and I did say that the process might have to be moved to the next stage (formal) as is Company Policy. This was not a threat. I went on to explain the plan and that it would be used to monitor progress over the next three months. I explained that the plan would be used to gather evidence to prove to the business that there was an improvement in performance. I did not tell her that it would impede her employment prospects.

11 We went through each of the tasks on the plan. We discussed the maintenance of a daily log of her tasks. I explained that this task was

because in the past she had suggested she had 101 things to do and that we wanted to monitor the planned and not planned tasks. She did not agree with the task. She asked me if she had to email me as and when she went to the toilet which I found surprising.

12 We then discussed her normal working hours. As far as I was aware, we had agreed them at the PDR on 6 April. Vicki said she disagreed with them and that she did not always want to start at 8.30am. She commented that she was not a child. I asked her what the problem with the timings was but she would not tell me. I asked her if she was doing her 37 hours per week because there were indicators (e.g. missed deadlines, poor performance, time system reports) suggesting that she might not be. She responded by saying that I was treating her like a child and she felt I did not trust her. The meeting lasted approximately 35 minutes.

13 The following day, on 17 May, I received an email from her detailing her 'daily log' of the 16 May (including toilet breaks and getting drinks) with a note stating that the request is demeaning and another demonstration of how she was being harassed and bullied (page 323 – 324). I contacted the case coaching team as I was concerned and felt quite uncomfortable after our meeting. Case coaching advised me that this sort of reaction was not particularly surprising and I should ignore it and allow things to calm down. I did write to her and ask her to consider the tasks in the PIP (page 331), which I thought was reasonable, given I was based at another site.

14 We scheduled a further performance review meeting for 30 May 2017. I informed HR that I was uncomfortable holding meetings alone with Vicki and it was arranged that Debbie Kempton, Principal Engineer, would also attend."

136 We considered the claimant's evidence on this in paragraphs 198-215 and 227-229 of her witness statement. We saw that Mr Archibald referred in paragraph 15 of his witness statement to the allegations that he had told the claimant that she was "not a proper engineer" and that he had "shushed" her, but that was after he had referred to the meeting of 30 May 2017. The claimant said in paragraph 204 of her witness statement that he had said during the meeting of 6 April 2017 that she was "not a proper engineer". Mr Archibald denied that he had said that the claimant was not a proper engineer, or anything like it. He did (in paragraph 29 of his witness statement) accept that there was one occasion before 16 May 2017 when he was on a Skype call with a customer, discussing room requirements, when the claimant was sitting two desks away discussing something with Mr Andrew Green and what she was saying was incorrect (in his view) so, he said: "I raised my hand and indicated for her to hold on." He continued (in paragraph 29 of his witness statement):

> 'I finished the conversation I was having and turned round and spoke to both Andy and Vicki. I was not dismissing her but the information she was giving to Andy at the time was incorrect. I did not "shush" Vicki.'

137 The claimant's allegation in this regard was stated in paragraph 231 of her witness statement, which was as follows:

> "Later that day [16 May 2017] I was in a meeting with SA and AG. I raised a solution to an issue that my colleague AG had raised, however SA 'shushed' me whilst raising his hand in front of my face before I could finish my sentence. He has not done this to any of my male colleagues. Later, Jonathon Rose, told me that he raised the same solution with SA and was told it was a brilliant idea."

138 The claimant did not say what that "brilliant idea" was. No such "brilliant idea" was put to Mr Archibald in cross-examination. At page 993, there was a record of the claimant saying to Mr Pegg in the grievance hearing that he conducted on 23 January 2018:

> "He put his hand in front of my face to shush me and said I wasn't an engineer."

139 So, in the grievance hearing, the claimant ran together the two allegations of "shushing" and saying that she was not a proper engineer. She did not refer to the brilliant idea that she had had which Mr Archibald had rejected but which he had accepted was brilliant when Mr Rose suggested it.

140 Given those factors and the evidence that we had heard, we concluded that Mr Archibald did not when doing whatever it was that the claimant described as "shushing" her treat her any less favourably because of her sex, because (we concluded) he would have done the same to a man in the same circumstances. We also concluded that whatever it was that made the claimant think that Mr Archibald had said that she was "not a proper engineer", he did not say those words or say anything that was to any extent less favourable treatment than the manner in which he would have treated a man in the same circumstances.

141 The one thing that the claimant did accept occurred was that she had refused to accept set working hours. As she said in paragraph 212 of her witness statement:

> "I did not agree to work the set hours as SA's email of 10 April 2016, suggests I did. I stated that I was content to work more consistent hours in the near future but due to my personal circumstances and looking after my parents dog and caring for my nan I could not start before 10am."

142 We found that insistence of the claimant that she was entitled to refuse to agree to set normal working times difficult to understand in the light of paragraph 8.1

of her contract of employment, which we have set out in paragraph 130 above. We then looked at page 362, which was an email from the claimant to Mr Margrett of 1 June 2017, where the claimant wrote this:

> "I haven't requested a change to my regular working pattern. I never agreed to one! My contract states that I have core hours between 10:00 and 16:00 and I am in attendance within those hours unless, I have taken holiday."

143 On page 364, on the same day, the claimant had written to Mr Archibald that she was "on a variable working time contract". That was plainly not correct unless there was some document in the bundle to which we were not referred which indicated the contrary. One of the new documents put in the bundle between 5 November 2020 and 8 February 2021 was the document at pages 1502-1536 entitled "Defence Information Varitime and Flexi Time Working Arrangements". The "Introduction" section, which was on page 1507, said this (and this only):

> "This document captures existing flexible, varitime and TOIL arrangements across Defence Information (DI) providing guidance to both line managers and employees. The arrangements are only applicable to full time professional employees. Arrangements for part time employees will be agreed on an individual basis. Also detailed are shift patterns.
>
> All arrangements are a privilege and not a contractual right and can be amended or removed from an individual, department, site or collectively if deemed necessary. The fundamental component to the success of this scheme will be co-operation between the employee and their manager."

144 We saw too that on page 1508 there was a section entitled "Principles applicable to all professional employees", which started with the following text as its first bullet point:

> "All full time professional employees must be present during the core times. The individual manages their own start and finish times in line with these core times and the business requirements".

145 We did not read that bullet point in its context (namely the passage set out in paragraph 143 above) as <u>entitling</u> an employee to work variable working hours.

146 Mr Archibald's approach was, however, sympathetic to the claimant, as could be seen from the email chain on pages 375-376, in the course of which, on 5 June 2017, he wrote this in relation to the allocation of time by the first respondent of working hours when sick on a Friday (6 instead of 7 hours 36 minutes):

> "I have some sympathy with Vicki's point about holidays and MISC opening hours. We are expecting 8Hr days to cover the early closure on a Friday however if one day is a holiday (7:24) then there is an expectation that the extra 36 mins should be made up in the rest of the week admittedly its only 9 mins per day. However the extreme point with only working on Friday and expected to do 7:24. [Sic] Maybe there needs to be some discussing and clarity. Possibly investigate how Maritime Services policy handles this as the majority of employees come under them?"

147 In those circumstances, we concluded that the claimant was mistaken in thinking that she was on a variable working time contract. The governing provision in her contract was paragraph 8.1, set out in paragraph 130 above. Therefore, Mr Archibald's approach to the issue of the claimant's working hours was in no way wrongful, and we were satisfied on the balance of probabilities that he was in fact sympathetic to the claimant's position in so far as he could be. We concluded too that the only reason why he was pressing for the claimant to agree set hours and then to attend the MISC to do them was that he genuinely believed that she was not working an effective 37-hour week. He was (we concluded) entitled in the law of contract (given the express term in paragraph 8.1 of the claimant's contract of employment) to do that, and it was in no way wrongful (i.e. conduct which might be part of an accumulation which constituted a breach of the implied term of trust and confidence) for him to seek to tie the claimant down to agreed hours. That was because there was reasonable and proper cause for what he was doing, which was to seek to monitor (1) the hours that the claimant was in fact working, and (2) her effectiveness when she was in fact working. For the avoidance of doubt, we concluded that the manner in which Mr Archibald acted in regard to the claimant's working hours had nothing whatsoever to do with her sex.

148 Given that conclusion and our conclusion stated in paragraph 113 above, we accepted what Mr Archibald said in paragraphs 6-14 of his witness statement in its entirety (subject to reviewing the evidence concerning the alleged comment to the claimant relating to the impedance of employment prospects, which was the subject of the final sentence of paragraph 10 of Mr Archibald's witness statement, to which we return below). We also concluded that all of the things that he did as he described in those paragraphs relating to the claimant's performance were done because he and Mr Haslam genuinely believed that the claimant was not performing her role to the standard which it was reasonable to expect her to attain, and that those things had nothing whatsoever to do with the claimant's sex.

<u>Putting the claimant's name on the list of employees with absence or performance issues</u>

149 Mr Haslam accepted in substance that he had on 20 April 2017 caused the claimant's name to be put on the list of employees with absence or performance issues initiated by Ms Jane Bryant and operated by Mrs Kempton

and line managers below her in the hierarchy, including Mr Haslam. Mr Haslam described the situation in paragraphs 46 and 47 of his witness statement, which did not refer to a list, but to a "fortnightly review between [Ms Bryant], Debbie Kempton (Principle [i.e. Principal] Engineer) and line managers to review and discuss absence and performance issues for any personnel," of which Mr Haslam said he had "advised" that the claimant should be "part".

150 It was Mr Haslam's evidence that that had nothing to do with the claimant's sex. We could see nothing in the circumstances as we found them to be, including as stated in paragraphs 113 and 147-148 above, to justify us in drawing the inference that it was done to any extent because of the claimant's sex, and in any event we came to the view that the only reason why the claimant was placed on that list was that Mr Haslam genuinely thought that the claimant's name should be put on that list because the claimant's issues fitted within the scope of the fortnightly review.

<u>The alleged reference to the impedance of employment prospects; the email of the claimant at pages 315-316 sent to Dr Banks on 12 May 2017</u>

151 We heard oral evidence from Dr Banks about what he and the claimant had discussed on about 7 April 2017 and whether or not the giving of an "inconsistent" rating at a PDR would result in it being difficult to move jobs. He said that that was not correct: that it would depend very much on the circumstances and that he had had a woman move to his team who had before then had three ratings of "inconsistent". That rating, he said, is not a rating of "poor" but merely that not all aspects of the employee's performance are consistent with what the employee said at the beginning of the year he or she would attain by the end of that year. Dr Banks was asked about what he and the claimant had discussed on 7 April 2017 because of the following words (the first 16 of which were the opening words) in the email that the claimant sent to him on 12 May 2017 at pages 315-316:

> "I have just realised that I did not send you this after I spoke with you. ... Only yesterday (6th April) I find out that I am being <u>singled out</u> for a special PDR. I have not yet see the PDR, but I have been told by Steve that it contains comments that would severely impede any future employment prospects within BAE." (Emphasis by underlining in the original and not added by us.)

152 That email of 12 May 2017 at pages 315-316 was the subject of paragraph 39 in the Scott Schedule, which alleged that the email was a grievance that Dr Banks should have dealt with as such and that if the claimant had been a man then Dr Banks would done more about it. In fact, the email continued after the words "I have just realised that I did not send you this after I spoke with you":

> "<u>Harassment and Bullying</u>

> I really don't want to; but it seems that Steve (and Jim) are determined to force me into a complaint of harassment and bullying against them. I need your advice, because I am contemplating a formal grievance."

153 The email then continued with the second sequence of words set out at the end of paragraph 151 above, namely "Only yesterday (6th April) [etc]". It ended with the words on page 316:

> "I have many more examples of bullying, I have been deliberately undermined by overloading and constant criticism. I have been exposed to offensive, intimidating, malicious and insulting behaviour.
>
> I believe the new PDR to be malicious and intended to intimidate, as well as, retaliation to my earlier complaint.
>
> Can please advise me what to do as soon as possible."

154 In those circumstances it was in our view unrealistic to suggest that the email at pages 315-316 was a grievance that Dr Banks should have done anything with and that he would have done more than he in fact did if the claimant had been a man. For the avoidance of doubt, we concluded that he would not have done any more than he in fact did do if the claimant had been a man. Dr Banks was not the claimant's line manager, and he had no kind of management responsibility for her. All he could reasonably be expected to do in response to the email was to advise the claimant to raise a formal grievance, which it was his evidence (which we accepted: see paragraph 206 below) he did.

155 The email at pages 315-316 contained one indication of the reliability of the assertion in it that Mr Archibald had said to the claimant that the PDR contained comments which "would severely impede any future employment prospects within BAE", but before we turn to that, we record that in cross-examination, the claimant said that she was not sure that Mr Archibald had used the word "severely".

156 The one thing that provided a clue to the reliability of the assertion in the email that Mr Archibald had said that the claimant was having a PDR and that it contained comments which would "severely impede any future employment prospects within BAE" was relevant in addition to the issue of the claimant's knowledge of her legal rights (which was relevant to time limit issues and therefore jurisdictional issues). That thing was the following sentence:

> "I know that Jim has been notified by a colleague who witnessed their behaviour, that their conduct, if I were to leave, would constitute constructive dismissal."

157 That colleague was, it was clear from paragraph 190 of the claimant's witness statement, Mr Andrew Green. That paragraph was in these terms:

> "Andy Green phoned JH to speak to him as he had witnessed a lot of the unreasonable behaviour, either in person, whilst I was on the phone, by emails and communicator. He said to JH 'I think you really need to be coming down here [MISC] for a few days to see what her workload is really like and that they need to be careful because this would be seen as constructive dismissal behaviour.'."

158 As we say in paragraph 72 above, Mr Green was interviewed by Mr Markham when the latter was considering the claimant's appeal against the dismissal by Mr Pegg of her grievance, and the notes of the interview were at pages 1170-1175. There was in them at page 1172 this passage relating to the assertion of the claimant set out in the preceding paragraph above:

> "SM — in the context of that period in time, Vicki moves from Christchurch and is then working for yourself. Is there any point in time where you can recall any particular inappropriate behaviours from Jim and Steve?
>
> AG — The only thing I can recall is after a long emotional conversation with Vicki, it sounded to me that it was borderline constructive dismissal. I said just to Jim that he needs to be careful criticising Vicki as she takes things hard. If what she has told me is true, it sounds close to constructive dismissal. I have not witnessed any of the conversations; I have only seen Vicki's reaction to it which was very emotional."

159 There was, however, one other passage in the notes which was relevant to the reliability of the assertion (set out in paragraph 156 above) that Mr Haslam had been "notified by a colleague who witnessed their behaviour, that they their conduct, if [the claimant] were to leave, would constitute constructive dismissal", and that was at page 1173, where AD, i.e. Ms Dewhurst raised the claimant's workload. The exchange was in these terms:

> "AD – Another area to discuss is around Vicki's workload. Her view was that she was overloaded with work. She spoke about the team away day in 2016; she would have been working with Steve at that point. You specifically asked how she can fill the role which is two roles. What's your view on Vicki's workload? Was it appropriate?
>
> AG – I remember the meeting, I purposely brought that point up. I felt Vicki had been given too much to do too soon, especially as she had just come back from having depression. It was too much, too soon. She was supposed to be on a reduced hours but she was full time within 2 weeks in a new role and I didn't feel she was getting the full support she needed.
>
> AD – Did you raise anything with anyone outside of the session?

> AG – No, I raised at the session. There was Gareth, Jim and Steve. I said it's effectively 2 jobs squished into one. How would she manage that, being new to the role?
>
> AD – What was the response?
> AG – I can't remember so it can't have been much."

160 That was plainly a reference to the workload of the claimant during the final four months of 2016, and not what Mr Archibald and Mr Haslam had been doing during the first part of 2017, up to 6 April 2017. The claimant's assertion that Mr Haslam had been "*notified by a colleague who witnessed their behaviour, that their conduct, if I were to leave, would constitute constructive dismissal*" was (in its context) apparently intended to be understood as a reference to what had happened at least in part, if not completely, during 2017. On that basis, the assertion was not borne out by what the colleague in question, Mr Green said to Mr Markham.

161 Ms Kempton was asked in cross-examination whether she agreed that if an employee had a rating of "inconsistent" then the employee would not be able to move to another project. Ms Kempton's response was that it was *"not a hard and fast rule*", and that "*it is not fair on an employee if they are having an informal PIP [i.e. performance improvement plan], just to move them and move them and move them as the root cause of the issues is not addressed. If they do not have the opportunity to show that they are better than they have so far achieved then we would move them*".

162 In all of the above circumstances, we concluded that Mr Archibald did not say to the claimant that an "inconsistent" rating would impede, let alone severely impede, her future employment prospects with the first respondent.

<u>The telephone conversation between the claimant and Mr Margrett of 2 June 2017 and the subsequent investigation into the possibility of a breach of the Official Secrets Act ("OSA") and/or ITAR [i.e. United States International Trade in Arms Regulations, referred to by the first respondent as export control rules]</u>

163 In paragraph 250 of her witness statement, the claimant said this:

> "On the afternoon of 2 June 2017 AM [i.e. Mr Margrett] called me to discuss my working times. During this conversation he told me that I had asked for my working times to be set, I told him I hadn't and that I just made a local agreement with my line manager. He told me that he knew all about me and that I was just making it up. I told him that I knew I hadn't requested a change to my working pattern as I had recorded the HR meetings with SA on 16 May 2017 and 30 May 2017. In response AM said it was 'illegal' I said it wasn't he then said I was '*the vilest, most disgusting, immoral, rude human being*.' This was such an offensive and upsetting thing to say to someone, I was shocked and really upset. AM

sends an email to JH and SA on 5 June 2017 about our conversation (AD 45-46)."

164 The reference there to "AD45-46" was to the document which was also at pages 380-381, to which we refer in the following paragraph below. Mr Margrett's evidence on what happened on 2 June 2017 was in the following paragraphs of his witness statement (which he stood by firmly in cross-examination):

> '10 Vicki then phoned me on 2 June 2017, following another conversation she had had with Steve regarding flexible working. ...
>
> 12 It was a very difficult telephone conversation, as Vicki kept saying words to the effective [sic] of "*why can't I just keep working the way I am*", and telling me that she had a right to come in at 10am each day. I explained to Vicki that this was not an attempt by the Business to force her into something, but just an attempt to support her and offer a suitable level of flexibility and protection. I emphasised to Vicki that if she didn't want to make the request, she didn't have to, but that she would need to manage her working hours effectively going forward.
>
> 13 During the call, Vicki also voiced concerns regarding her treatment by Steve and Jim Haslam (Engineering Manager). I advised Vicki that if she felt unhappy with the way she was being treated, she should raise a formal grievance.
>
> 14 As part of this conversation, Vicki advised that she was now recording her calls and meetings because she felt she was being treated badly. We discussed whether Vicki had recorded any of her conversations with Steve. Vicki admitted she had, and told me she had taken advice and felt that she was well within her rights to do it. I told Vicki that she ought to inform the person that she was recording their conversation, and ask for their permission.
>
> 15 Given the lapse of time, I cannot recall any further specifics of my telephone conversation with Vicki, but my notes from the time (pages 367 – 368) capture the main points, which I have detailed above. My standout recollection is that it was a challenging and difficult interaction, and I do recall saying to one of my colleagues after the call that it had been a very difficult conversation.
>
> 16 I did not say that Vicki was "*the vilest, most disgusting human being*". I am a CIPD qualified and experienced HR professional, and those are simply not words that I would use to an employee, and do not at all reflect my approach to these kind of issues. As I have explained above, I do remember expressing to my colleague that Vicki had been

very difficult during the call, but I am confident that I did not use the language Vicki alleges.

17 After I first became aware of this allegation, I asked my colleagues (who had been in the same room at the time) whether they had heard me say those words, and neither of them had. They also advised me that had they heard me use such language, they would have taken notice, as it would have been very out of the ordinary.'

165 Mr Margrett followed up that conversation by seeking advice from the first respondent's in-house legal team and then sending to Mr Archibald, Mr Haslam and Ms Kempton the email at pages 380-381 of 5 June 2017. On the same day, Ms Michelle Villis sent the email at pages 384-385 to Ms Karen Kristiansen about the matter. Both Ms Villis and Ms Kristiansen worked in the first respondent's security team. The email from Ms Villis included this paragraph:

> "My belief is that this is a Breach of Official Secrets Acts to record on a prohibited place without authority. My further belief is that she [i.e. the claimant] will have been notified of this at her initial company induction and that there will be signage to advise against recording at all secure locations. I am concerned that she has downloaded this information onto personal IT and if its classified this is a breach of the RMADS process."

166 Ms Kempton told us in answer to supplementary questions asked in examination in chief that the first respondent has a "List X" designation from the United Kingdom government which permits the first respondent to hold classified information, and that the concern with an employee making a covert recording was that the employee might inadvertently record something in the background which is classified information. Such a recording would be, she said, a breach of the OSA. We accepted that evidence, which was in fact not challenged.

167 Mr Margrett's first contact with the claimant after their telephone conversation of 2 June 2017 was when he sent her the email dated 6 June 2017 at pages 422-423. In it, he said this:

> "I left a message for you earlier today to call me as I wanted to follow up on the telephone call we had on Friday afternoon and to advise you what action has been taken as a result.
>
> During the call you advised me that you were making recordings of conversations with your managers. I advised that was not an appropriate course of action to take, especially as you had not advised those being recorded this was happening, however you believed you were within your rights to take this action.

I also advised you that I would be informing Steve Archibald, Jim Haslam and Debbie Kempton that you have been making recordings, which I have done.

Please be advised that BAE Systems has a company position not to permit recordings. Furthermore MAI Security have been made aware of your actions. They advise that this may constitute a breach of the Official Secrets Act and that it will be necessary to discuss with you the nature of these recordings to understand whether a breach has occurred and what the implications for BAE Systems are. You should therefore expect to be contacted by a member of the Security Department this week who will make arrangements to discuss the recordings with you in more detail.

I feel it is necessary to remind you that employees are required to follow company procedures at all times and failure to do so may result in disciplinary action being taken."

168 The claimant replied in the email on page 422 sent a day later. It was in these terms:

"Hi Andy,

Thank you far putting your concerns in writing. I apologise for missing your call and I would like to request that any further correspondence between us is done so via email, and or through my union representative.

I was going email [sic] regarding our telephone conversation on Friday. I was very upset with the way you spoke to me throughout. I have never met and you claimed to have no previous knowledge of my situation, or me other than the email conversation regarding my timekeeping. Yet you felt justified in saying that I was the vilest, most disgusting, immoral, rude human being. I hope that this was not intended to hurt and offended [sic] however, I did take it very personally.

In our conversation I gave you no reason to believe that I had done anything to contravene the Official Secrets Act, I take my responsibilities very seriously and I am upset that once again my integrity is in question.

Thank you for passing this on to the security team."

169 Mr Margrett responded to that email six days later, on 13 June 2017, in the email at page 461, which was in these terms:

"Vicki,

Many thanks for your response.

The purpose of the call was to clarify the situation and to make sure you were aware of what was happening. There was no mention that you had actually broken the OSA only that you may have and that the Company Security process required they look into it further.

I believe I was polite and professional throughout the call and I did not at any point refer to you as "the vilest, most disgusting, immoral, rude human being". I have spoken with colleagues who were in the room whilst the conversation was taking place and they do not recall these words being said either.

If you have genuine concerns about the way you were treated again I must remind you there Is the Ethics Helpline which can be contacted on 0800 374199, alternatively you could discuss the matter with your Iine manager or raise a formal grievance.

From my perspective I do not feel able to let your allegations pass as they stand and I'll therefore be arranging an informal meeting between the pair us to discuss the allegations and the telephone call shortly."

170 Mr Haslam said this about the matter in his witness statement:

"59 In May, Steve [Archibald] raised concern with me that he suspected Vicki had been recording conversations between them. I raised these concerns immediately with HR and Steve also followed up directly (page 397). Given the nature of work undertaken by the UKLI team, the potential of unauthorised recordings gave rise to concerns that security and confidentiality policies might have been breached and that Export Control rules could have been compromised.

...

63 Following Andy's conversation with Vicki on 2 June, and his email to me and Steve on 5 June copied to Debbie, Debbie contacted Security and an investigation was undertaken to establish whether the unauthorised recordings contained any export controlled and/or company or customer sensitive information. This resulted in numerous emails, phone calls and meetings, which are documented in the bundle. Michelle Villis (Military Air & Information Security) and Ian Walker (Head of Export Control) were informed and assisted with the investigation.

64 As evidenced in the emails contained in the bundle at pages 421 and 455, I tried repeatedly to arrange times that Vicki and Michelle Villis could talk by phone, so that they could discuss the recordings and close the matter. It was a catch 22 situation where, to my understanding, Vicki was getting upset about the situation but the only

> way to resolve it was to talk to Michelle, and Vicki did not take the first couple of opportunities to talk to Michelle. When they eventually did get in contact on the morning of 27 July 2017, my understanding is that the conclusion reached was that Vicki had only recorded conversations about her objectives and performance, and that no company sensitive, government classified or export controlled information had been recorded and so the matter was closed. Michelle confirmed that to me in a skype conversation dated 27July 2017, and my understanding was that Michelle told Vicki that all she had to do was provide a written statement and then the issue would be closed."

171 Mr Margrett said this in paragraph 21 of his witness statement concerning the ending of the first respondent's concern from a disciplinary point of view about the claimant having recorded the meetings of 16 and 30 May 2017 to which we refer above:

> "On 16 June 2017, I spoke to Michelle Villis (Head of Security Operations), regarding the security investigation into Vicki's covert recordings. Michelle informed me that the security team had reached the conclusion that Vicki's the recordings [sic] did not constitute a breach of the Official Secrets Act and/or export control regulations (although Vicki has been naïve in her actions). Michelle had asked Vicki to confirm in writing that there was nothing of concern in the recordings at which point the matter would be closed. Following this conversation, I wrote to Steve, Jim, and Debbie Kempton to provide them with an update (page 477)."

172 We read the email at page 477. It was dated 16 June 2017 and was consistent with (and in fact it was probably the basis for) what Mr Margrett said in paragraph 21 of his witness statement. (We therefore accepted paragraph 21 of Mr Margrett's witness statement.) We also read the emails at pages 421 and 455 to which Mr Haslam referred in paragraph 64 of his witness statement (which we have set out in paragraph 170 above). They did not make it clear that the investigation into the possible breach of the OSA and/or ITAR was closed. We said so at the first stage of the hearing before us, in November 2020, and we were told by Mr Green on behalf of the respondents that there were in existence some texts which showed unequivocally that what Mr Haslam said at the end of paragraph 64 of his witness statement was true. Those texts were put in the bundle before we resumed the hearing on 8 February 2021, and were at pages 1369-1372. On 4 July 2017, Mr Haslam wrote on page 1369: "*My understanding is that security need an email from you with a statement about the recording (I think just repeating in writing what you told Karen Kristiansen on the phone), then they will consider the matter closed, and it won't be a formal matter*." Then, on 14 July 2017, in the text at page 1371, Mr Haslam wrote to the claimant:

> "I've spoken to Michelle, could you please call her between 8-9am on Monday morning? She's just got some very basic questions all of which you've answered elsewhere and to me already (i.e. confirming no classified or export controlled stuff recorded). Very easy quick box ticking, just so she can hear it for herself to confirm in writing to export control that the matter is closed then this whole thing goes away. Michelle's numbers are [numbers given]".

173 On the same page there was a text from Mr Haslam sent on 19 July 2017 to the claimant, in which he wrote:

> "Hi Vicki, how are you?
>
> Michelle is free on her [number given] phone number all afternoon today and 8-9am on Friday Morning.
>
> Please do call her, it should be a short easy call that I hope will reduce/remove a source of stress."

174 On page 1372, there was this text exchange between Mr Haslam and the claimant which was shown to have occurred on 27 July 2017:

> Mr Haslam: "Have you called Michelle yet?"
>
> The claimant: "Yes I have spoken with her".

175 At page 535, there was an instant message exchange between Mr Haslam and Ms Villis, dated 27 July 2017 and in these terms:

> "**Haslam, Jim (UK) 12:19:**
>
> hi michelle, i understand you've spoken to vicki?
>
> **Villis, Michelle (UK) 12:20:**
>
> I have - just. She will provide a written statement that there was nothing classified or or export controlled when she returns. The matter should then be closed from our perspective. :-)
>
> **Haslam, Jim (UK) 12:22:**
>
> thanks
>
> **Villis, Michelle (UK) 12:25:**
>
> You're welcome."

176 The claimant said this about that exchange in paragraph 277 of her witness statement:

> "Whilst I was not aware at the time, following my employment ending I understand that on 27 July 2017 ... there was an instant message exchange between JH and MV in which MV confirms that the breach of the Official Secrets Act/ Export Control, should be closed (535)."

Our conclusions on the allegations numbered 23, 25 and 55 concerning the claimant's covert recordings and the responses of the first respondent and Mr Margrett to them

177 The allegation numbered 23 was that the claimant "was or was [led] to believe that she was under investigation for a disciplinary offence and/or criminal offence, namely breach of the Official Secrets Act. ITAR and export Control", and that this was harassment within the meaning of section 26(1) of the EqA 2010, the protected characteristic being sex or disability (or both). In addition, in paragraph 55 of the Scott Schedule it was alleged that the same thing was direct discrimination because of disability. We concluded that the claimant was never "under investigation for a disciplinary office and/or criminal offence" as such in relation to her covert recordings, but whether or not she was under such an investigation was not the point. The issue was whether or not by being treated in the manner in which she was in fact treated (our findings of fact in this regard being determinative), she had been treated in breach of section 13 or 26, read with section 39, of the EqA 2010.

178 We concluded on the basis of the evidence to which we refer in paragraphs 163 to 176 above, and having heard and seen Mr Margrett, Ms Kempton, and Mr Haslam give evidence, that the manner in which the fact that the claimant had made recordings of the meetings which she participated in with Mr Archibald and others on 16 and 30 May 2017 was considered and dealt with by those persons had nothing whatsoever to do with the claimant's sex or her disability. None of those persons had the claimant's sex or her disability in mind when they made decisions concerning that matter. There was also nothing in the circumstances which might be thought to indicate that Ms Villis or Ms Kristiansen had either the claimant's sex or her disability in mind in doing what they did in regard to the fact that the claimant had recorded those meetings.

179 In addition, the sequence of events in respect of which a complaint could in theory be made (i.e. assuming that it was well-founded on the facts, which we have found it was not) ended at the latest on 27 July 2017 when the claimant was told the thing recorded in the document at page 535 whose text we have set out in paragraph 175 above. We found as a fact that the claimant then had spoken to Ms Villis (as shown by the text exchange of 27 July 2017 that we have set out in paragraph 174 above), and that the claimant then knew that all she had to do was write a short statement in the terms described in the

document at page 535 when she returned to work, and the matter would be closed.

180 As for factual assertions giving rise to allegation 25, we found as a fact that Mr Margrett did not say to the claimant that she was "the vilest, most disgusting, immoral rude human being" on 2 June 2017 or at any other time. We arrived at our conclusion in this regard on a balance of probabilities bearing in mind

180.1 our perception of Mr Margrett as a measured and experienced human resources professional,

180.2 the background factual circumstances as he described them in paragraphs 14-17 of his witness statement set out in paragraph 164 above (i.e. the content of those paragraphs excluding the first sentence of paragraph 16), which, having considered them carefully, we accepted as accurate, and

180.3 the fact that the claimant had not used quotation marks around the words "the vilest, most disgusting, immoral rude human being" in the email at page 422.

181 The claimant, we concluded, as Mr Green submitted, had (at best from the point of view of her motivation) interpreted what Mr Margrett had said to her as being to the effect that she then stated in the email at page 422. She had then subsequently genuinely but mistakenly believed that the words had in fact been said, as was shown by the fact that when she referred back to the words after writing that email, she used quotation marks around the words.

182 For the avoidance of doubt, we concluded that Mr Margrett treated the claimant in precisely the same way as he would have treated a man, or a person with the disability of a mental health condition of the sort that the claimant had at the time, i.e. on 2 June 2017. The manner in which he treated the claimant during his conversation with her on that day was, we concluded, in no way wrongful.

Allegation 20 (and 53 and 56): that Mr Archibald said in the claimant's presence that people with mental health issues should be "lined up and shot"

The evidence

183 In paragraph 230 of her witness statement, the claimant said this:

> "Later, on 16 May 2017 SA came into the office w[h]ere I, Andrew Green and Jonathan Rose were sat and asked me about the mental health quiz that was on my desk, as part of mental health awareness week. In the knowledge that I had suffered from stress, anxiety and depression, SA said '*People with mental health issues should be lined up and shot*'. This was an extremely offensive and insensitive comment to make to me. I was

> so humiliated and upset at what SA had said. I do not believe SA would have said this if either SA was aware that Andrew Green or Jonathan Rose had a mental health condition. I believe that SA thought he would be able to get away with saying that type of comment to me as I am a woman."

184 Mr Archibald's evidence on this in his witness statement was in these terms (which were paragraph 28 of that statement):

> 'I am aware that Vicki alleges I said that "*people with mental health issues should be lined up and shot*" on 16 May 2017. I did not say this. I should say that I was not aware that Vicki suffered from a particular mental health issue during the period when I was her line manager only becoming aware of this at the second grievance meeting in June 2018. On the day Vicki alleges I made the statement she also sent me a detailed and comprehensive breakdown of her day which does not refer to this alleged statement nor does it record that I "*shushed*" her (see below). A possible explanation for the allegation relating to mental health is that I had a conversation about mental health awareness week with another team member. I only have the vaguest recollection of it but I may have said that in Roman times they would have been stoned or something similar. I may have said that in Hitler's time they would have been shot. I was trying to highlight what progress had been made. These were historical references made to a third party and were not in any way directed at Vicki. She certainly did not tell me either at that time or at any subsequent time that any comment I had made had upset her. I was only made aware of the issue during the first grievance interview (March 2018) and was lead [sic] to believe that this was offered by a 3rd party and not Vicki herself. At the first grievance interview the time line cited for this issue was "*a week before her PDR so last April (2017)*" the week I was on holiday. At the second grievance interview (June 2018) the time line changed to between "*April 17 and now (June 18)*" and when I received the Claim Form it was cited as 16 May 2017.'

185 By the time of the hearing before us, the claimant had nailed her colours to the mast and was saying that the words in question were said on 16 May 2017. We looked carefully at the list of things that the claimant said had happened on 16 May 2017 in the email at pages 323-324 to which Mr Archibald referred in paragraph 13 of his witness statement that we have set out in paragraph 135 above. Nothing was in that list by way of a record or assertion that Mr Archibald had said anything at all about mental health issues. That was despite the fact that there was this sequence in that list where, if Mr Archibald had said what the claimant now alleged he said, it would (almost certainly) have been recorded that he had done so:

> "Lunch at 12:00 till around 12:25 With Steve Archibald
> Meeting with Steve Archibald

> Writing up personal minutes and notes from meeting with Steve A
> Got a drink from water fountain whilst there discussed menatal [sic] health week with Steve Bradbury
> Went into Admin Theme room
> Wrote up notes from Admin Whiteboard – Notes Made with Craig Shannon Willliam Woodhouse and Shane Weir — RSIT objectives — ALIS famil — Querys from Admins
> Drafting ideas for posters for Admin room to send to CPO Shannon when done
> Discussing unfair treatment and being singled out"

186 We then searched through the hearing bundles for references to the words "lined up and shot". We saw that the first time that the claimant alleged that Mr Archibald had used those words was when she sent the email to Mr Stephen Wilding at pages 752-753, which was the subject of allegation numbers 59, 67 and 69, the latter two of which, we saw, wrongly referred to the date of the email as being 12 October 2017. We say that they wrongly referred to the date of the email as being 12 October 2017 because (1) we found no email from the claimant to Mr Wilding of that date in the bundle and (2) we saw that the only email from the claimant to Mr Wilding that could conceivably be regarded as raising something by way of a complaint was the one at pages 752-753, which was sent on 23 November 2017. The heading to that email was "Bulling and harassment" [sic]. It was in these terms (to which we were required to pay particularly close attention given the allegations numbered 59, 61, 67 and 69 in the Scott Schedule):

> "Hi Steve,
>
> As you know I went to see the OH GP. I did not consent to this report being sent out before I had seen it. When I phoned the surgery they had said they had to send it to OH then me then the company. I have withdrawn all consent for this form to go anywhere for a couple of reasons but mainly because the report is factually incorrect. Including my address and years of service. I was assured that the only information Jim and Debbie would receive was the advice from the GP however it seems that they are to receive the whole report. I feel this is just another way of intimidating ,undermining and bullying me. (please remember Steve Archibald said to me in front of other members in my team that people with mental health issues should be lined up and shot) I do not want the people who have contributed to my anxiety and depression seeing my medical in confidence information or discussing it with anyone else. Please also take into consideration that Jim has already told colleagues and customers why I am off sick, what I am off sick with and that I was being investigated.

I also asked what the terms of reference were i.e. What was asked of the doctor. There were clearly questions that were asked of the doctor as he has put in my report. In Answer to your questions... what was asked?

Jim has invited me to another sickness review meeting. I really don't think it's appropriate that Debbie or Jim are there. I feel the bulling [sic], harassment and discrimination is ongoing. I feel they are trying to intimidate me, Jim knows he is implicated in what caused my anxiety stress and depression yet comes to the meetings. Both Jim and Debbie trying to ignore what has happened and pressure me back to work for Steve Archibald. As everyone is aware Jim and Steve are the problem. Debbie witnessed my line manager - Steve put me on a pip with no evidence of poor or inconsistent performance and still nobody has told me why. The PIP is still on hold pending my return to work. Even if I was to return to work All I currently have been offered is to work for a line manager and engineering manager who systematically harassed bullied and discriminated against me. Facing them each month only sets off my extreme anxiety. And deteriorates my mental health further.

Asking me to return to work for Steve whilst I look for another job is implying that they don't believe I am being discriminated against. Despite witnessing the bullying and discrimination, Debbie described it as clash of personalities. Which is not the case.

Following the meeting on the 13th September Debbie sent me job vacancies, out of area. All this says to me is that I am not believed (that I am being bullied and/or that I am ill) even I am believed why am I being moved, surely the bully should be moved not the victim. Why does the company continuously protect those that have breached company policy's procedures and ignore the code of conduct. I feel that I am being pushed out of my job and the company. There is no way in my current mental state caused by the company that I would be offered another job role. Also I feel it is unfair to expect me to go to an interview whilst off sick. Particularly as I am suffering with stress depression and anxiety. The OH GP advised that I do not make any career decisions whilst in my current mental state.

Also I still haven't been cleared by security for breach of the official secrets act and breaching itar regulations.

Kind Regards,

Vicki"

187 In fact, in the claimant's grievance of 9 January 2018, the claimant added the allegation that Mr Archibald had said that mental health questionnaires were a waste of time: that was clear from paragraph 27a on page 790.

188 Mr Archibald was first asked about the allegation in that paragraph by Mr Pegg on 6 March 2018, which was of course over 9 months after 16 May 2017. The notes of Mr Pegg's interview of Mr Archibald of 6 March 2018 were at pages 1046-1054. The claimant had at that time said that the comment was made in April 2017, "before her end of contract PDR", as Ms Dewhurst was noted to have said on page 1047. Mr Archibald's response was that he "Definitely [did] not" say it. He then said:

> "I remember having a conversation with Simon Bush about the quiz but it was more recently and Vicki wasn't even there at this point. In 2017, before Vicki went off I spent a total of about 9 days in the MISC when she was there. Between January and Vicki going off, I say about 9 days there or thereabouts. Some of those days I wouldn't have had any interaction with Vicki whatsoever."

189 The claimant's evidence was that she had reported the comment to Dr Banks. She did so in paragraph 232 of her witness statement, which was in these terms:

> "I did not know what to do and was in a terrible state. I tried to call GB a few times for advice but could not get hold of him (320-321, 322). I managed to get hold of him and told GB that I had recorded the meeting with SA and a summary of what was said in that meeting. I told Gareth that I was extremely upset with what had happened. I told him that I was particularly worried that SA was implying that I had been falsifying my timesheets, giving the effect and the assertion that I had been fraudulent in relation to my travel allowance had had on my health. I also told GB that SA had said to me '*People with mental health issues should be lined up and shot*' earlier in the day. I think GB's notes of that conversation appear at page 303 of the bundle."

190 Dr Banks was asked about the document at page 303 and he said that it was not in his handwriting and that he had not seen it before. He was not asked specifically about paragraph 232 of the claimant's witness statement. However, there was in the bundle a series of records of missed calls from the claimant to him (at pages 320, 321, 322, 333, 334 and 347). There was nothing in his witness statement which suggested that he had spoken to the claimant after she had sent her email of 12 May 2017 to him at pages 315-316 except to say on or shortly after that day that she should formalise the complaint in a written grievance as such, i.e. utilising the first respondent's grievance procedure. In cross-examination, Dr Banks said that he had been told by Mr Haslam's line manager, Mr Dave Torrance, that if the claimant did that, i.e. submitted a grievance formally, then it would be investigated straightaway, and that he (Dr Banks) had sought advice from his former line manager, Mr Andrew Caunce, who had said that he (Dr Banks) should cease to be involved as the claimant was not his (Dr Banks') staff member. We accepted that evidence of Dr Banks.

Certainly, he gave no evidence to the effect that he had been told by the claimant that Mr Archibald had said to her (or anyone else, in fact) that people with mental health issues should be lined up and shot.

191 There was one piece of documentary evidence that on its face supported the claimant's allegation that Mr Archibald had made that comment. It was in the note of the interview of Mr Andrew Green at pages 1170-1175 to which we have already referred in paragraphs 72-74 and 158-159 above. At page 1173, Ms Dewhurst was recorded to have said this to Mr Green:

> "I have two specific points to mention - one of them doesn't have a particular date on this incident, but Vicki stated she was in the office with yourself and Steve Archibald and Steve asked about the Mental Health Awareness quiz on her desk. Vicki explained she was given it by the business and his response was that all people with mental health should be lined up and shot. I just wanted to check your understanding of that."

192 That was a distinctly leading question, we noted. That was not only unfortunate given the fact that Ms Dewhurst assumed the truth of the claimant's assertion (which, we note, incidentally, was helpful to the claimant), but also because Mr Green had already said at the start of the meeting (as noted on page 1170): "my memory isn't great though I will warn you now". In any event, the exchange continued:

> "AG – Yes, that was one of the clumsy comments.
>
> SM – Was it said in a pointed expression or?
>
> AG – It was typical military banter; Steve is ex-military. But not in front of Vicki when he knows she has just come back from depression.
>
> AD – What was Vicki's response?
>
> AG – She was very upset.
>
> AD – In front of Steve?
>
> AG – No, I think she internalised it but then she would go outside far a cigarette and burst into tears."

193 Whatever that exchange showed, it certainly showed that Mr Green did not recall Mr Archibald making the alleged statement <u>to</u> the claimant, but as part of "military banter", which was "in front of" the claimant.

194 Nevertheless, there was (as we have recorded in paragraph 62 above) another part of the documentary evidence which was supportive of the claimant's case in this regard. It showed that Mr Archibald was, despite what he said in

paragraph 28 of his witness statement, which was that he was "*not aware that Vicki suffered from a particular mental health issue during the period when I was her line manager only becoming aware of this at the second grievance meeting in June 2018*", aware that the claimant was suffering from a mental health issue. That was the record of the interview carried out by Mr Markham on 27 June 2018 which we have set out in paragraph 62 above.

195 Unfortunately, while Mr Bush was (as we record in paragraph 53 above) interviewed by Mr Markham on 5 July 2018, the detailed notes of that interview (at pages 1196-1198) contained no record of Mr Bush being asked to recall any discussion that he might have had with Mr Archibald about the mental health questionnaire.

196 In addition, Mr Archibald's oral evidence showed that there had been a family tragedy as a result of a mental health issue on the part of a member of the family, and he was plainly fully aware of and empathetic about the impact of mental health issues.

Our conclusion on allegation number 20 in the Scott Schedule

197 In coming to a conclusion on the factual assertion in paragraph 20 of the Scott Schedule, we were swayed most by the detailed record of the claimant at pages 323-324 which she had written on 16 and 17 May 2017, plainly in anger, and in a mindset that was highly critical of Mr Archibald. If she had indeed heard him say on that day the words "People with mental health issues should be lined up and shot", then, we were sure, she would have recorded them in that document.

198 We therefore concluded that Mr Archibald did not say to the claimant that people with mental health issues should be lined up and shot.

The allegations in paragraphs 38, 59-61, and 63 of the Scott Schedule: the manner in which what the claimant referred to in those paragraphs as grievances were dealt with

199 When considering these allegations, we appeared to be hampered to an extent by the absence of a list of issues which included a paragraph numbered 23, to which the final three of those numbered paragraphs referred. However, on a close examination, the list of issues (which was at pages 110-116) cross-referred to the Scott Schedule, so we considered those three allegations by reference simply to the Scott Schedule, interpreting it as best we could.

200 Except in relation to the manner in which the claimant's grievance (properly so called) at pages 782-923 was considered (which we consider in the final part of this section below, i.e. paragraphs 212-214 below), there was in the numbered paragraphs of the Scott Schedule which we consider here concerning the manner in which the claimant's complaints were dealt with nothing more in

substance (as opposed to form) factually than in allegation 39, which we have considered in paragraphs 152-154 above. So far as necessary, we include in the grievances referred to as having been made between "22 February 2017 to June 2018" (the words used in paragraphs 59, 61 and 63 of the Scott Schedule) the email at pages 752-753 that we have set out in paragraph 186 above and the things that the claimant said or sent to Dr Banks, to which we refer in the next section below. In form, there was one further factual allegation to which we need to refer here. That was allegation 38, which was about an email that the claimant sent to Mr Stephen Bradbury on 11 May 2017 under the heading "Re: Mental Health Awareness Week". It was said in paragraph 38 of the Scott Schedule that the failure by Mr Bradbury to do more than he did in response to the email was direct sex discrimination, in that if the claimant had been a man then Mr Bradbury would have done more than he did do about the claimant's concerns stated in the email. (For the avoidance of doubt, we could not understand the cross-reference in the final box relating to allegation 38; the cross-reference was to paragraphs of the list of issues and yet the cross-references did not seem to be apt. We therefore took the allegation as one of simple direct sex discrimination, which was the heading to the allegations numbered 38-53. All of those allegations contained the same apparently mistaken cross-references. We therefore concluded that we should consider all of the allegations in the Scott Schedule by reference only to the heading to the section in which they were placed.) The email was at page 313 and was in these terms:

> "Hi Steve,
>
> Please could forward this to whoever is collecting the information from Mental Health Awareness Week.
>
> In theory the business has approached mental health week well. However it will only work if they act on what employees are saying. Just listening doesn't change fundamental problems in the business that are not being addressed! I have been off work with work related stress 3 times in my 16 years at BAE. Totalling nearly a year that I have not come to work due to being bullied, harassed, physically and verbally assaulted and discriminated against pushing me into depression. I am still experiencing some of these problems and nothing gets done! HR, Line managers, project managers were/are aware yet it is always brushed under the carpet. However if handled correctly, or even attempted to be handled, these periods of sick leave due to stress and depression could have been avoided.
>
> In keeping with the theme, what do you think about at work. I have listed a few of the thoughts I have had over this week.
> Why is my grade and pay not in line with my male peers.
> Does my boss have a problem with me? or is it just because I am a women [sic]

Should I leave engineering
Will it ever get better for women in BAE.
Why am I spoken to like a child

I hope that the business addresses my concerns and does [not?] follow the previous pattern where work issues that impact peoples personal lives, and their mental health and welfare are ignored.

Kind Regards,

Vicki Scott"

201 That was not a grievance of the sort that requires an employer to start an investigation. It would have puzzled the reasonable recipient: the stated intention of the writer was that the email be sent to "whoever is collecting the information from Mental Health Awareness Week". The idea that that person should then have treated it as a grievance does not in our view bear scrutiny. In fact, as the claimant acknowledged in cross-examination, as was shown by her detailed list of what she did on 16 May 2017 at pages 323-324, the relevant part of which we have set out in paragraph 185 above, she had discussed with Mr Bradbury the issues to which she referred in her email to him at page 313. For the avoidance of doubt, we saw no evidence from which we could draw the inference that the reason why Mr Bradbury did not treat the email at page 313 as a grievance and then progress it as such was because of the claimant's sex. There was nothing to suggest that he treated it any differently because it came from a woman rather than a man and we concluded on the balance of probabilities that he treated it in precisely the same way that he would have treated it if it had come from a man.

Allegation 64; things said or sent to Dr Banks which the claimant relied on as founding a claim of victimisation in relation to the investigation of whether or not she had breached the OSA

202 In paragraph 64 of the Scott Schedule, which was the first allegation of victimisation within the meaning of section 27 of the EqA 2010, reference was made to what were said to be grievances stated to Dr Banks "of discrimination/harassment by Mr Haslam and Mr Archibald" on "22 February 2017 and/or 22 March 2017 and/or 12 May 2017". We have not so far referred to what the claimant says she said to Dr Banks on 22 February 2017, and we do that immediately below. We have already referred to (1) the email of 22 March 2017 which was the second of those asserted grievances (it was at pages 278-279 and we refer to it in paragraphs 104-106 above) and (2) the email of 12 May 2017 at pages 315-316 which was the third of those asserted grievances and was the subject of allegation number 39, which we have considered in paragraphs 152-154 above. However, since paragraph 64 was an allegation of victimisation, we had to revisit the document to which allegation 39 related, i.e. at pages 315-316 and to consider whether or not either Mr

Haslam or Mr Archibald knew of it at any time before these proceedings were commenced. The same was true of the email of 22 March 2017 at pages 278-279.

The conversation of 22 February 2017

203 The first of the asserted grievances stated to Dr Banks was the claimant's conversation with him to which the email of 22 February 2017 at page 240 related (it was a short email and merely was to the effect that Dr Banks was able to meet up for a chat); the conversation was then referred to by the claimant in paragraphs 147 and 148 of her witness statement, in these terms:

> "147. Around lunch time on 22 February 2017 during the Event week, I met up with GB and discussed the issues I had with SA, JH and other issues such as what had happened on the first day of the event, including -
>
> a. That SA and JH we [sic] asking me to do tasks, then once I had started the task asking me why I was doing it. I think I described this to GB as them 'gaslighting me';
>
> b. That I felt I had too much work I was expected to do Event Design, Event support, Day to Day system Administration, LM Support, BAEs SCM, Point of contact, Cover for SB and my actual role ALIS Admin Theme lead;
>
> c. That I had been blamed for the logon sheet having not been completed when that task was assigned to Adam Garner's;
>
> d. The comments JH made to me regarding the sign-in sheets;
>
> e. That SA suggested that I should be cleaning up at the Event;
>
> f. SA's comments in front of PO Kyle Hope.
>
> 148. GB told me not to worry that he would 'do some digging under the radar'."

204 When it was put to Dr Banks in cross-examination that he had said that he would "do some digging under the radar", he said this (as noted by EJ Hyams but with the note tidied up; the names may not have been recorded completely accurately, but that is not material):

> "I am not convinced I referred to the cliché of the radar; I said I would make a few inquiries with some on the team to see if they were happy with everything on the team and I did – Malcolm Porter; Yvonne Porter and Claire Wellard who worked in the MISC. I asked a number of things of them and I have known one of the guys for a long time and it was quite surprising to me that this kind of thing was happening but when I dug I did not find anything [that supported what the claimant was saying.]"

What did Mr Haslam and Mr Archibald know about that conversation and the content of the emails of 22 March 2017 and 12 May 2017 from the claimant to Dr Banks?

205 Dr Banks said these things in his witness statement about the emails of 22 March 2017 and 12 May 2017 at pages 278-279 and 315-316 respectively:

> "14. On 22 March 2017 Vicki send [sic] me an email commenting that she was not happy at work and was dreading coming in each day (pages 278 – 279). We spoke on the telephone though, given the lapse of time, I cannot recall the specifics of the conversation but Vicki made no allegations of harassment to me at that time. Her concerns seemed to be about how she was being treated generally by her managers. I do know that I advised Vicki that if she wanted to, she could raise a formal grievance in line with the Business's grievance procedure. As I was not in her line management chain or even in her function it would have been inappropriate for me to have taken any other action.
>
> 15 On 12 May 2017, Vicki sent me a further email (pages 315 – 316) after a telephone conversation between us during which it was clear that she was very angry. Within this email, Vicki said that she felt Steve Archibald (and Jim Haslam) were trying to force her to raise a grievance for bullying and harassment. She detailed interactions which she felt were bullying and asked for my advice, as she was contemplating a formal grievance.
>
> 16 Following receipt of this email, I sought advice from my line manager (Andrew Caunce) and Jim's line manager (Dave Torrance) as to how to respond to Vicki. Dave told me that he was happy for me to speak to Vicki about her concerns and advise her to raise a formal grievance (as I had done previously) so that the issues she raised could be addressed. I therefore phoned Vicki and, as before, advised her to raise a formal grievance in line with the Business's grievance procedure. I also suggested that she meet with Jayne Bryant, Head of Engineering to discuss her concerns. When I saw an email referring specifically to "private chat with Jackie Gaines", I was confident that Vicki was trying to set up a meeting with Jayne Bryant as I had advised.

> ...
>
> 20 After receiving Vicki's email on 12 May 2017, I let Jim Haslam and Steve Archibald know that Vicki had raised some issues and appeared to be struggling at work, however I did not forward Vicki's email."

206 We accepted those paragraphs of Dr Banks' witness statement.

207 Mr Haslam's witness statement contained in paragraph 32 this passage concerning the conversation which the claimant had with Dr Banks on 22 February 2017:

> "I note that Vicki alleges at paragraph 21 of her Grounds of Claim that she contacted Gareth Banks about the alleged treatment she had been subjected to by me and Steve. I do not know the details of the contact between Vicki and Gareth Banks".

208 We accepted that Mr Haslam did not know about what was said by the claimant to Dr Banks on 22 February 2017. It was not put to him that he was aware at the time of the content of the email at pages 278-279 that the claimant sent to Dr Banks on 22 March 2017, and in any event we concluded from paragraph 14 of Dr Banks' witness statement that we have set out in paragraph 205 above that Mr Haslam was not aware of that content before these proceedings began.

209 Mr Haslam's witness statement contained in paragraph 48 this passage concerning the email of 12 May 2017 at pages 315-316:

> "I understand that on 12 May 2017, Vicki emailed Gareth Banks raising concerns about her treatment (pages 315 – 316). Gareth made me aware of the email but did not send it to me."

210 We accepted that passage of Mr Haslam's witness statement.

211 It was not put to Mr Archibald that he knew about any of the three communications to Dr Banks referred to in paragraph 64 of the Scott Schedule. In fact, that paragraph stated that the alleged detriment was that "The Claimant was or was lead [sic] to believe that she was under investigation for a disciplinary offence and/or criminal offence, namely breach of the Official Secrets Act." Mr Archibald was not in any way involved in that matter, except to raise the concern that the claimant was recording her meetings with him, which was factually correct.

The manner in which the claimant's grievance of 9 January 2018 was considered and dealt with

212 The sequence of events in relation to the claimant's formal grievance (at pages 782-923) was this.

212.1 The grievance was submitted on 9 January 2018: the email enclosing pages 782-923 was at page 924.

212.2 Mr Pegg commenced hearing the grievance on 23 January 2018, and then adjourned that hearing to 8 February 2018 when he concluded it; that was evidenced by the notes in the bundle at pages 961-1001 and 1009-1040.

212.3 On 21 February 2018, Mr Pegg sent the letters at pages 1041-1044 inviting Mr Margrett, Mrs Kempton, Mr Haslam and Mr Archibald to meet him.

212.4 He met them on 6 March 2018; the notes of those meetings were at pages 1046-1074. One part of those pages was a note of a telephone conversation with Ms Helen Early which Mr Pegg had as part of his investigation.

212.5 On 16 March 2018 Mr Archibald sent Mr Pegg the email at pages 1075-1077 in response to the matters raised in his interview of 6 March 2018 with Mr Pegg.

212.6 On 10 April 2018, Mr Pegg invited the claimant's former line manager, Mr Chris Smith, to an interview by Skype: the letter in which that was done was at page 1079.

212.7 On 12 April 2018 that interview occurred; there were notes of it at pages 1080-1084.

212.8 On 16 April 2018 Mr Pegg had a meeting with the claimant at which he gave her his detailed report on her grievance at pages 1085-1099 (called in fact "Stage 1 Grievance Summary Report") and the letter of which we were sent a copy by email on 12 February 2021, of which there was an incomplete copy at page 1100.

213 When it was put to him in cross-examination that he should have moved more quickly in determining the claimant's grievance given that the procedure (at pages 1294-1301) said that the hearing of the grievance should "normally be held within give working days of receipt of the formal grievance" and that the manager hearing the grievance should "respond to the grievance, in writing using a standard pro-forma, normally within five working days", Mr Pegg said that

213.1 the claimant herself asked for a pause while she considered the documents disclosed to her in response to her SAR, which he of course agreed to;

213.2 Ms Dewhurst kept in touch with the claimant throughout the period that he (Mr Pegg) was dealing with the grievance: he believed that it was via WhatsApp messages but he did not know how often that occurred;

213.3 the earliest date that the meetings could for a number of practical reasons (including the availability of Mr Pegg, the witnesses, Ms Dewhurst, a note-taker and certain meeting rooms) be arranged with the "priority witnesses" as he called them was 6 March 2018;

213.4 the Easter holiday was at the end of March that year;

213.5 he had a day job (he is a senior employee of the first respondent and at the time was "the Technical Manager responsible for the engineering integration to introduce a new radar system onto the Typhoon aircraft") which was demanding; and

213.6 he give himself three clear weeks to progress the grievance investigation, interleaving it with two days each week when he was either at Edinburgh or Munich, and working in evenings and at weekends, sacrificing his own family time to do so, to give himself the time to consider the grievance thoroughly and without distraction; and

213.7 he then held the outcome meeting at Portsmouth instead of his own base, which was at the first respondent's office at Preston.

214 We accepted that evidence of Mr Pegg.

Allegations 26, 68 and 69 in the Scott Schedule

215 Allegations 26, 68 and 69 in the Scott Schedule concerned particular aspects of the claimant's PDR. Allegation 26 depended on a finding of fact that Mr Haslam stroked the claimant's hand in a suggestive manner, and as we say in paragraph 98 above, we found that that did not happen. However, the factual background to the allegation raised in paragraph 26 is linked to the subject matter of allegations 68 and 69.

<u>Rolling back of the 2016 PDR</u>

216 Mr Archibald referred to the factual basis for the claim of detrimental treatment in paragraphs 26, 68 and 69 of the Scott Schedule in paragraphs 24 and 25 of his witness statement, which were in these terms:

> "24 I note that Vicki has alleged that I rolled back her 2017 PDR. Her 2017 PDR was not rolled back. Her 2016 PDR was rolled back but her rating was not changed. Her rating remains currently recorded as good (pages 208 – 210). Vicki signed off the 2016 PDR on 22 February 2017 with the comment "Looking forward to the new year with the new roles expected. Also looking forward to working for Steve. It should be a challenging new year".
>
> 25 In December 2017, I completed Vicki's PDR for 2017 (pages 771 – 773). PDRs not only look at performance in terms of work, but also behaviours and attitudes. The comments I put in the PDR at page 773 are my subjective views. There is a section for Vicki to put in her views, however Vicki did not complete her part. In my view the form is a record of a conversation rather than a final judgment by me."

217 Mr Haslam did not give direct evidence in relation to the alleged rolling back of the claimant's 2016 PDR: he referred to it in paragraph 24 of his witness statement as having been done by Mr Archibald. When cross-examined on that, Mr Haslam said that it would probably have been Mr Archibald's decision to seek the roll-back, which had to be done by the staff responsible for operating the software in which the document was held (called "Success Factors"), and therefore had to be requested specifically. There was such a request, dated 24 January 2017, at pages 215-216, and it was evidently made by Mr Archibald. Mr Haslam had no recollection of the request or the reason for it but said that while it was technically possible to roll back a PDR for a year and change the grade, that was not what had happened here. We accepted that, as it was clear from the document at pages 208-210 and paragraph 24 of Mr Archibald's witness statement, which we accepted in particular because of what he said in oral evidence. That was that the software in which the PDR documents are held often gets stuck and that the only way to get it unstuck is to roll the document back on the system. He said that he had done that here and sent the document on to the claimant for her to sign, which she had done.

218 Allegation 26 was to the effect that Mr Archibald and/or Mr Haslam had rolled back the claimant's PDR in retaliation for the rejection by the claimant of Mr Haslam after he had (as she alleged) stroked her hand. Thus, it was an allegation of harassment within the meaning of section 26(3) of the EqA 2010. As Mr Archibald said, he had absolutely no reason to assist Mr Haslam to gain revenge for the claimant's rejection of Mr Haslam in response to Mr Haslam's stroking of the claimant's hand: he would have nothing to gain and everything to lose by doing that, so it stretched credulity to assert that he, Mr Archibald, had done that.

219 In any event, we turn now to allegations 68 and 69 in the Scott Schedule. They were based on Mr Archibald's reference in the document at pages 771-773 (at page 772) to the fact that the claimant had "started to site [sic] harassment and

bullying against a number of individuals without any real foundation". That was said by the claimant in paragraphs 68 and 69 of the Scott Schedule to have been done as victimisation within the meaning of section 27 of the EqA 2010 in response to one or both of two things:

219.1 the claimed fact that the claimant had complained to Mrs Kempton on 30 May 2017 of discrimination and harassment; and

219.2 the fact that the claimant had on 12 October 2017 sent an email to Mr Wilding complaining about discrimination/harassment.

220 We have already considered the supposed email to Mr Wilding of 12 October 2017: we presumed that the reference was in fact to the document at pages 752-753, which we have set out in paragraph 186 above. Mr Archibald was not asked in cross-examination (or otherwise) whether he saw that email, but he did say the following things in his witness statement:

> "21 On 21 June I met with Ian Lambert, Vicki's trade union representative. My notes of our meeting are at page 482 – 483 of the bundle. I agreed with him that he would be invited to the next meeting to review the PIP with Debbie Kempton and Jim also present and to go through a timeline as to how we got to the PIP and what Vicki needed to do to improve her performance.
>
> 22 No further review meeting actually took place and I was not further involved in matters until I was interviewed as part of Andy Pegg's grievance investigation in March 2018."

221 We accepted that evidence: the documents in the bundle were consistent with Mr Archibald being no longer involved, and Mr Haslam instead taking responsibility for relevant matters relating to the claimant's absence from work (and, as we say in paragraph 7 above, she was absent from work from 7 June 2017 until the date she resigned). Thus, we concluded that Mr Archibald did not know about the document at pages 752-753 from the claimant to Mr Wilding.

222 However, Mr Archibald clearly would have known whether, and, if so that, the claimant had claimed in the meeting of 30 May 2017 that she had been "bullied and treated unfairly", as he was present at that meeting. In paragraphs 9-11 of Mrs Kempton's witness statement she described the meeting and said that during it, the claimant had said to Mr Archibald "that she felt she had been bullied and been treated unfairly." Mrs Kempton said that Mr Archibald appeared to be genuinely shocked to hear what the claimant was saying: shocked in the sense that he was very surprised to hear it, in that he had had no idea before then that the claimant felt that way. He himself sent the email of the next day, 31 May 2017, at page 349 to the claimant, in which he said this:

> "Hi Vicki,

> Whilst driving home after the meeting yesterday I was pondering some of what was said, as you probably noticed I was quite shocked and hurt at some of the comments and I had no idea how you felt.
>
> So I would like to take this opportunity to apologise if any of my actions have been perceived by you as disrespectful and my failure to recognise that. It was never the intent and I will endeavour to correct that in the future.
>
> All I ask is that in the future if you feel uncomfortable with any of my actions then please let me know. It would be best for both of us to clarify the context or if humour was intended at the time and will also allow me to establish the boundaries.
>
> Best Regards,
>
> Steve"

223 We saw that as corroborating Mrs Kempton's perception (which we accepted was genuine) that Mr Archibald was shocked in that he had until 30 May 2017 had no idea that the claimant felt that she been treated (as Mr Archibald described it in that email) disrespectfully.

224 However, the claimant had already, at the end of the email at pages 323-324 to which we refer in among other places paragraph 185 above, asserted that she was being "harassed and bullied". That was not a statement that the claimant was being harassed and bullied in breach of the EqA 2010, we saw, but those were the words that Mr Archibald wrote in the PDR for 2017 at page 772, so it was at least possible that he had written those words in the PDR at page 772 because they were in that email.

225 Nevertheless, they might have been written because of something said, as it was asserted by the claimant in paragraph 68 of the Scott Schedule, by the claimant to Mrs Kempton on 30 May 2017. However, before that could be the foundation of a valid claim of victimisation, something had to have been said on 30 May 2017 by the claimant to Mrs Kempton that amounted to a protected act within the meaning of section 27(2) of the EqA 2010. The part of the claimant's witness statement which described what she had said to Mrs Kempton on that day was paragraph 240. There was no indication there that the claimant had said anything about, or even remotely related to, the EqA 2010.

226 Mrs Kempton described in paragraphs 7 and 8 of her witness statement what the claimant and she had discussed on 30 May 2017 before the meeting at which Mr Archibald was present. Those paragraphs were as follows:

"7 I travelled to the Portsmouth site for the meeting on 30 May 2017. I recall that Vicki pulled me aside before the meeting. We had an informal chat and she effectively gave me her side of the story and tried to convey how she was feeling. Vicki said that she felt as though she was being treated unfairly in general and didn't feel as though she was underperforming. I suggested to her that Steve may not have been aware of how she felt in this regard and that she should share this with him.

8 We also discussed flexible working and workplace banter. With respect to flexible working, Vicki had previously indicated that she had carer responsibilities, but was adamant that she did not want a change to her contract to formally recognise this. I explained to Vicki that a formal application would protect her as the employee and make it clear when she was available to work. With respect to workplace banter, I suggested to Vicki that people sometimes don't realise that what they say causes offence to others. I asked Vicki if this was still going on, and whether she has made it clear that it was ca[u]sing her offence. At that point Vicki said she recognised banter and that wasn't the issue. I advised that we should discuss these issues in the meeting with Steve.

...

10 In the meeting, Vicki told Steve that she felt she had been bullied and been treated unfairly. I distinctly remember how stunned Steve was when Vicki made this allegation. He was quite visibly shocked - it was clear that he had absolutely no idea that that was how Vicki felt, and it was obvious that had not been his intention. Steve apologised to Vicki if anything he had done had made her feel that way, and assured her that that had never been his intention and he only had Vicki's best interests in mind."

227 In fact, we had the transcript of the meeting, at pages 18-44 of the additional bundle. We could find in it no reference to the claimant saying that she felt that she had been bullied or treated unfairly. If nothing else, that reinforced our recognition of the need for caution when deciding what was in fact said at meetings of which there was no contemporaneous record, and of the value of a contemporaneous record (or, better still, a transcript of a recording of what was said at the meeting). The only thing that the claimant was recorded in the transcript of the meeting of 30 May 2017 to have said that was to any extent a criticism of the manner in which she was treated generally was this, which was recorded at the top of page 41 of the additional bundle:

"Ok so I'd like to say something along them kind of lines but Steve I would appreciate if you could talk to me a lot more respectfully than you do and have done today you have been respectful, previously you haven't".

228 In fact shortly after that entry, i.e. below it, and on the same page, Mrs Kempton is recorded to have said to Mr Archibald: "You seem genuinely sort of gob smacked", to which he replied; "I am". Thus, Mrs Kempton remembered what the claimant said as being that she had been bullied and treated unfairly, but in fact what the claimant said to Mr Archibald was that he had not been respectful previously. That could not, we concluded, properly be regarded as a protected act within the meaning of section 27 of the EqA 2010.

229 There was nothing else in the notes at pages 18-44 of the additional bundle which could conceivably be regarded as a reference, whether implicit or otherwise, to the EqA 2010 or the rights afforded by it.

230 In those circumstances, we concluded that the claimant had not in fact done a protected act within the meaning of section 27 of the EqA 2010 when speaking to Mrs Kempton on 30 May 2017.

The last straw for the claimant

231 When she was being cross-examined, the claimant said that the last straw for her was seeing the words set out at the start of paragraph 219 above in the PDR at page 772. That was borne out by paragraphs 320 to 321 of her witness statement.

One issue of knowledge

232 Before we can state our conclusions on the claims, we need to refer to the question of when the claimant first came to know about the email of 4 March 2016 at page 189 which was the subject of allegation 1 in the Scott Schedule. In paragraph 40 of her witness statement, the claimant said that she was "not aware of this until after my employment had ended with BAE on 19 April 2018". We doubted the accuracy of that assertion, although we acknowledge that the claimant was not cross-examined on it so we had to be cautious about coming to a conclusion that it was not accurate. The reason why we doubted the accuracy of the assertion was that there were the following indications in the documents before us that the claimant could reasonably have been expected to know of the document at page 189 by the beginning of February 2018, and might well in fact have been aware of it at that time but have since forgotten that fact.

232.1 The claimant was, the document at page 1004 showed, sent by Mr John Sanders of the first respondent before 26 January 2018 "information from Debbie Kempton, Jayne Bryant, Andrew Green, Chris Smith, Michelle Villis, Karen Kristiansen and Gareth Banks".

232.2 That "information" was (we concluded, as a matter of interpretation of the document at page 1004) all of the documents given to Mr Sanders pursuant to the claimant's SAR.

232.3 There was no indication in the bundle or the claimant's witness statement that the claimant received anything more concerning Dr Banks before the resumed hearing of the claimant's grievance, on 8 February 2018.

232.4 In paragraph 113 of her witness statement, the claimant said this:

> "Whilst I was not aware until I received the SAR around March 2018, on 19 January 2017 (215 -216) it seems that JH or SA requested the rollback of my Performance Review on BAE's HR software."

232.5 On 30 January 2018, however, Mr Haslam's documents were posted to the claimant, as recorded by Mr Sanders in the email of that date on page 1007.

232.6 In paragraph 307 of her witness statement, the claimant said this:

> "On 9 January 2018 I sent my draft grievance to SW regarding discrimination, bullying and harassment (924, 780 - 781). I had not received full disclosure from my subject access request and as such was unable to complete my grievance."

232.7 The first sentence of paragraph 40 of the claimant's witness statement was in these terms:

> "Whilst I was not aware of this until after my employment had ended with BAE on 19 April 2018, I was provided with an email dated 4 March 2016 [i.e. the email at page 189] as part of my response to a subject access request."

232.8 In paragraphs 310-311 of her witness statement, the claimant said this:

> "310. On 22 January 2018 I received a partial response from DK in relation to my subject access request. In or around late January/ early February 2018 I had noticed that within the documents sent to me from DK [i.e. Mrs Kempton] on 22 January 2018, that MV had decided to close the investigation against me in relation to allegedly breaching the Official Secrets Act, although I was still unsure if this was a final decision.

311. On 23 January 2018 I attended my grievance hearing. I attended this meeting with a colleague, Dawn Berridge, after I had found out from my subject access request that DK had previously been involved with/ aware of my performance management."

233 Those documents and statements of the claimant showed that the claimant had probably forgotten by the time she made her witness statement precisely when she received documents emanating from Dr Banks. We noted in this regard that even if the email of 4 March 2016 from Dr Banks to Mr Haslam at page 189 was disclosed only by Mr Haslam pursuant to the claimant's SAR and not also by Dr Banks, then it was sent on to the claimant on 30 January 2018: see paragraph 232.5 above.

234 There were in the bundle only two emails from Dr Banks which were at all negative as far as the claimant was concerned: the one of 4 March 2016 at page 189 and the one at page 244 dated 10 March 2017 to which the claimant referred in her witness statement in these terms:

> "160. On 10 March 2017 JH emails me, GB and SA with feedback from the event and notes that I received positive customer feedback. In response GB makes the inappropriate comment that ' ... *Kyle and Vicki got on quite well*!'. I was not copied into GB's inappropriate response, speculating about my private life."

235 The following exchange was recorded on page 1029 to have taken place during the second part of the claimant's grievance hearing with Mr Pegg, which took place on 8 February 2018:

> "AP – The grievance has 5 items in correspondence with Gareth.
>
> AD – To be clear on the relationship with Gareth, was he your manager?
>
> VS – He was Project Manager. Jim was the Engineering Manager. He always said to me I'm not in your chain, anything that happens to you is nothing to do with me.
>
> AP – Was there a working relationship there?
>
> VS - I always thought we had a good working relationship but from some of the emails, I don't think I have any more." (Emphasis by underlining added by us.)

236 We could not see how the claimant could have come to the conclusion that she no longer had a good working relationship with Dr Banks except from the emails at pages 189 and 244.

237 In all of those circumstances, we concluded that the claimant either (1) knew by 8 February 2018 of the email at page 189 dated 4 March 2016 from Dr Banks to Mr Haslam but had by the time she came to make her witness statement forgotten that fact, or (2) could with reasonable diligence have seen that email by then.

Our conclusions on the claimant's claims as stated in the Scott Schedule

An initial conclusion on the question whether the claims of harassment within the meaning of section 26(1) of the EqA 2010 added anything to the claim of direct discrimination within the meaning of section 13(1) of that Act

238 We concluded that with the exception of the claim in paragraph 1 of the Scott Schedule, the claims of harassment within the meaning of section 26(1) of the EqA 2010 added nothing to the claims of direct discrimination here, in that the mental element required in the circumstances of this case was no less for the claims of harassment within the meaning of section 26(1) than it was for the claims of direct discrimination within the meaning of section 13(1) of that Act.

Paragraph 1: the "bun in the oven" email

239 We concluded that the email at page 189 constituted (albeit inadvertently as far as Dr Banks was concerned) harassment within the meaning of section 26(1) of the EqA 2010. However, we also concluded that it was not just and equitable to extend time for making the claim in respect of it. That was because the claimant either knew or, with reasonable diligence, would have known by 8 February 2018 that the email had been sent by Dr Banks, and yet the claim was not made until 18 July 2018. That was a delay of over five months, and the claimant was at that time clearly able to press her grievance and then appeal against its dismissal, at a time when (as was evident if nothing else from the email of 12 May 2017 at pages 315-316, to the relevant part of which we refer in paragraph 156 above) the claimant was well aware of her legal rights and (see paragraph 14 of Mr Margrett's witness statement, which we have set out in paragraph 164 above, which, as stated in paragraph 180.2 above, we accepted) was taking advice about them. For the avoidance of doubt, we took into account fully the fact that the claimant was suffering from anxiety and depression throughout that period.

Paragraph 2; the alleged derogatory remark about the claimant's mental health made by Mr Haslam to Mr Archibald in about November 2016

240 Given our conclusions on the facts stated in paragraph 65 above, this claim did not succeed.

Paragraph 3: the alleged stroking by Mr Haslam of the claimant's hand

241 Given our conclusion on the facts stated in paragraph 98 above, this claim did not succeed.

Paragraphs 4 and 42: the text messages to the claimant's mother

242 Given our conclusion on the facts stated in paragraph 99 above, these claims did not succeed.

Paragraphs 5 and 43: the alleged chastisement of the claimant in relation to the attendee log-in sheet in February 2017

243 Given our conclusions on the facts stated in paragraph 103 above, these claims did not succeed.

Paragraphs 6 and 44: the allegation that Mr Haslam said to the claimant "Keep your hair on" and "Oooo is it that girl time, put your handbag away"

244 Given our conclusion on the facts stated in paragraph 106 above, these claims did not succeed.

Paragraphs 7 and 45: the allegation that Mr Archibald told the claimant that she should have been cleaning up the tea and coffee after the delegates

245 Given our conclusion on the facts stated in paragraph 108 above, these claims did not succeed.

Paragraphs 8 and 46: the allegation that Mr Archibald said to the claimant in front of a customer: "Nobody said the project would keep you on"

246 Given our conclusion on the facts stated in paragraph 118 above, these claims did not succeed.

Paragraphs 9 and 47: the allegation that Mr Archibald unfairly criticised the claimant for not having completed a return to work meeting

247 Given our conclusion on the facts stated in paragraph 123 above, these claims did not succeed.

Paragraphs 10, 17, 48 and 49: the allegation that Mr Archibald inappropriately questioned the claimant about her working hours and then threatened her with disciplinary action if she did not agree her working hours

248 Given what we say in paragraphs 142-146 above and our conclusions on the facts stated in paragraph 147 above, these claims did not succeed.

Paragraphs 11, 12, 24, 50 and 54; Mr Haslam's criticisms of the claimant concerning the completion of the February 2017 Event report and the subsequent criticism of the claimant in a PDR and/or subjecting the claimant to a PDR

249 Given our conclusion on the facts stated in paragraph 113 above, these claims did not succeed. We add that we could not understand why it was asserted that Mr Haslam's criticisms of the claimant's performance were made in any way because of, or were in any way related to, the claimant's disability within the meaning of (respectively) sections 13(1) and 26(1) of the EqA 2010.

Paragraphs 13 and 51; Mr Archibald's suggestion to the claimant that if she wanted promotion she could leave the first respondent's employment

250 Given what we say in paragraphs 125-127 above, these claims did not succeed.

Paragraphs 14 and 52: the instant message sent by Mr Haslam to the claimant on 22 Marcy 2017

251 Given our conclusion on the facts in paragraph 129 above, these claims did not succeed.

Paragraph 15: the claimant being singled out on 6 April 2017 for a meeting to discuss her PDR

252 Given our conclusions on the facts stated in paragraphs 113 and 148 above, this claim did not succeed.

Paragraph 16: the alleged statement of Mr Archibald to the claimant that an "inconsistent" rating would impede her employment prospects

253 Given our conclusion on the facts stated in paragraph 162 above, this claim did not succeed.

Paragraph 18; Mr Haslam's adding of the claimant's name to the poor performance/absence list

254 Given our conclusion on the facts stated in paragraph 150 above, this claim did not succeed.

Paragraph 19; threatening the claimant with disciplinary action if she did not agree to an allegedly unnecessary capability action plan

255 Given our conclusion on the facts stated in paragraph 148 above, this claim did not succeed.

Paragraphs 20, 53 and 56: alleged statement that people with mental health issues should be lined up and shot

256 Given our conclusions stated in paragraphs 197 and 198 above, these claims did not succeed.

Paragraphs 21 and 40: the allegation that Mr Archibald "shushed" the claimant

257 Given our conclusion on the facts stated in paragraph 140 above, these claims did not succeed.

Paragraphs 22 and 41: the allegation that Mr Archibald said to the claimant that she was not a proper engineer

258 Given our conclusion on the facts stated in paragraph 140 above, these claims did not succeed.

Paragraphs 23 and 55: the allegation that the claimant, in being or being led to believe that she was being investigated for a disciplinary office and/or a criminal offence, namely a breach of the OSA, and/or ITAR/export control, was harassed (the protected characteristics being both sex and disability) and discriminated against directly because of her disability

259 We deal with allegation 55 at the same time as allegation 23 because those allegations are closely related, if not in part a duplication because (as we say in paragraph 238 above) we saw nothing added by a claim of harassment within the meaning of section 26(1) of the EqA 2010 to a claim of direct discrimination because of the same protected characteristic as that to which the conduct in question is said to relate. In fact, we found it impossible to understand why it was alleged that it was direct discrimination because of disability, let alone harassment within the meaning of section 26(1) with the protected characteristic being disability, to investigate the claimant's actions described in paragraphs 163-182 above. In any event, that was a proposition for which we saw nothing factual from which an inference could be drawn that it was such direct discrimination (or that the action was in any way related to the claimant's disability), and which we rejected. Thus, that claim did not succeed.

260 Similarly, there was in our view nothing in the circumstances from which we could draw the inference that the claimant's sex affected in any way what the respondents did in response to the knowledge that the claimant had recorded her meetings of 16 and 30 May 2017 with Mr Archibald and on 30 May 2017

with Mrs Kempton as well. The conduct of the respondent in that regard had, we concluded, nothing to do with the claimant's sex, i.e. her sex was to no extent a motivating factor for any of the persons employed by the respondent who took steps in response to the claimant's recording of those meetings. Thus that claim also did not succeed.

Paragraph 25: the allegation that Mr Margrett called the claimant "the vilest, most disgusting, immoral, rude human being"

261 Given our conclusions of fact stated in paragraphs 180-182 above, this claim did not succeed.

Paragraphs 26-37; harassment within the meaning of section 26(3) of the EqA 2010 in response to Mr Haslam's alleged stroking of the claimant's hand

262 Given our conclusion on the facts stated in paragraph 98 above, these claims did not succeed.

Paragraph 38: the alleged direct discrimination because of sex through Mr Bradbury not treating the claimant's email to him at page 313 as a grievance and addressing it as such

263 Given our conclusions stated in paragraph 201 above, this claim does not succeed.

Paragraph 39: the failure by Dr Banks to treat the email that the claimant sent to him on 22 May 2017, at pages 315-316, as a grievance was direct discrimination because of the claimant's sex

264 Given our conclusions stated in paragraph 154 above, this claim does not succeed.

Allegation 57: that subjecting the claimant to a PDR on and after 6 April 2017 was a breach of section 15 of the EqA 2010

265 We could not accept that subjecting the claimant to a PDR on and after 6 April 2017 was unfavourable treatment because of something arising in consequence of her disability of depression and anxiety. If, however, it was such treatment then it was a proportionate means of achieving the legitimate aim of assisting the claimant to perform to a satisfactory standard. We had difficulty understanding why it might be thought otherwise, and in fact this point did not appear to be actively pressed (or at least pressed with any vigour) by Mr Curtis on behalf of the claimant.

Allegation 58: the claimant was subjected to "an unnecessarily prolonged investigation [from 30 May 2017 to April 2018] in relation to potential disciplinary and/or criminal conduct relating to a breach of the Official Secrets Act, ITAR and export control", and that was a breach of section 15 of the EqA 2010

266 This allegation failed on the facts if only (but in fact not only) given our finding of fact in paragraph 179 above. That was because in our view it could not sensibly be said that there was an "unnecessarily prolonged investigation" as claimed here, not least because the investigation was to the claimant's clear knowledge at the latest on 27 July 2017 concluded satisfactorily from her point of view. In addition, we could not understand why it was asserted that it was unfavourable treatment because of something arising in consequence of a disability to have a prolonged investigation except as a consequence of the disability making it impossible to speak to the claimant, but in that event not speaking to the claimant would have been a proportionate means of achieving the legitimate aim of not making the claimant's mental health worse. Here, in any event, what Mr Margrett said in paragraph 21 of his witness statement, which we have set out in paragraph 171 above and (as stated in paragraph 172 above) accepted, showed that if there was any doubt in the claimant's mind at any time after 16 June 2017 that the investigation was satisfactorily concluded, it was not objectively justified, so that it could not credibly be said that there was any delay in the investigation, let alone an unnecessary prolonging of it. Furthermore, the investigation was a proportionate means of achieving a legitimate aim, which was complying with the first respondent's obligations described by us in paragraphs 165 and 166 above. For all of these reasons, this claim did not succeed.

Allegation 59: "Not concluding grievances and/or grievance appeal promptly" from 22 February 2017 to June 2018

267 Mr Curtis did not press this allegation beyond the date of the claimant's resignation, which was 19 April 2018. In any event, we could not see why it was asserted that it was unfavourable treatment because of something arising in consequence of a disability not to conclude grievances promptly. More importantly, given the sequence of events and factors which we record in paragraphs 212-214 above, we could not see any failure here to consider promptly the only grievance which the first respondent was in our view obliged to consider. In addition, given that sequence of events we concluded that the manner in which Mr Pegg considered the claimant's formal grievance was a proportionate means of achieving the legitimate aim of considering the detailed and lengthy grievance reasonably thoroughly and fairly not just to the claimant but also to those against whom she had made allegations of wrongdoing.

Allegation 60: failure to make a reasonable adjustment by not concluding disciplinary investigations promptly (concerning the alleged breach of the OSA etc)

268 Given our findings in paragraphs 164-176 above, there was a disciplinary investigation which was prolonged by the failure by the claimant to engage with Ms Villis before she in fact did, which was on 27 July 2017, but that in any event the period of the investigation was no more than from 2 June 2017 to then, and not, as asserted in paragraph 60 of the Scott Schedule, 30 May 2017 to April 2018. The claimant was told by Ms Villis on or before 16 June 2017 that all she needed to do was (see paragraph 171 above) "confirm in writing that there was nothing of concern in the recordings at which point the matter would be closed" and (see paragraph 172 above) by Mr Haslam on 4 July 2017 that all she needed to do was send an email to "security" in the terms described in paragraph 172 above, and then (because the claimant plainly did not do that) on 14 July 2017 that she could simply call Ms Villis, so that the length of the investigation was arguably at most from 2 June to 4 July 2017 (i.e. assuming that there might have been any doubt in the mind of the claimant before then that the investigation was capable of being brought swiftly to a satisfactory conclusion if she co-operated with it in an uncontentious and undemanding way).

269 During that period, the claimant was absent from work except for the first four days so in our view there was no failure to take a reasonable step. However, and crucially, the claimed PCP was not a general practice: it was here simply what happened in the circumstances and was not something which generally happened.

Allegations 61-63; alleged failure to make reasonable adjustments by "not concluding grievances and/or grievance appeal promptly", "not keeping employees reasonably update[d] regarding the progress of an investigation in relation to a potential act of misconduct" concerning the OSA, and "not keeping employees reasonably update[d] regarding the progress of complaints/grievances raised by employees

270 None of these further complaints involved the application of a PCP in our judgment. Rather, they all concerned the manner in which the respondent (t was claimed) acted towards the claimant specifically. In addition, they were not well-founded on the facts, given what we say above, for example in paragraphs 267-269 above. For the avoidance of doubt, we did not see in the claimant's witness statement any allegation of a failure to keep her updated on the progress of the investigation into her formal grievance, and we concluded from what Mr Pegg said as recorded in paragraph 213.2 above that she was in fact kept updated on the progress of that investigation. None of those complaints succeeded, therefore.

Allegations 64-69; victimisation

271 Allegations 64-67 were to the effect that the claimant was investigated for a possible breach of the OSA and related obligations because she had raised grievances to, respectively,

271.1 Dr Banks on 22 February 2017 and/or 22 March 2017 and/or 12 May 2017,

271.2 Mr Bradbury on 11 May 2017,

271.3 Ms Kempton on 30 May 2017, and

271.4 Mr Wilding on 12 October 2017.

272 The persons who were then said to have treated the claimant detrimentally because she had made those communications were, in all four cases, Mr Archibald, Ms Villis and Mrs Kempton.

273 Given what we say in paragraphs 202-211 above, we concluded that Mr Archibald did not in any way treat the claimant detrimentally because of the claimant's communications to Dr Banks referred to in paragraph 271.1 above. There was no evidence of Ms Villis or Mrs Kempton being made aware of those communications. Thus, allegation 64 was not made out on the facts, and did not succeed.

274 It was illogical or at least fundamentally inconsistent to allege (1) that there had been a failure by Mr Bradbury to deal with the claimant's email to him of 11 May 2017 at page 313 and also (2) that Ms Villis, Mrs Kempton and/or Mr Archibald had treated the claimant detrimentally because she had sent that email to Mr Bradbury, unless there was some evidence that the three alleged victimisers had seen it. There was nothing in the evidence before us, or at least to which our attention was drawn, to support the proposition that they had seen it. The allegation in paragraph 65 of the Scott Schedule therefore also did not succeed.

275 Given our conclusion stated in paragraph 230 above that the claimant did not do a protected act on 30 May 2017 when speaking to Mrs Kempton, allegation 66 did not succeed.

276 Given our conclusions stated in paragraph 268 above, the allegation made in paragraph 67 of the Scott Schedule was not well-founded on the facts: the investigation about which complaint was made had finished long before the claimant sent her complaint in writing to Mr Wilding, which was in fact sent not (as claimed) on 12 October 2017, but on 23 November 2017: see page 752 and what we say in paragraph 186 above.

277 Allegation number 68 in the Scott Schedule was predicated on the proposition that the claimant did a protected act when speaking to Mrs Kempton on 30 May 2017. For the reason stated in paragraph 275 above, that complaint was not well-founded and did not succeed.

278 Allegation 69 was that Mr Archibald and/or Mr Haslam caused the claimant's grievance against them to be "inappropriately referenced in the Claimants PDR in April 2018" by reason of the claimant "[raising] a grievance of discrimination/harassment to Mr Wilding" on "12 October 2017". It was not put to Mr Haslam that he had contributed in any way to the text of the document at pages 771-773, and in any event we concluded that only Mr Archibald added text to the document on those pages at the relevant time, i.e. at the end of 2017. Given our conclusion stated in paragraph 221 above about Mr Archibald's knowledge of the email at pages 752-753 (that he did not know about it), the claim made in paragraph 69 of the Scott Schedule could not, and accordingly did not, succeed.

The claim of constructive dismissal

279 As for the claim of constructive dismissal, the only thing which we found was in any way wrongful (in that it was in any way a breach of the Equality Act 2010) in all of the complaints that the claimant made in the Scott Schedule was the first one, concerning the email at page 189 of 4 March 2016 from Dr Banks to Mr Haslam (albeit that the claim in respect of it was out of time). The claimant did not resign in response to that, as was clear from paragraph 40 of her witness statement, which we have set out in paragraph 232.7 above (even though she might have been mistaken about her knowledge of when she first saw the email at page 189).

280 In any event, as we record in paragraph 231 above, the claimant resigned in response to something else: the fact that Mr Archibald had written the words set out at the start of paragraph 219 above in the document at pages 771-773. We have concluded that those words were not written in breach of section 27 of the EqA 2010. We reviewed them in the light of the claimant's claim of constructive dismissal to see whether they were in themselves a breach of the implied term of trust and confidence or, if not that, then at least in some way wrongful so that they could properly be regarded as forming part of "a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term" to which Underhill LJ referred in paragraph 55 of his judgment in *Mruke v Khan*, which we have set out in paragraph 31 above.

281 We did not see those words as being in themselves likely to damage the relationship of trust and confidence, but if they were, then there was reasonable and proper cause for them, given our above findings of fact. Thus, they were not in our view in themselves a breach of the implied term of trust and confidence.

282 We therefore asked ourselves whether the relevant email on page 189 and the fact that Mr Archibald had written the words set out at the start of paragraph 219 above in the document at pages 771-773, taken together, constituted a breach of the implied term of trust and confidence, i.e. an accumulation of conduct which, taken together, constituted a breach of the implied term of trust and confidence. We concluded that they did not. That was in part because they were in no way connected. It was also in part because of the significant lapse of time between them. In any event, we did not see in the words set out at the start of paragraph 219 anything that was wrongful. That was because they were the expression of a genuine view of Mr Archibald for which there was on the facts as found by us an objectively-justified foundation.

283 Therefore, in our judgment the first respondent had not, in the circumstances as we found them to be, breached the implied term of trust and confidence.

284 Accordingly, the claimant resigned and was not dismissed within the meaning of section 95(1)(c) of the ERA 1996.

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Employment Judge Hyams

10 March 2021

Sent to the parties on:

12 March 2021
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T Henry-Yeo
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For Secretary of the Tribunals