EMPLOYMENT TRIBUNALS

Claimant: Mrs R Hussain

Respondent: Commissioners for His Majesty's Revenue and Customs

Heard at: **Birmingham (parties via CVP)** **On:** **24, 25, 26, 27, 28 April 2, 3, 4, 5, 9 May**

Before: **Employment Judge Edmonds**
Mr J Kelly
Mr S Woodall

Representation
Claimant: In person
Respondent: Ms E Hodgetts, Counsel

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is:

1. The claimant's claims of direct discrimination on grounds of race, religion or belief and disability fail and are dismissed.

2. The claimant's claims of failure to make reasonable adjustments fail and are dismissed.

3. The claimant's claim of harassment related to disability fails and is dismissed.

4. The claimant's claims of victimisation fail and are dismissed.

REASONS

Introduction

1. At the time of writing this Judgment and Reasons, this claim was one of seven being pursued against the respondent in the Employment Tribunal. This claim was the first to proceed to hearing.

2. The claimant remains employed by the respondent and at the relevant time she worked as a Band O employee within the counter avoidance team. The claimant commenced early conciliation through ACAS on 22 July 2019 and the certificate was issued on 22 July 2019. Her claim form was presented on 23 July 2019.

3. This case is essentially about the way that the respondent treated the claimant between June 2018 and December 2019 and specifically the way that she was managed in relation to various health conditions, namely anxiety, plantar fasciitis and diabetes. Although her claim relates to the period up to December 2019, it should also be noted that only her victimisation claim relates to the period from July 2018 onwards: given that her claim form was dated 23 July 2019, her allegations logically need to precede that date, however as EJ Butler had accepted into the list of issues certain allegations of victimisation relating to the period up to December 2018, the respondent accepted that this had operated as a valid amendment to the claimant's claim in that regard.

4. The parties attended this hearing via CVP video link by way of a reasonable adjustment due to the claimant's disabilities. For the first six days the Tribunal convened in person in the Tribunal room, and for the remaining days (of which 1.5 days were for deliberations) everyone attended by CVP. In addition, by way of adjustment, we agreed to have short comfort breaks for the claimant every 25 to 30 minutes, and to ensure that at some point each afternoon the claimant would have the opportunity to pray. We also recognised that, due to the claimant's long covid (which occurred after the events in these proceedings), the claimant suffers from some short-term memory loss and we sought to assist the claimant wherever possible with this, for example helping her to locate documents in the file and giving her additional time to do so. Having done so, along with the other adjustments made during the proceedings, we are confident that the claimant has had a fair hearing.

Claims and Issues

5. There were two preliminary hearings to identify the issues in this case. At the first, heard by EJ Butler on 7 January 2020, there was only time to define the issues related to the claimant's claim of victimisation and she was ordered to provide further details relating to her other claims. This prompted the claimant to provide a schedule containing nearly 500 complaints, many of which were not part of the claimant's claim as set out on her claim form. There was then a further open preliminary hearing of 3 days' duration before Employment Judge Noons on 22 to 24 June 2022. At that hearing, an application to amend the claim (to include the nearly 500 allegations from her schedule) was refused. EJ Noons struck out certain of the claimant's claims and issued deposit orders in relation to some others. The claimant subsequently did not pay the deposit and so I dismissed those claims prior to evidence being commenced, leaving only those claims which had not been subject to deposit order or previously struck out remaining to be heard.

6. EJ Noons had included in her case management order a list of the issues in the case, excluding those relating to victimisation which had been addressed by EJ Butler. However, at the start of the hearing, I identified that

it was not ideal that the issues were spread across two separate documents (the two case management orders), and some of those issues were no longer relevant (those being the ones which had been subject to the deposit order which had not been paid). The respondent therefore agreed to prepare an updated List of Issues containing a complete set of the issues remaining in the case during the first day of the hearing, which we received at the start of the second day before evidence commenced.

7. Those issues appeared in a different order to the original issues as determined by EJ Butler and EJ Noons. We went through those issues and satisfied ourselves that, whilst they had been re-ordered and re-worded, they reflected the issues as set out by EJ Butler and EJ Noons. We also satisfied ourselves that the way they had been reworded was more specific and closer to the wording in the relevant statute and was therefore helpful. We therefore adopted those issues. Three matters however were noted:

    a. In relation to knowledge of disability at the relevant time, we clarified that this was an issue in relation to both the condition of anxiety and plantar fasciitis, and not just anxiety as had been noted. In the event, it was conceded during the course of the hearing that the respondent did have knowledge of the disability of anxiety during the relevant period.

    b. In relation to an issue as to whether the claimant was issued with a formal warning on 19 December 2018, the original issue as drafted by EJ Noons had referred to this as being a performance warning, however it was agreed that it was in fact an attendance warning.

    c. There was one additional issue that had erroneously been added by the respondent, which had not been in EJ Noons' Case Management Order dated 1 July 2022, relating to whether the refusal of an Occupational Health referral in February 2019 was direct discrimination on grounds of disability. This was removed when it came to submissions.

    I agreed that the issues should be varied to reflect the above.

8. The issues are lengthy and therefore we do not repeat them verbatim here, however in our conclusions below we have put each issue in italics in full before addressing it, so they are listed through that mechanism. In summary, however, the allegations are of direct discrimination on grounds of disability, race and religion or belief, failure to make reasonable adjustments, victimisation and (in respect of one allegation only) harassment. The respondent accepts that the claimant was disabled as follows:

    a. In relation to anxiety, throughout the relevant period (i.e. by at least June 2018) and that the respondent had organisational knowledge of it throughout that period;

    b. In relation to plantar fasciitis, throughout the relevant period (i.e. by at least June 2018) although the respondent submits that it did not have organisational knowledge of this until January 2019;

c. In relation to diabetes, from April 2019, with the respondent having the requisite knowledge from that point onwards (this being when the claimant was diagnosed).

9. The issues in the case very specifically relate to the period from June 2018 to December 2019: this is important to note given that the claimant has a number of other claims in the Employment Tribunal and there are issues in those claims about potential overlap with these issues and/or whether the claimant should have raised any allegations as part of this claim. The claimant had requested permission to amend her claim form to include claims relating to the period prior to June 2018, which was denied by EJ Noons.

10. Finally, we would note that when it came to evidence and submissions, it appeared clear to us that the claimant did not fully understand how the issues in her case had been pleaded, with the claimant making references to different types of discrimination to those in the agreed issues at various points (e.g. her submissions referring to indirect discrimination despite that not appearing anywhere in the agreed issues). In addition, it also appeared that the alleged protected acts the claimant referred to in evidence were not always the same alleged protected acts that she had identified in the agreed issues (e.g. she referred at times to being victimised for having brought a Tribunal claim and/or for having supported a colleague with a grievance in 2012).

11. When deciding the case, we have used the issues as agreed by EJ Noons and EJ Butler. We considered that it would not be in accordance with the Overriding Objective (set out at Rule 2 of the Employment Tribunal Rules) or the interests of justice to extend the issues beyond those agreed and beyond the pleadings, without any application to amend and without the respondent having had the chance to respond to the claimant's allegations in full (particularly given that the issues were agreed following a three day preliminary hearing which allowed considerable time for discussion of the issues, and given that it was clear to us that some issues had either been struck out or were not given permission to be added by way of amendment at that hearing). However, for completeness we have made some additional observations in our conclusions which indicate our position on some additional points raised by the claimant during the proceedings.

Procedure, documents and evidence heard

General

12. Given that the claimant has other claims before the Employment Tribunal covering other allegations and time periods, we have sought to confine our findings to the matters which occurred between June 2018 and December 2019 (save for some limited findings that are of direct relevance to the issues despite being outside of that period, such as the 2016 DSE assessment).

13. During the course of the hearing, we encountered a number of IT issues relating to various people in attendance. We therefore had to break on a number of occasions for the issues to be rectified, including on one day allowing time for the respondent's representative to travel into Chambers to

join the hearing from there, and on a large number of occasions pausing to wait for the claimant's connectivity to improve as her screen kept freezing. During periods where one party was frozen / dialling out and into the hearing, we ensured that those parties who remained in the CVP room did not discuss the case. It also took some time for the claimant to locate documents during the hearing, as it appeared that she was working from a workstation at home which did not have space around her for the file of documents. The claimant said that this was because she was not permitted to use her work computer to dial into the hearing: the respondent's representative did not believe this to be the case and we would find it surprising if it was given that the respondent's witnesses all dialled into the hearing from their work computers as far as we are aware.

Witnesses

14. The Tribunal heard evidence from the claimant and on her behalf, from Mrs Nirmala Chauhan, a colleague. The Tribunal heard from the following witnesses on behalf of the respondent:

    a. Mr Mohammed Ali, claimant's line manager from June 2018 to November 2018;

    b. Miss Stacy Parsons, claimant's line manager from November 2018 to March 2019;

    c. Mrs Claudine Campbell, claimant's line manager from March 2019 to the end of the relevant period; and

    d. Miss Farzana Malik, workflow manager at the respondent.

15. The claimant's witness statement amounted to 71 pages, which appeared to cover the entirety of her employment within the respondent and not merely the period of time relevant to the issues in her claim. In an email sent to the Tribunal on 18 April 2023, there was a suggestion from the claimant that her witness statement was not complete and had relevant information missing: however upon discussing this with the claimant at the start of the hearing it appeared that this was primarily a reference to the claimant not feeling that all the relevant documents were in the file for hearing. When I said to her that she could nevertheless have put her side of events forward in her witness statement, she said that she had done so and accepted that her witness statement was in fact complete. Given the length of the claimant's statement, we do not address every single point raised by her in these Reasons, although we have considered her statement insofar as relevant to the issues in the case.

16. At times during the claimant's evidence, she was unable to recall specifics or the information she did give was in conflict with the documentary evidence. We were invited to draw inferences from that in relation to the claimant's credibility. The Tribunal has concluded that there were indeed occasions on which the claimant's oral evidence was clearly wrong in light of the documentary evidence we saw. However, we are also mindful that the claimant has not only the disabilities that are the subject of these proceedings, but also long covid. We conclude that there was no malice on the claimant's part, but simply that her recollection of certain events is not

correct. That said, where her evidence was in conflict with the evidence of other witnesses, who we found to be consistent and reliable, we have taken into account that the claimant's recollections are not entirely accurate. For the avoidance of any doubt, we have also ensured that we have not made any assumptions that the claimant would have made similar errors at the relevant time, given that we have only seen the claimant since her long covid commenced and therefore her health now is different to her health at the relevant time.

17. In relation to the evidence of Mrs Chauhan, this was given by telephone due to concerns raised by Mrs Chauhan about utilising video because of medication that she was taking. It became clear during her evidence that she had prepared a draft version, which the claimant had amended before it was further amended into a final version. The respondent submitted that no account could therefore be taken of Mrs Chauhan's evidence, and further that a date that had been provided within it (24 April 2019) was patently wrong given that the claimant was on leave on that date. We have addressed the date issue later in these reasons. However more generally in relation to Mrs Chauhan, whilst it is not unusual for representatives to assist witnesses with the style and topics covered in witness statements, the level of involvement that the claimant had leads us to conclude that Mrs Chauhan was coached by the claimant. Again, we do not necessarily find any malice in that however it is then difficult for the Tribunal to take Mrs Chauhan's evidence at face value when we do not know if the contents were her words or not. We do not find that Mrs Chauhan has lied to the Tribunal, however we do find that her evidence is difficult to accept in its entirety given the level of support she had with it from the claimant.

18. The claimant also submitted what she referred to as witness statements for a number of other individuals, namely Alison Grimley, Carolynn Anderson, Hamida Bano, Imran Shaikh, Kizzy Bingham, Mumtaz Ahmed, Shaid Malik, Sophie Begum, Vincent Parker and Gulferaz Ahmed. In reality, these were in most cases simply emails from those individuals to the claimant, rather than formally drafted statements, and in a number of cases were simply character references. I explained to the claimant that those who were giving evidence for her should attend the Tribunal (video being acceptable in this case) to give evidence, so that they could be cross-examined. The claimant sought to contact the individuals, but save for Mrs Chauhan and Mr Malik (which we address below), did not receive a positive response. The claimant has sought to suggest that witnesses are too scared to give evidence for fear of reprisals. We would add that there is nothing to support that assertion and to the contrary the respondent's representative has made it very clear that there would not be.

19. In relation to those witnesses who provided a written statement but did not attend to give evidence, we have therefore had to consider what weight to attach to their evidence. We have taken their evidence into account as relevant background, but as no more than that given that the witnesses were not present to be cross-examined. In any case, many were not directly relevant to the issues in the case or were primarily intended to be character references.

20. In relation to Shaid Malik, he was prepared to attend the Tribunal by CVP to give evidence, however the respondent was happy to agree the contents of

his witness statement and therefore this was not necessary. The claimant did then suggest on day 7 of the hearing that he would be able to give relevant evidence on other matters (specifically why her anxiety levels were as they were, namely related to a colleague named Mr Bailey). It was explained to the claimant that his witness statement had already been provided and the previous Tribunal orders had been clear that all witness evidence needed to have been provided in advance of the hearing on the specific dates set by the Tribunal and that he should have included anything he wanted to say in that. At that point the claimant then sought to argue that the document provided as a witness statement for him, was not in fact a witness statement at all, but I explained that this did not assist her as there had been a clear order for each witness to provide a written statement in advance. I also explained to the claimant that it was accepted by the respondent that the claimant had an issue with Mr Bailey and that the claimant was disabled by reason of anxiety, therefore this was not in dispute. In the circumstances I found that it would not be in the interests of justice or the Overriding Objective for Mr Malik to be called to give further evidence.

21. In addition, at the start of the hearing the claimant also indicated that she wanted a number of other individuals to give evidence at the hearing, and requested a witness order in relation to 54 individuals (including those identified above), and also requested that her MP be called to give evidence on the basis that she had explained her issues to her MP, who had written to the respondent but not received a response. I made clear to the claimant that this was a significant number of individuals, and that only those who had information relevant to the issues to be decided in the case should be called. However, rather than reflecting upon this and narrowing her assessment of who would be relevant, it is relevant to note that in her submissions at the end of the hearing the claimant instead submitted that a longer hearing should have been allocated to a Judge who had time to hear evidence from that volume of people.

22. Having discussed the subject of witnesses at length with the claimant I came to the conclusion that the claimant was in fact seeking to call everyone who had had any involvement in her situation within the respondent at all, regardless of (a) the extent of their involvement; (b) the relevance of their evidence and (c) whether their involvement was during the relevant period. Some of the witnesses were also witnesses that the respondent might have chosen to call, but had elected not to do so (e.g. other managers within the respondent, such as Nick Bent and Kerry King). I explained to the claimant that it was for the respondent to decide which witnesses it wanted to call but that the claimant could make submissions about the reasons why they did not call certain individuals, if she felt there was a reason for this.

23. I also made clear to the claimant that, before I would consider a witness order, I would expect the claimant to have sought to contact those witnesses herself to see if they would give evidence willingly, and I would need to be satisfied that the evidence they would give would be relevant. We therefore agreed that the claimant would seek to do so during the afternoon of the first day of the hearing, and we discussed the matter further at the start of the second day. The claimant provided a number of emails from certain of those whom she had sought to contact, and we went through

them in turn. In some cases, the individuals had in fact replied to say that they did not feel they had any relevant information to provide to the Tribunal and I decided that it would not be in accordance with the Overriding Objective to order those individuals to attend the Tribunal to give evidence. In another case, the claimant accepted that the individual in question was not involved in the case prior to 2023 and I declined to call that individual on that basis. More generally, I did not see anything that satisfied me that the listed individuals had significant relevant evidence to provide which would justify me making a witness order, and the fact that the claimant had suggested calling such a high volume of people suggested to me that the claimant had not fully addressed her mind to the precise relevance of each specific individual.

Documents

24. We were provided with a file of documents originally amounting to 1772 pages, and during the hearing a handful of additional documents were admitted into evidence, which were added to the files at pages 1773 to 1779 inclusive. Where page references are provided below, these are to the relevant pages in the file of documents. In addition to the main file of documents (and additional pages), we were also provided with a separate HR policy bundle, the claimant provided screenshots from other HR documentation that she considered relevant to the issues in her case and we were provided with an email showing a draft version of Mrs Chauhan's statement as referenced above. During evidence, the Tribunal also requested sight of the respondent's Distance and Homeworking Policy, which was also provided.

25. It was clear at the outset of the hearing and from emails that were in the Tribunal file that there had been some dispute between the parties about the relevance of a number of documents for inclusion in the file for hearing and that the claimant did not believe that all relevant documents had been included despite the size of the file. I could see that a large volume of emails had been sent over the previous months by the claimant to the Tribunal attaching a significant number of emails, with the Tribunal ultimately requesting that the claimant cease sending them in due to the volume of correspondence being received from her.

26. On 23 April 2023, the evening before the hearing commenced, the claimant had emailed the Tribunal (not copying the respondent), attaching a zip file containing a large number of PDF documents, each of which was simply numbered but with no name. In the content of her email she said that she had been advised to send in a separate electronic bundle as the respondent was deliberately not including vital or crucial information. On reviewing the zip file, I noted that it appeared to be the entirety of a subject access request response received from the respondent. I explained to the claimant that:

    a. Only those documents which were actually relevant should be included in the file, and it seemed unlikely that the entirety of the subject access request response would meet that test. It seemed to me that the claimant was simply asking for all documents to be included, without considering the individual relevance of each one; and

b. It was impractical for the Tribunal to work from an email with such a large number of unnamed attachments in any event, the Tribunal would need one set of additional documents to work from.

27. I therefore asked the claimant to reflect overnight and, if there were specific documents that she felt were relevant but were not in the file for hearing, to send them in as one additional document. The following day, the claimant did provide a list of documents but without the documents themselves to enable the Tribunal to link any individual document to its description. The claimant said that she was not able to do that task. In order to progress the discussion, I selected an item at random from the list and asked the claimant to describe what it was about. First of all, the claimant did not have the document to hand despite having sent it into the Tribunal, as it appeared that she had sent it from her work computer but was attending the hearing from her personal one. However, she was able to explain that the document in question was to show her appointment to the Stamps team. On exploring this, I identified that it did not relate to the relevant period in the claimant's case and did not appear to relate to the issues in her claim. I concluded that, it would be disproportionate and not in accordance with the Overriding Objective to delay the hearing further for the Tribunal to print and sort all of these emails, when I was not confident that they were all relevant to the case. I accepted that one or two of them might be, but there did not appear to be any quick way of ascertaining that so instead I asked the parties to proceed with the hearing but said that the claimant could identify any document she felt was relevant and provide it on an individual basis as we went through the hearing.

28. The claimant remained adamant that the respondent had failed to include a large number of relevant documents in the file. We accept that there may have been the occasional document which had some relevance to proceedings, however we noted two things during the course of the hearing. First, that the claimant was unable to clearly identify what those documents were. Secondly, where she did do so, in the vast majority of cases after reviewing the hearing file, the document was located there and had been in the file all along.

29. We are mindful that the claimant has long covid and genuinely had difficulties in remembering where documents were. We made allowances for this, as did the respondent during the course of the hearing (for example, assisting her to find documents in the file despite the absence of precise descriptions). However, given the number of months prior to the hearing where discussions about documents had been taking place, we find that the claimant could and should have taken the time to make a note of the documents that she saw as being key to her case and where they were found. She had not done so and a great deal of time was spent during the hearing addressing the fact that the claimant wished to refer to certain documents but could not recall the precise details of them.

30. In addition, the claimant sought to argue that she was disadvantaged because she only received the file of documents a short time before the hearing. We find that this was not exactly the case: in fact she had received the bulk of the documents in December 2022 and it was only those additional disputed documents which were not added to the file until closer

to the hearing date. None of these documents were new to the claimant however.

31. We made clear to the parties that we would only consider documents which we were taken to (whether in the file for hearing or not). This was made clear to the claimant in particular on a number of occasions, and we specifically reminded the claimant on a number of occasions that the Tribunal would not be reading all of the various emails she had sent to the Tribunal containing additional documents as a matter of course, she needed to identify specific documents which she felt were relevant.

32. Given we are aware that the claimant has other proceedings before the Employment Tribunal, we would urge the claimant to make sure that prior to the final hearings of those cases, she has written down the details of the key documents she wishes to take witnesses to and the page numbers of those documents.

Submissions

33. Both parties made oral submissions on Friday 5 May 2023. I made it clear to both parties that submissions would be limited to 90 each, and both parties were able to complete their submissions within the allotted time.

34. In addition, the respondent provided written submissions to the Tribunal and to the claimant at the end of the afternoon of Thursday 4 May 2023. These were provided at that time so that the claimant had the evening of 4 May 2023 to review them in preparation for her own submissions.

35. At the end of her oral submissions, the claimant asked if she could send her written submissions into the Tribunal. I explained that she could, but that she needed to do so that morning (or over lunchtime) as we would be commencing our deliberations that afternoon. I confirmed to the claimant that I had taken a good note of what she had said. The claimant did send her submissions into the Tribunal, however unfortunately there was an IT issue affecting the Employment Tribunal for around 2 hours that day and this meant that no emails reached the Tribunal during that period, including the claimant's.

36. The following Friday, the claimant attended a preliminary hearing relating to her other claims and EJ Edmonds was the Judge assigned to that case. Although the Employment Tribunal had been told that emails had been sent to all those who had tried to contact the Tribunal by email during that period, asking them to resend their emails, EJ Edmonds clarified the IT issue with the claimant directly and asked her to re-send her document, which she did. Unusually, the original time of sending the document was date stamped as 9 May 2023 and not 5 May 2023, however it referred to the submissions given earlier "today" so we have assumed that this may have been an IT glitch and that the claimant had indeed tried to send it on the correct day. This document was then shared with the rest of the panel in order to ensure that it had been considered before any final decisions were made in relation to the claimant's claims.

The claimant's perception of matters

37. Before we address individual findings in this case, we would take the opportunity to set out some general findings about the claimant's evidence, in addition to the point raised above about some of her recollections.

38. Having heard all of the evidence, a theme arose during the hearing, which was that the claimant's perception of matters on a number of topics was surprising. We find that the way that she perceives matters generally has impacted on her relationship with the respondent and specifically on the view she takes regarding the subject matter of this claim. We make it clear that we do not believe the claimant to be lying or behaving vexatiously or vindictively at any stage, however we find that the claimant approach has a tendency to jump to conclusions that there is simply no evidence to support. For example:

    a. Following the evidence of Mr Ali and Miss Malik, the claimant raised a concern that they had chosen to affirm rather than swearing their oaths on a holy text. The claimant said that she knew they were both religious and that she interpreted their decision to affirm as suggesting that they were not intending to tell the truth to the Tribunal, and invited the Tribunal to dismiss their evidence entirely. She did not point to any particular aspect of their evidence which she said was a lie. The Tribunal had made it clear to each witness that they had a free choice as to whether to affirm or swear an oath according to a particular religion, and that the Tribunal would make no judgment based on which option was chosen. In these circumstances, we find this a shocking accusation to make, and one for which there was no evidence. In our view, the claimant made an assumption which was completely unsupported and unfair.

    b. At the end of Mr Ali's evidence, the claimant noted that Mr Ali had been looking sideways during some of his evidence and that she felt he had been receiving assistance from a third party. Again, she provided no evidence to support this assertion. This resulted in Mr Ali being recalled to give evidence, during which he confirmed that he had two screens in the room, the centre screen having the video feed and the right hand screen containing his witness statement and the file of documents for the hearing. In our view, having watched Mr Ali give evidence, it was self-evident that when he turned sideways he was looking at a document bundle on a second screen and there was no basis whatsoever for suggesting that he had assistance with his evidence.

    c. In her submissions, the claimant suggested that one aspect of the unfair treatment she felt she had received from the respondent was that the respondent had assisted Mr Ali, Miss Malik, Miss Parsons and Mrs Campbell to give their evidence, but had not provided her with the same level of assistance. Those four individuals were witnesses for the respondent, whereas the claimant was giving evidence against the respondent. It is completely unrealistic for the claimant to think that the respondent would in any way assist her to prepare her case against it, regardless of the merits or otherwise of that case.

d. The claimant further suggested that, because Kerry King and Nick Bent had previously worked together, they must have therefore supported each other. Again, there was nothing to support this assertion.

e. As explained above, the claimant consistently sought to argue that the respondent had deliberately excluded a number of key relevant documents from the bundle. However, often, when discussing a particular document that she said was not in the bundle, we would find that it was.

39. Although we are mindful that the claimant's health has changed between the date of the alleged discrimination and the date of the hearing, we do nevertheless believe that these examples are consistent with some of the respondent's submissions about the claimant's interpretation of events at the relevant time, i.e. that the claimant would jump to conclusions about things that were simply not supported by the evidence.

Findings of Fact

Background

40. The claimant started working for the respondent, the UK's tax, payments and customs authority, in March 1993 and remains in the respondent's employment at the date of this hearing. During the claimant's employment she worked in a variety of roles however during the period to which this claim relates she was employed as a Band O employee, moving into the respondent's counter avoidance team during the period relevant to this claim. During the relevant period, the claimant was also a first aider within the respondent and took on some additional duties (voluntarily) relating to business continuity and diversity issues.

41. Although the period relevant to the issues in this case is between June 2018 and December 2019, it is relevant to note that there were two previous incidents which were referred to during evidence, and which clearly still weigh heavily on the claimant's mind:

    a. An incident in or around 2012 involving a managerial colleague named Dave Bailey ("the Dave Bailey incident"); and

    b. An incident which occurred a number of years ago (the precise number not being made clear to us, save that it was a significant number of years), involving a colleague named Mandy Morton ("the Mandy Morton incident").

42. Whilst both matters were mentioned during the hearing and it was apparent that the claimant had negative feelings towards both individuals, it was clear that it was the Dave Bailey incident which was of the most concern to the claimant. We were not provided with specific details about either incident during the hearing by either party, and it does not appear to be directly relevant, save to note that the claimant still feels aggrieved by whatever occurred. However when invited to raise a grievance about the Dave Bailey incident or to explore mediation during the relevant period in this claim, the claimant declined to do so. From the respondent's perspective, the matters

had been addressed a number of years ago when they arose. We find that, from the claimant's perspective, the fact that these issues still affected her significantly many years later influenced her perception of the respondent and various matters which arose during the relevant period. Although we were not provided with the details of what exactly happened, we do find that there may have been some knowledge around the team about whatever it was that had happened.

43. The claimant began to suffer from plantar fasciitis in around 2015 following the birth of her child. A DSE assessment was carried out on 3 November 2016 by Ron White of the respondent (page 496), at which time the claimant was based on the 9th floor of the respondent's City Centre House premises. This of course pre-dates the relevant period of the claim, however is relevant to the question of the respondent's knowledge of disability (to which we turn in our conclusions below). The assessment noted that the claimant had health problems with plantar foot, shoulder/arm problems and suffering from excessive office heat, the latter two of which are not disabilities which are pleaded as relevant to this claim. Mr White stated that the claimant could be covered by the Equality Act and noted that the claimant already had a foot rest. By way of adjustments, amongst other things, the assessment recommended that the claimant be found a window seat because she suffered from excessive heat, and that she be removed from hot desking so that she did not have to carry equipment. In evidence, the claimant suggested that this report was also evidence that she was disabled by reason of anxiety, however having read the report in full there is no mention of anxiety whatsoever and in fact it specifically lists only three (different) health concerns which the claimant suffered from: we find that there was nothing in this assessment which would reasonably alert any manager to any anxiety disability or condition.

44. It is also worth noting at this stage that the claimant's manager at the time of the 2016 DSE assessment was Sarbit Sidhu. Their relationship was good until the claimant had a period of sickness absence and then it went (in the claimant's words) "pear shaped" (the claimant ultimately moving to a different line manager, Janet Blow, in 2017).

45. The claimant's claim relates to her pleaded disabilities of plantar fasciitis, anxiety and diabetes. However, it is also relevant to mention that during the course of the hearing a number of other health conditions were referenced, which the claimant had suffered with at various times, none of which were pleaded as disabilities for the purposes of this claim. It is however relevant to mention them as we have found below that some of the matters which the claimant said were related to her disabilities, were actually related to other medical conditions. Other medical conditions referenced were the shoulder condition and excessive heat as referenced in the 2016 DSE assessment, menopausal symptoms, arthritis, asthma (although the claimant stated that this was not formally diagnosed but she was given inhalers), and a suggestion that she might be autistic although the claimant said that the doctor had said that she did not appear to be sufficiently autistic to warrant any diagnosis. Since the relevant period, the claimant has also suffered from long covid.

46. At the relevant time, the claimant had two children living permanently with her, one aged approximately 16 years old and one aged 3 or 4 (who started

school in September 2019). Her husband also had three children from a previous marriage, who spent alternate weeks at the claimant's. The claimant's husband was a full time carer for the children and the claimant and her husband also shared caring responsibilities for elderly relatives. The claimant also had various siblings and siblings-in-law, some of whom were local or within reasonable travel distance of Birmingham.

47. There was some discussion as to whether the children and the claimant's husband were at home during the daytime, and the evidence provided by the claimant was somewhat unclear on this point. The claimant was keen to suggest that everyone was often out during the daytime (so as to show that she had a private space to work from home), however her youngest child did not start school until September 2019. Whilst the claimant did say that her husband often took her child out or to nursery for the day and we accept that would sometimes have happened, we find that there were also occasions when they were at home. The claimant indicated that she could work from home within the living room, which she described as a long lounge that could be separated by a curtain or door. She also suggested that she could work from her son's bedroom however on questioning it transpired that this was in reference to lockdown, which of course occurred after the relevant period in this claim. Overall, we therefore find that the claimant did not have total privacy at home at all times during the daytime.

48. The respondent operated an attendance management policy and procedure (copies provided in the HR policy bundle), under which it is explained that Attendance Management Triggers can be generated in respect of:

"8 working days (pro rata) of absence in rolling 12 month period
4 periods of absence in rolling 12 month period"

The procedure states that if the trigger point has been reached, then a formal Attendance Meeting should normally be held to consider whether a Written Improvement Warning should be issued. If one is issued, then the jobholder enters a six-month Improvement Period, during which the trigger points are reduced. If attendance is satisfactory at the end of that period, the jobholder can then move into a Sustained Improvement Period of 12 months, during which absence is further monitored but the triggers revert to the standard ones.

49. The respondent also operates a "Disability Adjustment Leave" procedure (a copy of which was in the HR policy bundle). Disability Adjustment Leave is described in the respondent's attendance management procedure as:

"*paid special leave granted for a reason related to someone's disability. It is one possible reasonably adjustment managers can consider to allow disabled jobholders who are fit for work and attending work to have a reasonable adjustment of paid time off work to attend appointments or consultations or hospital treatment related to the management of their disability."*

Separate "Disability Adjustment Leave – guidance for jobholders and managers" dated 6 June 2019 contains a section entitled "When DAL doesn't apply". Within that section it states "*When the individual is not fit for work – that is sickness absence."*

50. Employees are also able to complete a "Workplace Adjustment Passport" documenting all workplace adjustment requirements that they might have. We were not provided with a specific policy on this, however we were provided with an example of one albeit not from the relevant time (it being the claimant's current one). From the evidence we heard about such passports and the content of the template which we were provided with (which we find is likely to be similar to the content of the template in place at the relevant time), we find that this is a document which is owned by the employee in question, rather than by management. It is for the employee to complete (as shown by the way the questions on the form are phrased). We also find that, once completed, it is for the employee to choose who to share it with.

51. In addition, employees can complete "Carer's Passports" to document any caring responsibilities they might have. This is not intended to document any medical conditions of employees themselves, but rather those that they care for. It is also not intended to cover what we call "normal" childcare requirements.

52. In relation to working from home, the respondent had a Distance and Homeworking Policy: this was for designated homeworkers and did not apply to the claimant. It also had a separate "Alternative working patterns: Working from home and working remotely" policy which was for employees whose normal place of work remained unchanged but they are permitted to work at an alternative location for a defined proportion of their working time. This made clear that it was not suitable for all roles and that suitability would be assessed on a case by case basis. Specific reference is also made to the possibility of working from home as a reasonable adjustment.

53. It is worth noting that contractual homeworkers were not, at the relevant time, permitted within the counter avoidance team, and there were a number of tasks which employees were not permitted to carry out from home. Relevant features of the role for the purposes of this claim include:

    a. They were not allowed to call customers on their own phones, and very few people (and none at the claimant's level) had work mobiles;

    b. There was no Teams in use at that time, employees used Skype instead;

    c. Some of the IT systems were not entirely reliable from home (and also on occasion in the office), and the Office 365 migration had not yet happened.

54. During the summer of 2017, the claimant had a significant period of absence. The claimant was issued with a formal Written Improvement Warning and was placed into a six month Improvement Period which ended on 4 January 2018, however at the end of that period it appears that due to an error made by her then line manager the claimant did not have a formal meeting to move her into the 12 month sustained improvement period.

<u>Mr Ali's line management</u>

The claimant's initial absence and return to work

55. In June 2018 Mohammed Ali became the line manager of the claimant's team. This arose due to the claimant and others being placed in an internal "redeployment pool" due to changes within the respondent's business. This was the first time that Mr Ali had acted as a line manager.

56. On 10 June 2018, the claimant was in a car accident and emailed Mr Ali on 11 June 2018 (page 124) to let him know that she was not feeling well and had been signed off work for two weeks. Mr Ali acknowledged the claimant's email and expressed concern for her wellbeing.

57. During her absence, Mr Ali referred the claimant to Occupational Health and a report was provided dated 21 June 2018 (page 130). This stated the reason for absence as being "*stress relating to personal issues and workplace issues*" and referred to whiplash. It referenced the redeployment process as causing stress. The report concluded that the claimant was fit to resume her normal role and recommended a two week phased return, along with discussions regarding the claimant's concerns about redeployment. It concluded that her stress condition was unlikely to be a disability. We accept that Mr Ali took that report at face value and did not know that the claimant had prior issues relating to anxiety.

58. The claimant returned to work on 25 June 2023 and attended a return to work discussion with Mr Ali on the same day (and continuing on 5 July 2018) (page 1619). During the meeting on 25 June 2018 the claimant and Mr Ali discussed a number of matters:

    a. The claimant's fitness for work and reasons for absence;

    b. The redeployment position and the fact that the claimant was being formally placed into the redeployment register; and

    c. Any reasonable adjustments that could be made for the claimant, along with the Occupational Health report and proposals for the claimant's phased return;

59. On 26 June 2018 Mr Ali sent the claimant a link to some internal guidance on stress and resilience guidance (page 132). He also discussed a stress reduction plan with the claimant (page 158) which he sent to her on 27 June 2018 (page 157). We find that the fact that Mr Ali did this so promptly was supportive.

60. There was then a follow up meeting on 5 July 2018, recorded on the return to work document, at which the following was discussed:

    a. The claimant's levels of absence and that a formal attendance meeting would be needed with her at a later date given that she had taken more than 8 days' sick leave;

    b. That the claimant had now had it confirmed that she would be moving to the counter avoidance team on 9 July 2018, that the claimant was feeling much better since finding this out and that she was no longer anxious;

    c. The claimant did however mention that there was a particular individual in the counter avoidance team that she was anxious about possibly

working with (Dave Bailey). Mr Ali explained that there was a grievance process that she could use if anything arose and the claimant commented that the grievance route did not work in her view; and

d. The claimant would return to full time hours from 9 July 2018.

61. The claimant has suggested that Mr Ali should have held a separate meeting with the claimant to discuss the suitability of the counter avoidance post, taking into account the claimant's personal circumstances and disabilities (notably anxiety according to the claimant's witness statement). However, we find that the counter avoidance position was clearly discussed on 5 July 2018 and the claimant would have been able to raise any concerns that she might have had at that meeting. To the contrary, the claimant indicated that she was feeling positive about the move and that she was no longer anxious. In those circumstances we see no basis upon which Mr Ali should reasonably have identified any concerns relating to any disability or otherwise, in fact it appears that the move was resolving the claimant's anxiety. Based on the Occupational Health report and the return to work meeting, it was reasonable for Mr Ali to conclude that the claimant's recent stress was triggered by both the car accident and the uncertainty of the redeployment process, rather than ongoing issues.

The attendance procedure

62. At this point Mr Ali needed to assess how to proceed in relation to the claimant's levels of absence. He was mindful of the procedural errors of the claimant's previous line manager in not formally meeting with the claimant to record the end of the 6 month Improvement Period, so he took guidance from HR on how to approach the situation. He then wrote to the claimant by letter dated 12 July 2018 (page 165) to invite her to a meeting to discuss the previous improvement period. The invite letter stated that "*Your attendance has been satisfactory during the improvement period. This meeting is to make sure that you understand what will happen if your attendance becomes unacceptable again*." Of course, the improvement period was the one that ended in January 2018, before the latest period of absence.

63. He then wrote to her by letter dated 19 July 2018 to confirm that she had moved into a Sustained Improvement Period from 4 January 2018 to 4 January 2019. He also said that he had asked the claimant if she needed any reasonable adjustments, and that the claimant had asked for time to review some reading material and worksheets. Mr Ali confirmed that he would work with the claimant to help her to manage her time. We find that at this stage there were no other adjustments sought by the claimant and that Mr Ali had made reasonable enquiries in that regard.

64. Then, on 20 July 2018 Mr Ali wrote again to the claimant to invite her to a formal meeting in relation to her latest absence (page 178). The meeting was later rearranged due to the claimant attending a funeral and took place on 1 August 2018 (notes at page 210) and Chris Hughes attended in addition to the claimant and Mr Ali. At the meeting, Mr Ali said that he had to consider whether to issue a formal warning as her attendance had hit a trigger point during the sustained improvement period. The claimant said

that she could not control her absence, and also commented that the job she is doing is not one that she would have applied for or that utilises her strengths, to which Mr Ali informed her that she could apply for other roles within the respondent. We find that this is in contrast to what the claimant said earlier that month on 5 July, when she felt positive about the move. For the purposes of this claim, there are no allegations about whether or not it was appropriate to move the claimant into the counter avoidance role so we make no findings in that regard, save to note that the claimant did not appear to object to the move. Whilst the claimant's recent stress was discussed at the meeting, the claimant did not inform Mr Ali that she felt she suffered from a long term illness or disability of anxiety, and therefore we find that at this stage Mr Ali believed that the claimant's stress absence was triggered by the events described above.

65. Towards the end of the meeting, Mr Ali referred to some additional tasks that the claimant had been taking on voluntarily, known as "BCP work" and a diversity awareness event. Mr Ali told the claimant that she might want to consider pulling back from some of her extra activities to give herself the time that she needed to focus on her core role, and suggested that these activities might also be impacting the claimant's work/life balance. The claimant has argued that the notes are inaccurate and that Mr Ali had actually belittled her contribution to the business continuity and diversity work. We find that there is no reason to believe that the notes are inaccurate and that they represent a fair summary of the discussions that took place on that day. They are consistent with comments later made by Mr Ali in a letter dated 3 August 2018 about the same issue, and the notes were taken by Mr Hughes as independent note taker (referenced on page 222). We accept that the claimant genuinely interpreted the comments as belittling, however they were not intended in that way and it was not reasonable for the claimant to have interpreted them that way: we find that they were in fact supportive and demonstrate that Mr Ali was trying to help find solutions to help the claimant succeed in her role. This is the first example of a common theme we have found throughout this case: the claimant often interprets matters in a different way to how things were intended.

66. The claimant suffered a panic attack at work the following morning, during which she was hyperventilating and vomiting. Upon becoming aware of it, Mr Ali approached the claimant and advised her that she could go home if she was not feeling well, however the claimant decided to stay in the office.

67. Later that morning, the claimant completed an "HRACC1" form, which is used by the respondent for employees to notify accidents, near misses or work related ill health (page 190). In the HRACC1 form she said that Mr Ali had made "*various inappropriate comments about the other HMRC work/wider contribution I am doing*" and that she was "*deeply offended, saddened and felt embarrassed/insulted*" by the comments. She said that she was physically sick at home later that day, and twice on 2 August. As outlined above, we find that the claimant genuinely felt this way after the meeting but that this was caused by her misinterpreting what was said, rather than because offensive comments were made to her. We also note that at this point the claimant is again referring to ill health triggered by a specific event, rather than any underlying condition.

68. On 3 August 2018 Mr Ali wrote to the claimant (page 200) to explain that he had decided not to take any formal action against the claimant in relation to her absence at that stage. We find that this again shows Mr Ali to have been a supportive manager.

The PDC meeting on 9 August 2018

69. On 9 August 2018 the claimant attended at "PDC meeting" (a meeting to discuss ongoing performance) with Mr Ali (page 213). During the meeting a team building meeting in the Stoke office was discussed, and the claimant raised a concern that Mr Bailey was based there. Mr Ali explained to the claimant that he understood that she did not want to work with him but that it was reasonable for him to expect her to attend the event which Mr Bailey had organised. He explained that Mr Bailey was a senior G7 manager and the claimant would not be able to avoid him. He asked the claimant what it was that the claimant did not like about him and the claimant said that he was "*obnoxious and inappropriate*", and that she could not erase her memory of "*what he has done in the past*". She did not however give any specific details. Mr Ali told her that she would have to make an effort to work with him. We find this to be a reasonable position for Mr Ali to take in circumstances where the claimant is providing no specific grounds for her dislike of Mr Bailey and is not raising any formal complaint against him.

70. Mr Ali and the claimant also discussed the claimant's performance, with Mr Ali raising concerns that the claimant was behind the rest of the team on her work book. The claimant said that she learns at her own pace, that it takes her time to absorb things and that if she rushes it she would make mistakes. She also commented that the others had not got the same problems as her such as bereavements or road traffic accidents. We find that the performance concerns were genuine, and were supported by later emails from 30 August 2018 when another member of the team raised concerns with the claimant about mistakes with her work (pages 232 and 233).

71. Mr Ali also chased the claimant for her "flexi" information. This relates to a system within the respondent whereby employees could work additional hours to accrue a certain number of flexi hours over a certain period (or go into deficit), and this was recorded on "flexi" sheets.

72. It is notable again that during this meeting, whilst the claimant raises a number of points, she does not at any time inform Mr Ali that she has an underlying health condition of anxiety, or that she needs any adjustments due to any disability or a workplace adjustment passport. In her witness statement, the claimant suggested that she was scared to raise concerns, however we find that this is simply not true as she did in fact raise a number of concerns throughout the relevant period. We also find that, where she did raise concerns, these were taken seriously by the respondent.

The second sickness absence

73. On 29 August 2018 the claimant contacted Mr Ali by email to inform him that she had been signed off sick until 10 September 2018 due to stress at work and at home. Mr Ali made a number of attempts to contact the claimant without success (page 224). Eventually Mr Ali and the claimant spoke on the afternoon of 31 August 2018 but the claimant said that she

was unable to discuss her absence as she had people sitting with her. She advised over email later that day that her absence related to bereavement due to the death of her father in law and also work related stress because she had been asked to attend a meeting where Mr Bailey would be present. It was submitted in evidence that this coincided with a period when the claimant would have been caring for her children as her husband had travelled to be with his father. We find that in the circumstances (where her husband had travelled to be with his sick father, who then passed away) this is understandable and does not change the fact that she was genuinely off sick.

74. On 10 September 2018 the claimant advised that she had been signed off again until 20 September 2018. During a conversation with Mr Ali on 11 September 2018 she referred to anxiety attacks in addition to bereavement and work related stress (the work related stress relating to Mr Bailey). Anxiety was also referenced in an email from the claimant to Mr Ali on 31 August 2018, along with an assertion that the claimant was still not fully recovered from her road traffic accident and minor operation (page 239).

75. During evidence, the claimant alleged that her husband took fit notes into Mr Ali at some point during this absence, and that Mr Ali's treatment of the claimant worsened because he then knew who her husband was. The claimant asserted that Mr Ali had known her husband which Mr Ali denied. We make no finding as to whether or not they knew each other beforehand as no specific information was provided to us to enable us to make a determination on this point, however we would point out that the claimant's claim is that Mr Ali discriminated against her because of her disabilities, race and/or religion, and not because of who her husband is.

76. A further occupational health report was obtained during this period of absence, dated 25 September 2018 (page 246). This referred to her absence due to a *"stress related condition*", and commented on the claimant having a number of issues to deal with, namely two bereavements, a road traffic accident, redeployment and perceived concerns about working with Mr Bailey. It went on to find that there were no medical barriers to returning to work.

77. The claimant was then signed off again until 31 October 2018 but attended a formal attendance meeting on 11 October 2018 (page 276). Again, Chris Hughes attended in addition to the claimant and Mr Ali. During this meeting the claimant confirmed that the absence was triggered by bereavement and work related stress. The claimant referred to the comments made by Mr Ali at the meeting on 1 August 2018, and said that there were other reasons for her stress leave too. Mr Ali asked for details but the claimant declined, saying that she wanted to address it through a grievance and not at this meeting.

78. Mr Ali asked the claimant what was preventing her return to work and she said that she did not want to work with Mr Ali or Mr Bailey. Mr Ali again asked the claimant if she wished to raise a grievance against Mr Bailey but the claimant declined to do so. Mr Ali then asked whether the claimant would consider mediation with Mr Bailey, but she said that she did not want to see his face because he was a "*racist bully*". This was the first time she had mentioned any issue relating to race. She later said that he would hold

onto faxes and tell her then manager that they were not collected, and accuse her of not saying good morning to him. She did not provide any details as to why this related to her race. We find it surprising that the claimant was not prepared to provide any specific details to Mr Ali to enable him to properly consider her concerns. We also find that, if a member of staff does not want to be in contact with a colleague in the workplace, they should make clearly why this is, particularly when the concern relates to something that happened so long ago.

79. During the meeting Mr Ali also asked the claimant what reasonable adjustments would help her back to work. The only thing identified by the claimant at this stage was that either Mr Bailey move, or she move to a different job. The claimant did not request any other adjustments. Mr Ali explained that the claimant was not being managed by Mr Bailey, as he was being managed by Kerry King, who in turn reports to Nick Bent. The claimant was not satisfied with this answer because he was still part of the management chain.

80. On 18 October 2018 Mr Ali wrote to the claimant (page 286) to summarise their discussions. He explained that the respondent would look into the possibility of moving the claimant to a new job, however said that she should consider alternative options if that was not possible. He then went onto explain that due to changes in the management structure the claimant's team would be moving under the line management of Stacy Parsons. He concluded by stating that the department would support her sickness absence at present, but would review this if it became unlikely that she would return to work in a reasonable period of time. This again shows that Mr Ali is being a supportive manager to the claimant, given her significant levels of absence by this stage.

81. We find that, whilst there have been some references to anxiety, Mr Ali reasonably concluded that the claimant's health concerns were triggered by specific events rather than an ongoing condition and that no adjustments were required other than her request to move away from Mr Bailey. During evidence, the claimant submitted that Mr Ali should have noted extra equipment on her desk. There may well have been extra equipment on her desk but given that her issues at this stage relate to anxiety, we cannot see what relevance that has.

82. The claimant also submits that during this period Mr Ali discussed her health (and that of others) with third parties inappropriately. In support of this she provided copies of emails between Mr Ali and a colleague (pages 1777 and 1778) in which another colleague's health was discussed. Having read those emails and heard evidence from Mr Ali, we are satisfied firstly that the colleague in question had consented to the sharing of that information, and secondly that the information needed to be shared in order to make sure that appropriate adjustments were provided for the colleague at a work event. We find it astonishing that the claimant would submit that these are somehow evidence of inappropriate behaviour by Mr Ali, and find that this is an example of the claimant misunderstanding and applying alternative (incorrect) meanings to normal management communications and/or decisions. In addition, with reference to any conversations with Mr Ali may have had with management regarding the claimant's health, we also

find that these were legitimate conversations for the purposes of Mr Ali making sure that his manager was aware of the issues he was dealing with.

83. In terms of a handover from Mr Ali to Miss Parsons, we find that Mr Ali did have some discussions with Miss Parsons about the claimant's health, and specifically informed her of the claimant's stress reduction plan, so she had some knowledge of the claimant's anxiety. During the period of Mr Ali's line management, no issues had arisen in relation to the claimant's plantar fasciitis and therefore we do not believe that there would have been discussions about that condition. The claimant also submitted that information would have been available through online disability records on the respondent's systems. From the claimant's description of these records, we find that these are likely to have been equal opportunity monitoring information, which we believe likely to have been collected in confidence for central HR purposes and would not necessarily have been accessible to managers. We find that the level of handover was sufficient in the circumstances.

Miss Parsons' line management

The claimant's return to work

84. The claimant's last day of absence was 2 November 2018 and she attended a return to work meeting with Miss Parsons on 5 November 2018 (page 303). The claimant's absence was discussed with her and the claimant advised that she had issues with her previous line manager and with another member of the management team who was based in another office (Dave Bailey). She did not mention any generalised anxiety condition, and we find that Miss Parsons would have reasonably assumed that the claimant's ill health was caused by specific trigger events.

85. At this stage it is important to clarify that Mr Bailey was based in another office, i.e. Stoke, because in evidence the claimant suggested to Ms Parsons that he was sitting with the claimant's team and that Miss Parsons should have moved him, which was quite plainly incorrect. This is another example of the claimant's recollection of matters differing significantly from what actually happened (as by the time Mr Bailey did move to her office, she had ceased to be in Miss Parsons' line management).

86. A further issue discussed at this meeting is that the claimant was at that time on the 9th floor, but Miss Parsons offered to try to find her a seat on the 5th floor (which she did and the claimant moved on 8th November 2018). The claimant explained that she had backache and muscle damage from her previous car accident and that she had suffered a large amount of emotional upset and stress due to two bereavements. The claimant confirmed that there were no other work related issues impacting her latest absence, that she was satisfied with her working environment and that she found the work different and challenging. She said that she did not need any additional help or support other than as already discussed and agreed, and it was agreed that a stress reduction plan would be completed. Miss Parsons advised the claimant that her absence had exceeded the trigger points and that she would be invited to a formal meeting to discuss this once a four week phased return to work had ended. Finally, it was

confirmed that the respondent was exploring a job move for the claimant but that this was not guaranteed.

87. The claimant has alleged that, due to there not being a workplace adjustment passport, Miss Parsons had to ask her to repeat herself about her health. We have set out above our finding that this document is one that the employee takes responsibility for preparing, and not the manager. In addition, Miss Parsons said that, regardless, she treats everyone with a clean slate and gets to know them afresh, and we find that this is good management practice. Even if there were a formal document regarding the claimant's health, we find that it would have been necessary for Miss Parsons to go through it with the claimant to gain a full understanding and to ensure that it remained up to date. Again, the claimant is taking something which is beneficial to employees (starting with a clean slate and gaining up to date information directly from the employee) as a negative because of her perception of things.

88. The claimant has also suggested that Miss Parsons should have followed "new entrant guidance" when taking over line management of the claimant. The claimant was not a new employee and this was simply a change in line manager, however we have taken note of the extracts from the guidance provided by the claimant entitled "Guide to ensure a smooth transition from one manager to another". It would be good practice to meet with the colleague as part of taking over line management, which Miss Parsons did as part of the return to work discussion.

Ongoing meetings and discussions

89. On 9 November 2018 the claimant and Miss Parsons had a further meeting, (notes at 306) and the claimant's stress reduction plan was completed (308) along with a DSE assessment. At this stage it was agreed with the clamant that, instead of picking up the full duties associated with her role, she would carry out some alternative (more junior) duties in order to support her return to work. The claimant's stress reduction plan indicated only one particular point to note, namely that a potential move to another role was being explored. No concerns were identified by the claimant in any other area and it recorded her level of stress intensity as being "low". We find that the meetings on that day show that Miss Parsons was being supportive to the claimant, and that the claimant had no significant concerns regarding her health other than in relation to wanting to move to another role.

90. The claimant had a further catch up meeting with Miss Parsons on 30 November 2018 (page 331). The claimant said that things were going ok, but that she was experiencing pain in her foot and that she found the walk difficult from where she parks her car (near five ways). The claimant advised that a role in the Broadway office would be more convenient for her however that she did not feel that the job roles that were located in that location were suitable for her. She asked if she could work from the Broadway office now that the cold weather had started. Miss Parsons told her that this was not a viable option as it would be very isolated but that occasional working from home could be a consideration.

91. They discussed the ongoing search for alternative roles, and the claimant commented that she was unable to apply for jobs as she was in a 12 month

sustained improvement period. Miss Parsons explained to the claimant that there was a rule that during a 6 month improvement period employees would be unable to apply for job vacancies, but that employees could apply during the 12 month sustained improvement period (which the claimant was in at that time). We find that this was correct information. The claimant has alleged that Miss Parsons should have informed her at that time that she was going to be issuing her with a formal warning and therefore that she would not be able to make applications, however we find that the formal warning had not been decided or issued at that point and therefore it would have been entirely inappropriate for Miss Parsons to have said that, as that would have pre-judged the outcome of the future formal attendance meeting. The claimant was aware that there would be a formal attendance meeting, therefore the claimant had all the information available to her to work out that there was a possibility that she would receive a warning and therefore enter a 6 month improvement period.

92. The claimant has asserted that she also mentioned anxiety and not being given a workplace adjustment passport during this meeting. We see no reference to this in the notes and no reason why it would not have been included had it been said.

93. At the end of November, the claimant also had an email exchange with Miss Parsons regarding some volunteering leave which she wanted to book for December 2018. This was under an internal scheme at the respondent whereby employees could take up to 3 days paid volunteering leave during a 12 month rolling period to carry out volunteering, provided that it was of sufficient benefit to both the employee and the organisation. Miss Parsons asked the claimant to complete the relevant application form including the relevant information about the benefits it would bring, which the claimant did. Miss Parsons then approved one days' leave on 6 December 2018 for this purpose.

94. On 4 December 2018 the claimant emailed Miss Parsons (page 340), asking to work from home or the Broadway office two days per week due to her foot condition of plantar fasciitis. She also referenced a potential carer's passport but said that she did not think she really needed one at present. This is somewhat confusing given that the contents of the email were about the claimant's health whereas a carer's passport would relate to caring responsibilities, and we find that the claimant was on occasion confused about what a carer's passport was. Miss Parsons replied on 6 December 2018 (page 340), confirming that whilst the claimant could not work from the Broadway office due to the team not being based there, the claimant could work from home twice per week on a temporary basis because of her foot condition, and asking her to provide a GP letter detailing her condition and its impact on her. She also attached the carer's passport guidance and said that an order had been placed for a lamp and humidifier, as recommended in the last DSE assessment. We find that overall Miss Parsons has therefore supported the claimant appropriately and met her requirements. A GP letter dated 12 December 2018 was subsequently provided, stating that the claimant had plantar fasciitis and "*was last seen with this in December 2017"*. We take it from that that the claimant had not visited her doctor about the condition between December 2017 and December 2018.

95. On the same day, Miss Parsons emailed the claimant (page 348), asking her to correct her flexi sheets.

Absence management meeting December 2018

96. The claimant attended a formal attendance management meeting on 12 December 2018. In addition to the claimant and Miss Parsons, Felicity Brown was present as note taker. The notes from this meeting in the bundle (page 315) contain a significant amount of tracked changes, which we find the claimant added once she was sent the notes.

97. During the meeting, the claimant's absences over a one and four year period were discussed with her. In the past 12 months she had taken 59 days' absence over two periods, including the most recent period of 49 working days. Over a 4 year period, the claimant had had 126 working days' absence (after discounting 26 days' pregnancy related absence). However you look at it, this is a significant level of absence.

98. During the meeting, the claimant said that she was not eligible for Access To Work because she worked more than 16 hours. We find that although the claimant may have genuinely believed that to be the position, she was wrong. Miss Parsons went through the adjustments and support which were in place for the claimant, although it should be noted that the claimant's revised version of the notes shows that she disagrees with some of the matters discussed. One of the points noted by the claimant was against the bullet point stating that she was being permitted to work from home twice a week temporarily, where she noted that she would have preferred to work from the Broadway office due to the provision of additional screens there. It was also stated that the exploration of a move outside the counter avoidance team had been unsuccessful. One of the other points noted by the claimant on the amended notes was that she felt that the stress reduction plan had been a tick box exercise: we have seen nothing to support this assertion and to the contrary we find that Miss Parsons has gone beyond what can be called "tick box" in the way she interacted with and supported the claimant.

99. A Written Improvement Warning for attendance was issued to the claimant on 19 December 2018 (page 373). We accept that the practical consequence of this was that the claimant was no longer able to apply for other roles within the respondent for a 6 month period. The claimant appealed against the imposition of the warning on the same day. The claimant's appeal was ultimately rejected by letter dated 11 January 2019 (page 399) and it was found that all relevant information had been taken into account, the decision was supported by the information available and all known reasonable adjustments had been put in place in a realistic timeframe and that the claimant had indicated to her managers that no other adjustments were required.

100. The claimant's stress reduction plan was also reviewed and updated on 19 December 2018 (page 378). No new concerns were identified. We find that this again shows that Miss Parsons was proactive and supportive in managing the claimant's health.

The claimant's place of work

101. The claimant then completed a carer passport on 20 December 2018. In this she documented the following caring responsibilities:

    a. Primary carer for her elderly parents;

    b. Younger sister and brother with disability / mental health issues for whom she is primary carer;

    c. Shared caring responsibility for 5 children, aged between 16 and 4 years old;

    d. The only driver in the household so needing to take dependents to/from appointments;

    e. Sometimes doing the school runs; and

    f. Sometimes looking after her husband if he is not well or has appointments (noting that English is not his first language).

    The claimant requested to allow her to work two days per week from home or from the Broadway office, to maintain a good work life balance, reduce travel time and be near her family in case of emergencies. Therefore, at this stage, we have a second reason for the claimant's request to work from home or the Broadway office, which is unrelated to her disabilities.

102. On 4 January 2019, Miss Parsons spoke with HR to seek guidance on the Broadway office situation. She told HR that the claimant currently drives but parks near to the Broadway office and then walks from there. Miss Parsons advised that the claimant cannot catch the bus to City Centre House or park closer to work for financial reasons. The claimant has disputed that the reference to financial reasons is correct, and says that actually it was also because standing waiting for buses was difficult for her and buses were unpredictable. Whether or not that is true, we see no reason why Miss Parsons would lie to HR in this scenario and therefore we find that Miss Parsons genuinely believed, based on her conversations with the claimant, that the claimant's motivation for driving and walking was financial.

103. During this conversation, Miss Parsons also explained that the claimant currently worked two days a week from home partly for caring reasons and partly to help with her condition. It was further noted by Miss Parsons that the claimant felt unsupported by her (showing that by this time the relationship was already breaking down), but in Miss Parsons view this was because Miss Parsons did not respond immediately to emails sent by the claimant, despite Miss Parsons responding as soon as she can given the high volume of email traffic received from the claimant. It is worth noting at this point that from what we have seen in the bundle and in the emails sent to the Tribunal by the claimant, the claimant does indeed have a tendency send a large volume of emails. At the end of the conversation, Miss Parsons expressed concern that the claimant's role was going to change and that she would require further training and this would impact the ability to allow the claimant to work from home more than two days a week. By this she meant that the claimant would soon be expected to move away from the more junior level (AO) type work she had been doing and onto O band work aligned to the rest of her team.

January to February 2019

104. On 11 January 2019 the claimant emailed Miss Parsons a request for 3 days' volunteering leave (page 404). In this email she said for Miss Parsons to let her know if all three cannot be taken in the same month, showing that she did not view approval as being guaranteed. She does not state the dates of the leave in her email, but we know from what happened later that these were for late April / early May. Miss Parsons replied on 14 January 2019 (page 404), explaining that the claimant had already taken 3 days in the last 12 month rolling period and therefore she was not able to consider any request until 22 March 2019 (when the first of those 3 days taken would then be more than 12 months ago). This was in accordance with the respondent's volunteering guidance. It should therefore have been obvious to the claimant at that point that she was not going to be able to take 3 days' volunteering leave at the end of April, as by that time she would still have taken 2 days' within the last 12 month rolling period. The claimant replied to say that she would book the days in March (page 404).

105. An Occupational Health report was obtained regarding the claimant's foot condition, dated 15 January 2019 (page 407). This related specifically to the condition of plantar fasciitis, as it was that condition which the claimant had raised concerns about at that time (in relation to travel to work). It was not related to any other condition and we find this to be reasonable given that it was only plantar fasciitis which appeared to be causing the claimant difficulty at that time.

106. The report explained that the claimant had experienced plantar fasciitis since 2015. It said that this condition usually goes away with time however the claimant's symptoms have never completely settled. It stated that gentle exercise may help, however a long walk or being on your feet for a long time often makes the pain worse. The report identified that the claimant had said she could do more work from home with better IT equipment such as a larger screen, and recommended a home based DSE assessment be considered. It said that the condition would cause pain when walking, and specifically that although working from home helps the claimant manage her condition, she had said that she would prefer to work from an office closer to home. The report concluded that the claimant was unlikely to be disabled under the Equality Act. We now know that position was incorrect (the respondent accepts that the claimant was disabled under the Equality Act by reason of plantar fasciitis since January 2019), however Miss Parsons would not have known that at the time.

107. In relation to the recommendation for a screen and a DSE assessment at home, Miss Parsons sought guidance on this and was given some conflicting information initially. Ultimately however she was informed that the claimant did not qualify for a home based assessment or better IT equipment at home on the basis that she was not a contractual homeworker. On this point, we find that the respondent's blanket position was surprising: whilst we can understand that for those who choose to work from home there would be no DSE assessment at home or specialist equipment, we find that the respondent should consider adopting a different approach for those who work from home for part of their working hours by way of reasonable adjustment. In this particular case, however, the

claimant's adjustment was temporary in nature and in those circumstances we can understand the respondent's position.

108. On 18 January 2019 Miss Parsons emailed the claimant confirming that as the equipment that had been recommended by the DSE assessor in November had all arrived and was working, she had closed the equipment requests (page 416). The claimant replied regarding the boxes in which the equipment came in, but said nothing to suggest that she did not have all the adjustments that she required at that time. The claimant says that this was because she had undiagnosed diabetes at the time and she was in a daze. Whether or not the claimant was suffering from ill health relating to undiagnosed diabetes, it is relevant to note that Miss Parsons cannot be criticised for assuming that everything had been addressed at this stage. The claimant said that she raised matters with Kerry King, however there is nothing in the bundle to suggest this was the case and in any event we would find it odd that she did not first raise any concerns about adjustments with her line manager.

109. On 28 January 2019 the claimant and Miss Parsons had a meeting to discuss the Occupational Health report, the claimant's request for a move and the stress reduction plan. They discussed the contents of the report, including the comment that the claimant was unlikely to be disabled and the claimant disputed that given the length of time she had had the condition. In relation to the claimant's requested move, it was explained to her that there were no roles available and that HR had advised that she did not meet the redeployment criteria. Miss Parsons confirmed that she was still exploring options but managed the claimant's expectations that a role could not be created for the claimant if there was not one available.

110. The claimant at this point raised concerns about Mr Bailey, specifically that he would be moving to her office in April 2019 (this again supports the fact that he was not based in the same office during the period of Miss Parsons line management). The claimant confirmed that was because she felt he was a bully, and that she had last had any interactions with him in 2012. Miss Parsons suggested mediation, but the claimant refused and said she also did not wish to arise a grievance because she saw it as too upsetting and just a tick box exercise. In relation to the stress reduction plan, they went through this together however it was identified that the claimant had not fully completed her sections of this and therefore the discussion was put on hold until the claimant added those additional details.

111. The claimant has asserted that at the same time she also requested a leg rest, however this is not recorded in the notes and we find on balance that the claimant did not raise this.

112. Also on 28 January 2019, the claimant emailed Miss Parsons to say that the radiator near her was not working and requesting a fan heater. Miss Parsons replied the same morning to suggest that the claimant ensure the windows were closed, and that she was not aware of any fan heaters but if the heating was not repaired in the next couple of days she could look into it. She allowed the claimant to work from home that afternoon. We find that this related to a very specific issue regarding a broken radiator, rather than any generalised request for a heater by way of reasonable adjustment (as the claimant asserted in evidence).

113. From around this time, the claimant says that Miss Parsons ceased talking to her in person and only communicated with her over email. She says that she was treated differently to other colleagues in this regard. We note that this cannot be entirely true as we have seen a number of emails between the claimant and Miss Parsons which refer to discussions which they have had, showing that there were still some conversations. However, on balance, we accept that in reality Miss Parsons probably was choosing email as her primary form of communication with the claimant. We find that this was because, by this time, she was aware that the claimant was disputing the contents of their discussions and that the claimant was upset with the way she was being treated by Miss Parsons. We find that Miss Parsons was seeking to protect herself by ensuring that there was a documentary record of interactions between herself and the claimant, to avoid any scope for confusion or doubt about what had been said. We understand why she did this and we cannot see that the claimant suffered because of it.

114. On 1 February 2019 the claimant emailed again about volunteering (page 464), saying that she would be requesting three days volunteering in about 6-7 weeks time for the West Midlands Fire Service. Miss Parsons replied on 5 February (page 464), asking the claimant to read the guidance and complete the application form, but also reminding the claimant that she would not be able to approve three days together and would only be able to consider one day, due to the amount of such leave the claimant had taken within the rolling 12 month period. This was in line with policy and gave the claimant clear notice that her request could not be agreed to.

115. On 5 February 2019 the claimant's stress reduction plan was updated again. The claimant raised a number of concerns and stressors.

116. During February 2019, the claimant's performance development conversation ("PDC") was cancelled. We were not shown any documents relating to this however, given that Miss Parsons' evidence on other matters has been corroborated by the documents we saw, we accept her evidence that she thought she recalled that the claimant had taken leave on the day the meeting was booked, and that she would have asked the claimant to re-book the meeting. The fact that it was the claimant who had cancelled it was also further documented within the notes of a meeting between the claimant and Miss Parsons on 11 March 2019 (page 553).

117. On 13 February 2019 the claimant completed a DSE self-assessment (page 504) due to her having pulled a muscle in her shoulder blade area (page 503) checklist. In this she referenced discomfort and that she had not been provided with a trolley back to carry equipment. In the relevant section, the claimant indicated that she had a footrest and did not raise any concerns about it. She also said that a foot stool had been recommended to keep legs straight. She did however say that she needed to sit near a window *"as I am very sensitive to smells and it can make me vomit, to reduce discomfort to eyes and thermal comfort in summer months. Also near the kitchen or wash room in case I am sick at work (anxiety / panic attacks)*. She then also forwarded a copy of her 2016 DSE assessment to Miss Parsons early the following morning (page 495). We note at this point that the 2016 DSE assessment related to a period a number of years earlier when the claimant worked on a different floor.

118. Miss Parsons then replied to the claimant's self-assessment on 14 February 2019 (page 500), attaching her responses to the concerns raised by the claimant (page 501). In this response she commented that, if the claimant was unable to transport her equipment between home and the office, "*we may need to consider if working from the office 5 days a week is a better option for you with your shoulder pain and discomfort"*. She does not however prevent the claimant from continuing with her temporary working from home arrangement and in fact confirms that she will order a new mouse for the claimant to work from home.

119. In relation to the claimant's comments about sitting near a window, kitchen and rest room, it was confirmed that there were a number of desks near to the window for the one day a week that the claimant needed to move desks. Miss Parsons said that she was not aware of any medical issues with panic attacks and recommended that if these were causing emotional or physical issues the claimant obtain medical advice. Miss Parsons confirmed that most seats are near "route 4" where the toilets and kitchen are located. She also confirmed that the claimant's ongoing concerns about work related stress are not something that a DSE assessor could help with.

120. In relation to the claimant's comment about a foot stool being recommended, Miss Parsons noted that this had not been shown as recommended on the latest DSE assessment and said that a further DSE assessment may be required.

121. There was some suggestion during the hearing that the claimant had contacted Chris Barker of the respondent regarding her concerns on 14 February 2019. The only documents in the bundle relating to Mr Barker are from 26 February 2019 and 14 March 2019 and we find that there was no written correspondence between them on that date. However, in a later email dated 26 February 2019 the claimant did say "*Like I explained to you on your visit 14/2/19.."* and therefore it does appear that there was some verbal conversation on 14 February 2019, although the details of it are unknown.

122. The claimant then emailed Kerry King, a member of management who was also one of the respondent's mental health advisors, on 14 February 2019 (page 517), asking for her line management to be changed to Claudine Campbell because of issues she had with Miss Parsons.

123. During the hearing the claimant asserted that Miss Parsons also refused to refer the claimant to occupational health on 14 February 2019. Having gone through the evidence and the documents available to us, we have found reference to this issue on 14 March 2019 (to which we refer below), but not 14 February. We find that the claimant was mistaken in her reference to 14 February 2019.

124. Following the claimant's email to Kerry King requesting a new manager, Ms King spoke with the claimant on 25 February 2019 (note at page 520). She informed the claimant that she did not believe that Claudine Campbell had capacity to act as the claimant's line manager due to Mrs Campbell working part time and spending one of her working days each week on trade union duties. She said that she could not see that Miss Parsons had done anything wrong save for one decision that she needed to review with her.

We find that this incorrect decision refers to Miss Parsons' decision not to issue the claimant with a trolley bag. She concluded that she had no reason to believe that the claimant was suffering from bullying or harassment by Miss Parsons.

125. The claimant then emailed Chris Barker on 26 February 2019 (page 522). She said that *"Although DSE equipment requested has been provided, there is lack of emotional support and duty of care".* She said that her mental health issues were being ignored, that she could not work with bullies, that the stress reduction plan was only a paper exercise, that she felt the respondent was delaying things so that she would be sick and then get another warning or resign, and that it was a constructive dismissal situation and she felt persecuted for raising concerns/whistleblowing.

The leg rest / foot stool

126. On 27 February 2019 Miss Parsons emailed the claimant (page 530), confirming in light of the claimant's DSE checklist of 13 February 2019, all of the equipment that had been provided to the claimant. She stated that *"You confirmed during our conversation this morning that you now feel all required equipment is in place and there is nothing further you need…"*. Specifically in relation to a footstool she stated that *"this piece of equipment is already in place and confirmed as fit for purpose*".

127. On 27 February 2019 Miss Parsons also provided a trolley bag to the claimant. The claimant has alleged that the timing of this was suspicious in light of her email to Chris Barker on 26 February and she feels this was the prompt for it, however Miss Parsons has said that she would not have been aware of the email to Mr Barker at that point. We note that in fact Ms King undertook to speak to Miss Parsons about the trolley bag on 25 February 2019 and we find that this was the likely reason why the trolley bag was then provided.

128. The claimant initially replied to Miss Parson's email about the equipment provided on 28 February 2019 to say simply "*Thanks*" (page 530). However she then emailed again on the same date at 1pm (page 537) to say that actually it was not the footrest that they had spoken about, it was a foot stool. Miss Parsons replied (page 537) to say that the foot stool is not on order as she had thought the one she had was fit for purpose. She said that she would now go back to the DSE assessor to identify if she was able to order this or if a risk assessment would be needed. We find that this was an appropriate and supportive response from Miss Parsons. We also find that this reflects an ongoing confusion regarding the correct terminology for the equipment which the claimant sought – i.e. whether it was a foot rest, a foot stool or a leg rest. Differing terms appear to have been used interchangeably when they are in fact different things. However, we find that the claimant was not clear either in what her requirements were, and therefore we do not place blame with any individual for the confusion.

129. Miss Parsons emailed Julie Coombes from the DSE team on 28 February 2019 (page 640) explaining the situation and asking if a leg rest could be ordered without an assessment. Miss Parsons chased Ms Coombes on 8 March 2019, and Miss Coombes replied saying that she had been making enquiries, and gave details of the only alternative which could be ordered.

She instructed Miss Parsons to go ahead and said that she will collect the previous item.

130. Miss Parsons emailed the claimant to update her on this on 12 March 2019 (page 561). The following day, the claimant replied complaining about the fact that the other foot rest was being taken away. We find the claimant's strong reaction surprising – it seems obvious to us that, even if mistaken, the DSE assessor had simply believed that the wrong type of foot stool / foot rest had been provided and therefore that the old one was not needed. A simple clarification that both were required would be sufficient to resolve the matter. This is again indicative of the claimant's perception of things, seeing conflict and issues where there were none.

131. In the same email, the claimant also asks for an Occupational Health referral as "*all this is causing me unnecessary stress having to go over things again and again*". We note at this stage that this is in the context of adjustments relating to plantar fasciitis specifically, and not any other medical condition.

132. Miss Parsons replies on 14 March 2019 (page 570), saying that she would go back to the DSE assessor regarding the claimant's concerns, but that she did not feel an Occupational Health referral would help support any recommendations, given that a telephone consultation had been held on 15 January 2019 and no recommendations made regarding equipment to support her foot condition. She confirmed that she had placed the order for the height adjustable footrest. Miss Parsons then emailed Ms Coombes on 15 March 2019 (page 639) confirming that the order had been placed and asking for a face to face risk assessment in light of the claimant's concerns.

The claimant's work duties and performance

133. Around this time, the claimant started working with the rest of the team on something called Schedule 36 letters. This related to a process under which HMRC has the power to issue taxpayers with notice to provide information, and penalties if not provided. The work involved checking case records, contacting caseworkers, taking incoming calls from customers and their representatives, carrying out Companies House checks and carrying out checks on other HMRC systems.

134. On or around 4 March 2019, Farzana Malik had moved to the counter avoidance team as a workflow manager to work with the claimant's team. Her role was to assign tasks to the team and ensure they were completed satisfactorily, giving support and coaching as appropriate, distinct from Miss Parson's role as HR manager / line manager. If performance issues were identified, Miss Malik would refer them onto Miss Parsons to address. We find that Miss Malik was made aware that the claimant was seeking to work from the Broadway office due to a health condition, but that she was not specifically made aware of the claimant's anxiety condition. When she first moved into the team, the team were selecting cases themselves on the system, however she changed that so that tasks were specifically assigned to individuals.

135. The claimant has asserted that Miss Malik had preconceived ideas about her, and this was supported by the evidence given by Mrs Chauhan. We

find however that, even if the claimant had heard some "gossip" about the claimant (which is possible), we do not believe that this influenced the way in which she worked with the claimant and we accept Miss Malik's evidence that she took the claimant as she found her.

136. From Miss Malik's evidence, we are clear that Miss Malik put in place step by step clear instructions for a number of tasks, and also added to the already-existing step by step instructions that previous employees had put in place.

137. By around mid March 2019, Miss Malik had identified a number of issues with the claimant's work. She sat down with the claimant to go through the work she was doing and to identify areas for improvement (e.g. things that the claimant had missed). From this point onwards, we find that Miss Malik was having discussions with the claimant about her work.

Stress reduction plan

138. On 11 March 2019 the claimant attended a meeting with Miss Parsons to discuss and review her stress reduction plan (page 552). During the meeting the claimant commented that she was finding the Schedule 36 work difficult. Miss Parsons asked the claimant if she had found the guidance beneficial, to which the claimant replied that she prefers to use her own notes but would rather not do that type of work. Miss Parsons sought to explore with the claimant what her particular areas of difficulty were, whilst making clear to the claimant that the BAU work she had been doing previously was moving to the more junior AO members of staff (it being more junior level work that had only been given to the claimant on a temporary basis). Miss Parsons asked the claimant what support she needed, however the claimant indicated that Miss Parsons could not change the role. Miss Parsons continued to explore potential support, such as additional feedback (and they discussed the fact that the claimant had cancelled her February PDC meeting). They also discussed the claimant's request for a move and it was confirmed to the claimant that this was still being explored but that nothing had been found as yet.

139. Miss Parsons asked the claimant about her reference to bullying and harassment on her stress reduction plan, and the claimant said that she finds it difficult to talk to Miss Parsons and found her cold. Miss Parsons explained that she did not always have time to come over and speak to people directly but that bullying and harassment are serious allegations and she suggested she speak to Ms King. Overall, the notes from this meeting show that Miss Parsons was attempting to support the claimant and we also note that this appears to have been a physical meeting, therefore it is not the case that Miss Parsons never spoke to her in person. Following the meeting, a box was added to the claimant's stress reduction plan, nothing her concerns (page 543).

140. The claimant says that her PDC conversation was due to take place on 13 March 2019 but that Miss Parsons cancelled it. We cannot see any evidence to show what did or did not happen in this regard. We find that the PDC did not go ahead, but make two observations: first, we do not feel able to say whether the claimant cancelled it or Miss Parsons (noting that the claimant had also accused Miss Parsons of cancelling the February one

when in reality the claimant had cancelled it). Secondly, whilst the PDC may not have gone ahead, Miss Parsons and the claimant were in regular contact, and Miss Malik was giving the claimant feedback on her performance, so there were opportunities for the claimant to request assistance with her performance if she wished to do so.

Further issues

141. On 13 March 2019, the claimant spoke with Ms King and Ms King in turn spoke with Miss Parsons. Following this, it was decided to continue with the order for the leg raiser / rest but for the claimant to also retain the footstool that she already had. We find this to be an appropriate outcome.

142. On 14 March 2019 the claimant then sent another HRACC1 form to Chris Barker (pages 572/573), alleging daily humiliations, harassment and subtle bullying. She referred to being told that her foot rest was being taken away from her and that this caused an anxiety attack and said that her manager did not support her. At this stage, we accept that Miss Parsons would not have been aware that the claimant had submitted this HRACC1.

143. On 18 March 2019 the claimant asked again about volunteering leave (page 625). She said that she would like to book three days' special (volunteering) leave and two days flexi leave. We find this a very odd thing for the claimant to have done, given that it had been made absolutely clear to her that three days would not be granted given the amount of volunteering she had already done over the past 12 months.

144. On 19 March 2019 Miss Parsons refused the request for volunteering leave. She explained that she did not believe that the activity would support new or enhanced development or provide a benefit to the business, and also referenced the claimant's unsatisfactory attendance record. She said that she did not fit the criteria for community volunteering. The claimant replied on the same day, expressing her disappointment at this and suggested that Miss Parsons had led her on and ruined her plans. In evidence the claimant said that the nature of the volunteering activity was different to those that she had done previously, even though it was for the same organisation, however we find that she did not reference that in this email, despite it being an obvious opportunity to do so, and on balance we find that she did not make this clear in other ways either. The claimant asked if she could book flexi leave or unpaid special leave instead.

145. On 20 March 2019, the leg rest arrived. However, the claimant did not open it. Her evidence was somewhat inconsistent on this point, saying at one point that she did not realise it was by her desk until Claudine Campbell later pointed it out, then also suggesting that it was by her desk with the rest of the team's spare equipment so she did not realise it was hers, and then also suggesting that the reason she did not open it was because she could see that it was unsuitable from looking at the unopened box (she referenced that she could see a piece of metal on it which she felt could be dangerous). We find that the equipment did indeed arrive on the 20th March, and that the claimant's account of events is unconvincing. If she knew it was for her, we find no good reason why she did not open it, given that this had been ordered at her request. Equally however, we find it implausible that she

would not have noticed that it was there, or that if she did not receive it she would not have checked on its whereabouts.

146. Line management then moved over to Mrs Campbell, as set out below. During the period of Ms Parsons' line manager, we accept that there was no discussion with the claimant about any personal evacuation plan ("PEP"). However, equally we find that the claimant did not raise this as an issue at any time. In evidence, the claimant suggested at one point that she only needed one when on the 9th floor, which she was not at that time. She also however suggested that she did need one due to moving round between floors for meetings. We find it surprising that on the one hand she says that she would struggle to move between floors, and on the other hand she was a first aider who presumably would have to be ready to go to other floors regularly. In any case, we find that the claimant said nothing to Miss Parsons to indicate that she would have any difficulty moving between floors or exiting the building in an emergency.

147. It is also worth noting that, following the end of Miss Parsons' period of line management, Miss Parsons raised a grievance against the claimant (page 733), alleging that:

    a. The claimant had submitted unfounded, malicious and unsubstantiated allegations against her;

    b. The claimant had consistently sent inappropriately high volumes of emails, expecting an immediate response; and

    c. The claimant was reluctant to speak to her face to face

    The grievance was formally investigated without mediation being offered to the claimant and was ultimately upheld (page 1648). The respondent submits, and we accept, that mediation is only viable where all parties wish to partake in it, and that it was Miss Parson's right to have her grievance addressed formally.

148. During the grievance investigations, we find that certain information was passed to the claimant to enable her to respond to the allegations, but not full details. We find this consistent with good practice, to maintain confidentiality over the grievance process, and find it strange that on the one hand the claimant asserts at various points that her own confidentiality was breached when her personal matters were discussed, but equally expects all matters related to another individual's grievance to have been shared with her.

<u>Mrs Campbell's line management</u>

Introductory meeting

149. On around 25 March 2019, Claudine Campbell took over as the claimant's line manager due to the allegations of bullying made by the claimant against Miss Parsons (and as previously requested by the claimant). Whilst Mrs Campbell had not managed the claimant before, she had some previous knowledge of her due to dealing with the claimant's concerns in her capacity as union representative.

150. We find that Miss Parsons did some form of handover to Mrs Campbell in late March, evidenced by the fact that on 27 March 2019 Miss Parsons forwarded to Mrs Campbell emails regarding the leg rest and volunteering leave. There is also a reference to a handover meeting on 17 April 2019 at page 1268 of the bundle. However, Mrs Campbell did confirm that the handover was not "in depth" as her management style was to speak to the person themselves and to access any relevant documents such as the stress reduction plan and DSE documentation.

151. On 3 April 2019 the claimant had an introductory meeting with Mrs Campbell (page 1264). We note that the meeting notes from this meeting show that they were added to on a regular ongoing basis until the end of August 2019. We also note that the meeting notes are headed "*Introductory meeting and a first P&DC 1-1 conversation"*. The claimant has denied that this meeting was a P&DC conversation but we find that it clearly was, both because of the title and also because, as referenced below, the claimant's work was discussed.

152. During this meeting a number of matters were discussed, including the claimant's concerns around Mr Bailey (but again no specifics provided by the claimant), the claimant's absence record and the temporary reasonable adjustment of working from home 2 days per week. In relation to her working from home days, Mrs Campbell told the claimant that her working from home days should not really be fixed days of the week, however the claimant said that she had set her home life around working from home on Tuesdays and Thursdays, for example taking her parents to appointments and collecting her children from school. Mrs Campbell confirmed that this would not necessarily be an ongoing arrangement. We find it surprising that the claimant did this given that the arrangement was also supposed to be temporary, and also note that the school run would have been during her normal working hours. This also demonstrates that caring responsibilities and doing the school run formed at least part of the reason why the claimant wanted to work from home.

153. They went onto discuss the claimant's health. The claimant referenced three ailments; dyslexia, asthma and difficulty working in a noisy environment. Interestingly, she did not reference anxiety or plantar fasciitis (her diabetes was at that time still undiagnosed). They then discussed the claimant's work. It was confirmed that as an O band employee the claimant would be taking on full O band duties and the BAU work that she had been doing would be passed to the new AO band employees. The claimant confirmed she would do a handover and mentor them into their tasks. The claimant went on to say that she felt she was fine with the O band work and had received the same training as the other O bands. She said that she did not feel she had any development issues.

154. They then discussed the claimant's volunteering, and Mrs Campbell expressed a concern that the nature of it did not appear to align with what the respondent envisaged from the scheme. The claimant commented that no one had objected previously: we find that was probably the case (save for Miss Parsons) but that this does not necessarily mean that the volunteering did fall within the remit of the scheme. Mrs Campbell said that she would look into it, but said that she thought that after so many years of volunteering with the same organisation, the fire service will have had

sufficient assistance and she could not see an ongoing benefit to the claimant's development or the business. She suggested the claimant look at other opportunities. This would have been an opportune time for the claimant to explain if she felt that this year's scheme was different to those of previous years (as she submitted in evidence), but she did not. On the meeting notes, Mrs Campbell also added a note after the meeting saying that on checking the claimant's record she in fact found that the claimant had taken 7 days in the previous year for community volunteering (in contrast to the permitted 3) but as different managers had authorised the requests she would take no remedial action.

155. The meeting was a long one and so Mrs Campbell informed the claimant that they would review her stress reduction plan separately. The claimant commented that her main stressor was being near Mr Bailey but otherwise her current stress levels were now low due to the change in line manager. In the circumstances, we find that to be appropriate.

156. Also on 3 April 2019, the claimant was contacted by the DSE team to set up her DSE risk assessment (page 686). The claimant replied the following day (page 686) saying simply "*I do not require a DSE assessment at present*". This information was then passed onto Mrs Campbell and the request for an assessment cancelled. The claimant says that she did this because she felt that without an Occupational Health report the DSE assessor would not be able to do anything. We find that to be a surprising view to take, but even if that were the case, the claimant does not explain this to anyone. From the respondent's perspective, the claimant simply did not want/require an assessment and the matter regarding the leg rest was now resolved.

April 2019

157. On 5 April 2019 the claimant emailed Mrs Campbell to ask for the volunteering leave again (page 698). This time she said that she was happy to work half days, or offered to take unpaid special leave as an alternative. In evidence, the claimant suggested that this was because in reality each day of volunteering would only take half of the day and therefore she could have worked from home for the other half, however she also contradicted herself in evidence on this point by suggesting that it did take longer than half days. Either way, we find it strange that she did not explain why she was asking to work from home half days, whilst also asking for 3 full days' (paid) volunteering leave, and we find her evidence to be inconsistent on this issue.

158. Mrs Campbell replied on 8 April 2019 (page 697), making the claimant aware that the counter avoidance work had now been declared business critical until the end of August 2019 at least (the implication being that this might prevent volunteering leave from being approved). She also confirmed that the application did not appear to fit the relevant criteria but said that she would ask the volunteering coordinator. In response to this, on 9 April 2019 for the first time the claimant suggested that she would learn new skills on this particular project. Mrs Campbell did indeed contact the volunteering coordinator (page 724), who confirmed that the activity did not clearly fit with the criteria for volunteering leave, but said that Mrs Campbell had discretion over the matter if she felt that it offered tangible business skills,

although noting whether this would be the case given the number of years that the claimant had undertaken this volunteering.

159. During this period, the claimant was diagnosed with diabetes and we accept that this upsetting for her. She told Mrs Campbell on around 8 April 2019 that she had had "bad news" and then on 10 April 2019 explained her diagnosis to Mrs Campbell. We accept Mrs Campbell's evidence that a particular concern to the claimant was a fear that she might die, based on her having a diabetes aunt who was extremely ill at that time. We find that Mrs Campbell reacted in a supportive manner and was understanding, sharing information about her own personal experience of the condition (Mrs Campbell's late husband having been diabetic).

160. On 17 April 2019 Mrs Campbell confirmed to the claimant that her application for volunteering leave was being refused (page 745). She did however confirm that the claimant could take unpaid leave, (which the claimant had previously suggested she could do). She also noted that the date of the leave coincided with the date on which a meeting had previously been booked to review the claimant's stress reduction plan and said that this would need to be rearranged. This demonstrates that the stress reduction plan remained at the forefront of Mrs Campbell's mind and she was addressing the clash proactively. The claimant has suggested that Mrs Campbell should have brought forward that review, however we see nothing to suggest that the claimant requested it and there may not have been availability in the diary. We also see no reason why Mrs Campbell would have viewed it as urgent, noting the claimant's comments about her stresses being low on 3 April 2019.

161. The claimant replied on the evening of 24 April 2019 (page 747), saying that she would take annual leave instead. In evidence the claimant said that she could not take unpaid annual leave because she did not have enough time to learn how to complete an unpaid leave request, and that due to the added stress involved in doing that, she decided to take annual leave instead. Whilst the claimant was perfectly entitled to ask for annual leave instead, we find nothing wrong in Mrs Campbell's handling of the situation and no reason for Mrs Campbell to suspect that the claimant had any difficulty in requesting unpaid leave. The claimant also explained that she was now unwell and would *"have to deal with the stress reduction plan when and if I get back"*

162. In evidence, Mrs Chauhan also said that on 24 April 2019 she overheard Mrs Campbell and Miss Malik discussing the claimant and commenting that she had assisted Mrs Chauhan's grievance previously. Mrs Chauhan said that she went and spoke to the claimant about it in the office that day. In reality, the claimant was on leave that day so that could not have happened. We find it hard, given the points noted above regarding Mrs Chauhan's credibility and the assistance she clearly had from the claimant with her statement, to say whether or not these conversations did not happen, or did happen but on a different date. Either way, they did not happen exactly as put to us.

Working from home arrangements, leg rest and occupational health

163. On 1 May 2019, Ms King emailed the management team about Ramadan, explaining that she had agreed that someone could work from home for one additional day per week during that period due to fasting and asking the managers to follow the same approach with their teams. This prompted Mrs Campbell to respond to Mrs King (page 760), explaining that the claimant would be working during Ramadan but she was not sure what work she could do from home and she anticipated that the claimant would be upset buy that as she had been using the working from home days for caring and childcare responsibilities. This in turn prompted Kerry King to ask for an update on the claimant's foot condition, given that the working from home arrangement was intended to be temporary and relating to her temporary foot condition, not her caring responsibilities (page 760).

164. Mrs Campbell replied (page 759) to explain that her plantar fasciitis had been diagnosed, along also with diabetes now (this being relevant because the claimant would not in all likelihood be fasting because of her diagnosis, although as the claimant noted in evidence she would still be getting up in the night with her children which we accept). Ms King then replied saying that she had found some work that the claimant could do from home and set out details of it (page 758). We find that this exchange was supportive and solution-focussed from both individuals. The claimant has also alleged that this exchange showed a breach of confidence on Mrs Campbell's part, by disclosing information regarding her disability to Mrs King. We find to the contrary that this was an appropriate discussion for them to have in order that Mrs King understood the claimant's health needs, and it was only because of that discussion that Mrs King found additional work for the claimant to do from home.

165. On 8 May 2019, Mrs Campbell and the claimant had an email exchange about her working arrangements during Ramadan (page 772). It was confirmed to the claimant that she could work from home the entirety of that week and the next as this had been arranged with her previous manager, but that she would need to come into the office on 9 May 2019 to go through the new work that she would be doing.

166. On 9 May 2019 the claimant emailed Mrs Campbell asking for an update on her request for a "*foot/leg rest*" (page 787). We do not know why the claimant suddenly decided to ask about it on that date, after saying nothing for a number of weeks and it having been sat by her desk since 20 March 2019.

167. Mrs Campbell went on to say that, although an Occupational Health referral had not been deemed appropriate up to that point, in light of the claimant's new diagnosis of diabetes one would now be arranged and a new DSE risk assessment template sent to the claimant. Mrs Campbell also said that she had now set up the leg rest for the claimant but noted that despite the claimant's plantar fasciitis, she chose to walk between Five Ways and the office as it was "*more convenient*" for the claimant. We find that based on this, Mrs Campbell's understanding of the reasons why the claimant walked from five ways was due to convenience and not for medical reasons.

Ongoing performance concerns

168. By May 2019 the Band O team were now assigned to "SSA" work which involved issuing letters and deeds to customers on a rolling monthly basis. We find that Miss Malik provided detailed step-by-step instructions to the team on how to do this work.

169. Miss Malik had some concerns about the claimant's performance and her ability to work from home and therefore contacted Mrs Campbell about this on 10 May 2019 (page 788). She explained that the claimant had appeared to be concerned about her ability to do the SSA work in the time allotted, despite Miss Malik feeling that plenty of time had been allocated. She also explained that the claimant was behind on her litigation (Schedule 36) work and suggested that the claimant's working from home arrangement was impacting on her ability to complete those tasks which could only be done from the office. She went on to say that the claimant had told her of her previous request to work from Broadway so that she could have double screens and reduce her walking time, and Miss Malik offered to work from the Broadway office herself on certain days so that the claimant could work from there instead. We find that this is a good example of Miss Malik seeking to support and assist the claimant, and that her concerns were genuine, legitimate and backed up by specific examples/information.

170. In evidence Miss Malik confirmed two key things relating to the claimant's performance. She accepted that the absence of a large screen at home would present difficulty and that it was easier to do the work when you have a large screen to work with. However, importantly, she also said (and we accept) that the claimant's performance was poor in relation to both tasks done at home and in the office. Therefore, the screen was not the reason for the claimant's poor performance.

171. The claimant has submitted that part of the issue was that Miss Malik was unsupportive and did not provide sufficient coaching too her. Having heard evidence from both Miss Malik and from the claimant, we accept Miss Malik's evidence that the claimant was over-reliant on assistance at times and that the claimant was demanding on her time, often sending one email directly after the other, whereas Miss Malik had to also spend time on other work and therefore was sometimes unavailable at the precise moment the claimant contacted her. We also accept Miss Malik's position that the claimant did not try to find solutions herself but would instead ask for help immediately (e.g. if she couldn't use one system, trying to find the information from another one so that the task could still be completed).

172. On 13 May 2019 Mrs Campbell spoke to the claimant about the concerns regarding the claimant's work and followed up in an email (page 796). In this email, she told the claimant that for the working from home arrangement to be viable, the claimant needed to be providing a credible work rate. She said that if this could be assured, she will continue to support the two day per week working from home arrangement.

Leg rest

173. Mrs Campbell also replied to the claimant's email about her leg rest on 13 May 2019, this being her next working day since the claimant's email had been sent, informing the claimant that it had been under her desk since 20 March 2019. Mrs Campbell commented that this was the only item available

without a more intensive DSE assessment, which the claimant had refused. Mrs Campbell noted that the claimant did not appear to have opened it. They then spoke directly and Mrs Campbell emailed the claimant again later that afternoon (page 797), summarising their conversation. Mrs Campbell commented that the claimant's explanation for not opening the leg rest had been that it had not been risk assessed and that she was awaiting an Occupational Health referral to see if a more suitable one could be sourced. We find that the claimant had declined a risk assessment (nor was one technically necessary for this piece of equipment) and she had already been told by Miss Parsons that an Occupational Health referral was not being made, so this is surprising.

174. Mrs Campbell then promptly sent the claimant the DSE user checklist to complete on 13 May 2019 (page 799), which the claimant completed and returned the following day (page 813). The form contained a specific section labelled *"chairs and footrests"*. Within this, there was a box where any specific information could be added but the claimant did not so do. The claimant said in evidence that she might have forgotten to do so because of her condition at the time however we find this strange given that the supposed absence of a suitable leg rest is what prompted this being arranged.

Further performance concerns

175. During the month of May (date unknown) the claimant has said that she logged into the performance system and saw that negative comments had been added by Miss Parsons. Miss Parsons said that she did not recall doing that and noted that she did not think that she would normally have access to the performance record of someone not in her team (which the claimant was not by that time). We accept Miss Parsons evidence, the claimant may believe that she saw something in there but we have seen no evidence that there was and we find it unlikely that Miss Parsons would have had access to the system once line management had been transferred to Mrs Campbell. Also in May 2019, the claimant noted that she had been sent a "simply thanks" voucher by Miss Parsons. Miss Parsons explained in evidence that this was something sent to the whole team for work on a particular project and the claimant would have received it because the work was done whilst the claimant had still been on her team. We accept that evidence and that this does not mean that the claimant had a good level of performance overall.

176. By 29 May 2019, Mrs Campbell had significant concerns and held a meeting with the claimant to discuss these (page 892). During this meeting she informed the claimant that she was not doing as well at the Band O work as she should be considering she had received the same training as the others, along with additional mentoring sessions. The claimant acknowledged difficulty using the databases and said that she had difficulty with continuity as she worked in isolation at home two days per week. Mrs Campbell explained that the current two day per week working from home arrangement would be withdrawn for the time being because it was not working out, although agreed to delay the withdrawal until after Eid Mubarak celebrations. The claimant was informed that, once she was working effectively and independently, then they could look again at the working from home position. Therefore, we find that the removal of the working from

home arrangement was due to the claimant's performance at that time, in order to support her to improve that performance. We do not find, as alleged by the claimant, that Miss Malik and Mrs Campbell had invented performance concerns as a mechanism to justify removing the working from home arrangement.

177. During this meeting, a proposal for condensed hours which the claimant had previously requested was discussed with her, however she said that she was no longer interested because she would not be working from home. Whilst the respondent has submitted that this is an illogical position to take, we find that we do understand the claimant's change in position on this – as condensed hours would mean leaving the house earlier and arriving home later and we can see that with the travel time factored in, that might no longer be so appealing to the claimant given that she had a young child who would no doubt go to bed relatively early.

178. Mrs Campbell informed the claimant that she would need to review the stress reduction plan but suggested that, given the length of the meeting so far, they do this on another occasion. The claimant said that she would also prefer to do it another time.

The claimant's two week sickness absence

179. The following day, the claimant raised a grievance (page 897) and started a period of sickness absence (page 906). She also raised another HRACC1 (page 1057) although the date on it is incorrect and so we cannot be sure exactly when it was sent. The claimant informed Mrs Campbell that she had had an anxiety attack, felt suicidal and had been signed off for two weeks. During her absence, the claimant visited her doctor on several occasions, including on 6 June 2019 when the doctor noted on the claimant's medical record (page 1776) that the claimant *"Would like a phased return for 3-4 weeks"… "Plan: Phased return done as requested"*. Unfortunately, neither party was able to produce a copy of the fit note that had ultimately been issued.

180. An Occupational Health referral took place during this period of absence on 6 June 2019 (page 939), received by the respondent on 17 June 2019. This noted the claimant's recent diabetes diagnosis, the claimant's concerns over perceived bullying, the commute into work and her caring responsibilities. It said that she seemed to have "*low grade distress"* and that *"..her medical efficiency, productivity and sense of well being would be improved if she is able to work from home more than in the office. This is clearly a Management not a medical decision…"*. It went onto say that the claimant had indicated that she would be happy to go to another office (we find this to have been a reference to the Broadway office). No specific recommendation was made regarding a phased return to work.

181. The claimant's last day of absence was 11 June 2019 and she attended a return to work meeting on 12 June 2019 (page 964). The following key points were discussed:

    a. A phased return over 8 days (later increased to 10 days);

    b. The claimant doing amended duties including development and upskilling over the next few weeks/months.

c. The claimant's request to change teams, which was being looked into, but there were no current vacancies;

d. A further DSE assessment arranged for 13 June 2019;

e. Noting that the claimant had submitted a grievance and HRACC1;

f. The claimant's concern about the quality of her work as she thought she was doing it correctly, and the claimant's request for a "best practice" crib sheet on how to address customers;

g. The claimant's caring responsibilities, it being confirmed to the claimant that the respondent would be sensitive to this notwithstanding her not working from home 2 days per week;

h. Noisy distractions at work;

i. Ongoing treatment regarding her foot condition;

j. The claimant having made an application to Access to Work on 11 June 2019;

k. The possibility of the claimant working one day a week from the Broadway office, however Mrs Campbell needed to consider appropriate supervision. The claimant raised no concerns about working from the Broadway office at this point.

l. The claimant's concerns about Mr Bailey and Ms Morton.

182. Details of the claimant's phased return were confirmed to her by email dated 12 June 2019 (page 961).

Risk assessment, Broadway and further performance concerns

183. The claimant's risk assessment was completed and the outcome sent to the claimant and Mrs Campbell by email dated 14 June 2019 (page 975). This recorded that the claimant walks from Broadway to the office and back again, and said specifically that this was the claimant's choice for financial reasons due to the cost of car parking and bus fares in the centre of town. It recommended that Mrs Campbell consider the claimant working from the Broadway office possibly two days per week, with DSE equipment. It found that the claimant did need a softer footrest similar to the one Mrs Campbell had. This was the first time that the footrest requirement had been expressed as being for a "soft" one.

184. On 17 June 2019 the claimant emailed Mrs Campbell (page 1003), saying that it would not be suitable for her to work from the Broadway office one day a week, asking for two or three days per week instead, or alternatively working from home. She asked to work from home rather than Broadway. She did not make any allegation regarding the phased return to work being of insufficient length.

185. Mrs Campbell emailed the claimant on 17 June 2019 (page 1002), noting that the claimant was choosing to walk from where she parked her car, and reconfirmed that working from home had been withdrawn as previously

discussed, but confirmed that she was exploring one day per week at the Broadway office. She said that if the DSE assessor had said to work there more than one day per week, she would look into see if this could be factored in as a reasonable adjustment.

186. On the same date, Mrs Campbell also confirmed to the claimant that she had arranged a OHN Workplace DSE referral to review the leg rest with her. We find that this again shows proactive support on Mrs Campbell's part.

187. On 19 June 2019, Mrs Campbell contacted the claimant in advance of Mrs Campbell going on leave (page 1051). She noted that the claimant had failed to provide her flexi sheets and reminded her of the requirement to do so, informed her that she should be hearing shortly about her OHN DSE Workplace Risk Assessment (which the claimant later did, receiving an appointment for 9 July 2019), and said that she would be reviewing the Occupational Health report that was received on 17 June 2019 and would discuss it with her on 26 June 2019.

188. On 20 June 2019, the claimant then emailed Mrs Campbell (page 1032) saying that she had reflected about Broadway but that she did not feel it would be helpful after all. She said that it would resolve her concerns about screens and being around Mr Bailey and Ms Morton but it would not support her with her plantar fasciitis or arthritis as she would have to park around 25 to 35 minutes walk away. She again asked to work from home either two days per week or to be made a contractual homeworker. In evidence, the claimant was asked whether she had a blue badge entitling her to use disabled parking. The claimant confirmed that she did and said that she had got it "this year", referencing both difficulties walking and covid. However, when asked when she applied for it, she suggested that she applied for it when working from home was removed, which we find was not correct. We find that the claimant did not apply for a blue badge in 2019.

189. Also in evidence, the claimant submitted that the reason why the Broadway office was no longer suitable related to the bus stops being moved due to the metro works. We find that it is indeed plausible that the bus stop did move, however on balance overall we find that it is unhelpful that the claimant did not explain that at the time, and also find that in reality what was happening was that the claimant wished to be a homeworker and was trying to find excuses for why any other arrangement would not be successful.

190. On 25 June 2019, Miss Malik updated Mrs Campbell on the claimant's performance, and proposed that she sit physically with the claimant that week to guide her through every stage of the process for the SSA work. We find that this is an example of Miss Malik genuinely trying to support and assist the claimant, and shows that individual coaching was being provided to her. We understand from the evidence we heard that the claimant did not like or appreciate Miss Malik's style of coaching, however we find the claimant's attitude to the support she was being given somewhat at odds with her assertion that she was not given sufficient support.

191. On 26 June 2019, Mrs Campbell spoke with the claimant and then emailed her to summarise their discussions (page 1099). She wished her Eid Mubarak and confirmed that the claimant had completed her phased return

now. Amongst other things, she also updated the claimant on the support that Miss Malik was going to provide to her. It appears that the claimant had expressed reservations about this during their discussion, but had agreed to continue with it. There was then a reference to the possibility of working from the Broadway office two days a week, and the claimant had said that whilst she had said she did not want this anymore, it was better than nothing so would take up the offer. It was therefore agreed that relevant DSE equipment would be ordered for that office, and Mrs Campbell also reported that the claimant had told her that if Access To Work could help with the bus fares from home to the office she would accept this as both City Centre House and the Broadway office were within a few minutes of a bus stop, and it was about affordability for the claimant. This again shows that a key motivation for the claimant was financial.

192. On 1 July 2019, the claimant emailed Mrs Campbell in response to her email of 26 July 2019 (page 1112). In this email, she stated that working from the Broadway office would not in fact reduce or remove her mobility issues and also raised concerns that she would not be able to do her daily exercises from the Broadway office. She requested again to become a homeworker. She commented that it was not a choice to walk to work, it was a necessity due to a lack of pay rise and not being able to afford a bus pass or pay taxi fares.

193. Later that day, the claimant emailed Ms Campbell again, asking for information about whose decision it was to remove the ability to work from home, and how long the arrangement would be in place. Mrs Campbell responded that evening, explaining that she had consulted with senior management about the issue and that the view was that she could not work from home whilst her work quality and work rate was as it was. She made clear the decision was due to the claimant's level of performance and that once the claimant reached the required standard they could have another discussion. She said that it had not yet been possible to find the claimant a position elsewhere in the business.

194. On 1 July 2019, Miss Malik then reported back to Mrs Campbell on how the sessions with the claimant had gone (page 1628), expressing concern that the claimant had not been available for the full duration of their planned time together due to the claimant informing Miss Malik on the day that she had other meetings to attend to, taking phone calls and having medical appointments which she had not disclosed in advance to Miss Malik. The claimant submitted that Miss Malik could have seen her appointment in her diary – however we find that it was not for Miss Malik to check the claimant's diary, the claimant should have directly informed Miss Malik in advance.

Further sickness absence

195. On 1 July 2019, the claimant was signed off as unfit to work, initially until 29 July 2019 (page 1108). As she had already been working on 1 July, her period of sickness absence commenced on 2 July 2019 and it continued until 14 August 2019. The claimant was therefore unable to attend her OHN DSE Workplace Risk Assessment on 9 July 2019.

196. On 2 July 2019 Miss Malik sent a separate email to Mrs Campbell, stating that the claimant needed close supervision on telephone calls. She explained that the claimant appeared to be resistant to making phone calls, preferring email instead. Miss Malik offered to do some role play with the claimant to assist her in telephone calls, however the claimant resisted, describing it as "*silly*". Miss Malik also reported that she had listened to a message that the claimant had left on someone's voicemail, which had been unsatisfactory. We accept Miss Malik's evidence that the claimant did not react in a positive way to the support that Miss Malik did offer her.

197. At this point Mr Bent of the respondent had been tasked with considering an issue which arose in the claimant's HRACC1 form as to whether or not the claimant's sick leave should count towards the trigger points under the respondent's absence procedures, where the absence was caused by work related stress. He spoke with HR for guidance on this and they concluded that if there had been negligence on the respondent's part, then under the attendance procedure an adjustment should be made to allow for this. Mr Bent expressed his view that the absence was in fact trigged by a reasonable management decision and not due to any negligence. We find that this was indeed one consideration under the attendance procedure, however note that Mr Bent was not looking specifically at the separate issue as to whether or not some/all of the claimant's absence should be discounted from the trigger points due to her disability. This would however be a matter for her manager to consider when reviewing attendance.

198. On 15 July 2019 the claimant raises a grievance (page 1164), alleging a number of matters, many of which use similar or identical wording to the wording used in the claimant's claim form in this case. She then sent an email to Mary Aiston on 22 July 2019 (page 1191) asking to add additional allegations to her grievance, including that no "PEP" (personal evacuation plan) "*was discussed or completed in light of my foot condition and the work adjustment passport was also not discussed/completed*". We find that this is the first time that either matter has been mentioned and given that by this time the claimant had raised a number of issues on a number of occasions, both formally and informally, we find that this added as an afterthought. The claimant's grievance was not upheld and this was communicated to her in writing (page 1608), although because the outcome is undated we cannot be sure when this was.

199. It is worth noting for completeness that on 23 July 2019 the claimant's claim form was presented to the Tribunal. We note this specifically here as there was some confusion about which period of absence an allegation about a phased return to work relates to, and it is relevant to that.

200. A further occupational health report was obtained, dated 25 July 2019 (page 1202). This did not recommend any specific phased return period, but did state that the *"key workplace intervention which is going to be most effective in alleviating this lady's perceived stressors would be flexible working pattern and the ability to work from home on a regular basis."*

201. On 22 August 2019 the claimant emailed Mrs Campbell at 5.04pm (page 1256) to say that she had been signed fit to return to work from the following day, with a three month phased return. This was one of Mrs Campbell's non working days so a colleague replied to at 8.46am the

following morning (page 1257) to confirm that a return to work meeting would occur once Mrs Campbell returned the following week, but that she could work from home that day to go through her backlog of emails. Separately, the claimant also called Mrs Campbell directly on 23 August 2019 at 10.21am to discuss her return to work (despite that being Mrs Campbell's non working day) and they had a discussion about arrangements.

Return to work meeting 27 August 2019

202. Mrs Campbell and the claimant met on 27 August 2019 to discuss arrangements for her return to work in more detail (page 1296). During this a four week phased return was implemented, which the claimant questioned as she said her GP had recommended a three month period, which we find was evidenced by a fit note (page 1310). Mrs Campbell asked the claimant why she felt she would need three months, but the claimant was unable to do so, only noting it was what the doctor had put. Mrs Campbell said that they would look at the impact and monitor over the four weeks provisionally set. This indicates that, if a longer period were in fact required, it appears that Mrs Campbell would have been open to considering increasing it. The four week period is also consistent with the respondent's absence policies, which state that a phased return would "normally" be no more than one month. The stress reduction plan was also discussed and it was agreed that a lot of the previous "High" stressors were things that had been based around the previous manager, so they agreed to draw a line under that plan and draw up a new one. We find this was a sensible approach.

203. Once Mrs Campbell sent the claimant the notes from that meeting, the claimant returned them with significant amendments (page 1335), including highlighting that only one of the "high" stressors had been alleviated by the change in line manager. Mrs Campbell therefore suggested that in that case they would use the old stress reduction plan and amend it, rather than starting afresh. We find that, although the claimant may have felt that there were still a number of stressors, we accept that Mrs Campbell's impression from the return to work meeting was as she had recorded it in her notes. She fully recorded other concerns which the claimant raised, including in relation to the phased return to work, so we do not believe she would have deliberately left it out.

204. On 3 September 2019 the claimant emailed Mrs Campbell saying that she found the return to work meeting very stressful and upsetting, and requesting that an independent notetaker be present at future meetings (page 1367). She raised a number of points, including the absence of a leg rest and asked again to work from home two days per week. Mrs Campbell responded with comments against all the points raised by the claimant (page 1370), correcting a number of allegations which she felt were not correct. In relation to the request to work from home, Mrs Campbell said that she and Miss Malik had identified a small task which, if the claimant managed it well, included an element that could be done from home. She said that Miss Malik would give the claimant training on this, and that the work was not work associated with the claimant's grade but would be a reasonable adjustment during the phased return. She also asked the claimant to cooperate with her and Miss Malik so that they could determine a point when they could confidently allow her to work from home.

205. She also explained that the OHN Workplace Risk Assessment for the leg rest had not occurred due to the claimant's absence, and that a new assessment had been booked for 13 September 2019 at 2.30pm. She noted that in fact the claimant had emailed her saying that she could not make that time due to doing the school run. In evidence the claimant asserted that Mrs Campbell should have checked whether the claimant might have a personal appointment at this time before confirming the appointment time, and criticised Mrs Campbell for not doing so. We find this astonishing: the appointment was made during working hours and the claimant had not sought or been granted permission to do the school run during those hours. The claimant further confirmed in evidence that this fell within what the respondent deemed "core hours" of work. We find that the claimant's belief that she was entitled to do the school run and that Mrs Campbell is somehow at fault for not checking the position on this first to be an indicator of how the claimant's perception of the situation is often far removed from the reality of it.

Workstation assessment 17 October 2019

206. The workstation assessment was carried out on 17 October 2019 and provided to Mrs Campbell on 22 October 2019 (page 1435). This recommended:

    a. A portal heater be provided on the basis that the claimant had reported sudden surges of feeling cold.

    b. A "leg stool" be supplied (and a link was provided). We find that this was a reference to the "leg rest" requested by the claimant

    c. That two surplus monitors sitting on her desk be removed; and

    d. That due to the claimant reporting frequent diarrhoea, she be allocated a desk space closer to a toilet with wash basin.

    It also stated that *"A follow-up assessment may be required from time to time in order to comply with the Health & Safety (Display Screen Equipment) Regulations 1992 as amended by the Health & Safety (Miscellaneous Amendments) Regulations 2002"*. There was no reference to any requirement to sit near a window. In addition, in evidence the claimant suggested that she had an ongoing issue with blurred vision at this point but this is also not referenced in the report and there was other evidence suggesting that there was an isolated issue with blurred vision due to eye drops taken in late May 2019 (page 892). We therefore find that there was no evidence provided to the respondent about any ongoing eye issue as of October 2019.

207. On 7 November 2019 the claimant emailed Jill Grogan of the respondent, to complain about the decision to remove her working from home arrangement and alleging that further adjustments were required in the workplace. She referenced not having a leg rest, heater, suitable washing facilities or a rest area. Ms Grogan responded to say that she was not going to go into the working from home issue again as it had already been addressed, however she believed that all equipment was provided or on order and expected soon. She noted that the claimant had a new desk on the 4th floor, close to

the toilets, and said that she was not aware that it specifically needed to be near a disabled toilet but would pick that up with Mrs Campbell.

Attendance review meeting

208. Due to the levels of the claimant's absence by this point, a formal attendance review meeting was held with her on 11 November 2019 (page 1465). Her level of absence was summarised to her as being 73 days over 4 occasions in the year from September 2018 to September 2019, and it was confirmed that this had hit the respondent's trigger of 8 days. The claimant raised a number of concerns about the way she had been treated, including the lack of a three month phased return, that she felt she had been given AO (more junior) duties originally as a trick so managers could say she had not been working to her grade, that others were still working from home but she cannot, concerns about seating arrangements and said that there was no compassion. She also commented that she had now asked for a blue badge. It was confirmed that the claimant's leg rest had arrived that day and that Mrs Campbell had set it up for her. The claimant said that it was ok but still uncomfortable as she could not raise the desk, but that she might be able to increase/decrease the chair or leg rest height to resolve this.

209. Mrs Campbell noted that the claimant had now moved to the 4th floor, and the claimant asked to be moved closer to the toilet so she could do her foot exercises in the toilet as there was not enough space at her desk due to the foot rest. Mrs Campbell explained that the desk she had was the only one available at that time but she would look into whether there was anything coming up on the 3rd floor. In evidence the claimant submitted that when she was sat on a different floor to her team she was isolated. We find that this argument is inconsistent with the claimant's desire to work from home.

210. The claimant informed the Tribunal that Mrs Campbell should also have discussed other adjustments in relation to anxiety and diabetes with her at this meeting, such as rest breaks, less complex work and additional guidance. We cannot find any indication that the claimant raised any concerns that she needed this additional support and/or that such support would be linked to her disabilities. The claimant was ultimately issued with a formal warning in relation to her attendance.

Flexi sheets

211. On 20 November 2019 Mrs Campbell emailed the claimant, noting that there were discrepancies on her flexi sheets and that as this was not the first time, this was a matter for concern (page 1476). They had a more detailed discussion about this later that day (page 1489). During evidence, we heard that the matter was addressed under the respondent's "fast track" process which was an alternative to the formal disciplinary process. The claimant submits that it was inappropriate to address this matter under the fast track process, however we find that discrepancies with the flexi sheets was a genuine cause for concern and the respondent would have been entitled to deal with it as a formal disciplinary matter. The fact that they did not again shows that they supported the claimant.

The claimant's desk

212. The claimant attended a meeting with Nick Bent of the respondent on 26 November 2019 to discuss her concerns (page 1511), accompanied by her union representative Gulferaz Ahmed. During this meeting the claimant commented that her desk was far away from the disabled toilet, although it was near a non-disabled toilet. The claimant said that she required private washing facilities available only in disabled toilets. We accept that this is what the claimant did require, because the medication which she took for her diabetes made her prone to diarrhoea. However we find that the type of toilet required was not made completely clear in the report dated 22 October 2019 which had just referred to a toilet and wash basin, and that the respondent had therefore not fully appreciated the claimant's requirement.

213. On 2 December 2019 Mrs Campbell contacted the claimant about an available desk on the 5th floor (page 1551), which she had also taken the claimant to see for herself. This desk was very close to the disabled toilet. The claimant replied on the following day (page 1550) to say that the desk was not appropriate. She said that she needed to be near the window/radiator due to "*nausea and vomiting (menopausal symptoms*") and *"also due to my anxiety I feel more comfortable and less distracted away from the middle walkways / printers etc*". She also said that in the past others had complained when she used a heater in the middle of a bank of desks, that it would cause problems for others around her when using fans, heater or opening the window, and she said that disruption would be less if she was near a window or wall. In the end, on 4 December 2019 Mrs Campbell contacted the claimant again (page 1549) explaining that Mr Bailey had agreed to move out of his desk so that the claimant could sit there.

214. On 2 December 2019 a health and safety risk assessment was updated for the claimant (page 1522). On this it was noted that the clamant had refused a buddy or personal evacuation plan. It was further noted on the risk assessment that the claimant was a trained first aid officer. The claimant has submitted that the reason that the claimant refused a personal evacuation plan was because she was now based on a lower floor, however on balance we find that the claimant simply did not think she needed one.

215. The claimant attended a further "PDC" meeting in December 2019. We find that there were no formal PDC meetings between the one on 3 April 2019 and December 2019. This does seem a long time and we find that it might have been helpful to have those more formalised discussions, however overall we find that there were a large number of discussions more generally about the claimant's performance and the claimant was fully aware of the issues with her performance and what was expected of her to improve that. In the circumstances, a structured PDC meeting would not have given the claimant any additional information which she did not already have.

<u>Other relevant facts</u>

216. The claimant raised a further grievance on 4 February 2020 (page 1651). Mrs Campbell attended a video interview on 9 July 2020 (page 1670), during which Mrs Campbell explained all of the supportive measures she had put in place for the claimant. During this she referenced that the

Claimant had no DSE requirement for a window seat – we find therefore that at this time Mrs Campbell was not aware of the 2016 DSE assessment, but in any case that had been with reference to the claimant's workstation on the 9th floor and the heating system on the 9th floor and so was outdated. The claimant was informed by letter dated 20 August 2020 that her grievance had not been upheld. The claimant appealed against that outcome and her appeal was not upheld on 11 January 2021 (page 1752).

217. On 21 April 2020 Miss Malik raised a grievance against the claimant (page 1657). This was ultimately upheld (page 1664), with it being found that Miss Malik had supported the claimant on numerous occasions, whereas the claimant had demonstrated an accusatory and unacceptable manner towards Miss Malik. Again, we find that to the extent that not all details of Miss Malik's grievance were provided to the claimant, there was nothing inappropriate with that given the confidential nature of the grievance.

218. As a more general point, there was no reference to race or religion or belief in respect of any individual allegation during the hearing. However, there was a general insinuation from both the claimant and Mrs Chauhan that the respondent was not always supportive of employees from ethnic minority backgrounds . We saw nothing in evidence to support that assertion.

Law

219. Section 39 of the Equality Act 2010 ("EA") provides that:

> *(2) An employer (A) must not discriminate against an employee of A's (B) –*
>
> a. *as to B's terms of employment;*
>
> b. *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> c. *by dismissing B;*
>
> d. *by subjecting B to any other detriment.*

Direct discrimination

220. Section 13 of the EA provides that:

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

221. Section 23 of the EA goes on to provide that:

> *(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*

222. In the House of Lords decision of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, ICR 337*, it was held

by Lord Scott that "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class"*.

223. The test as to whether there has been less favourable treatment is an objective one: the claimant's belief that there has been less favourable treatment is insufficient. Likewise, the treatment must be less favourable, not merely different.

224. Where there is less favourable treatment, the key question to be answered is why the claimant received less favourable treatment: was it on grounds of race or for some other reason. As Mr Justice Linden said in *Gould v St John's Downshire Hill 2021 ICR 1, EAT:*

"The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective…For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision…[and] the influence of the protected characteristic may be conscious or subconscious."

225. In *Nagarajan v London Regional Transport 1999 ICR 877, HL*, Lord Nichols said that

"discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds…had a significant influence on the outcome, discrimination is made out"

226. Often there will be no clear direct evidence of discrimination on racial grounds and the Tribunal will have to explore the mental processes of the alleged discriminator and draw inferences. The claimant will need to prove facts from which a Tribunal could properly conclude that the respondent had committed an unlawful act of discrimination, and this can include the drawing of inferences. However, simply establishing a difference in status is insufficient: there must be "*something more*" (*Madarassy v Nomura International plc [2007 EWCA Civ 33* and *Igen Ltd v Wong [2005 ICR 931]*). Likewise, unreasonable conduct alone is insufficient to infer discrimination.

<u>Reasonable Adjustments</u>

227. Section 20(3) of the EA provides that:

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

228. Section 21 of the EA provides that:

(1) A failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

229. Although the EHRC Code of Practice ("the Code") does not impose legal obligations and is not an authoritative statement of the law, it can be used in evidence in legal proceedings and Tribunals must take into account any part of the Code that appears relevant (see paragraph 1.13).

230. Paragraph 6.28 of the Code sets out some of the factors that might be taken into account when deciding what is a reasonable step: it is wise for the Tribunal to consider the factors although there is no duty to consider each and every one (*Secretary of State for Work & Pensions (Job Centre Plus) v Higgins [2014] ICR 341, EAT [58]*). The steps are:

a) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

b) The practicability of the step;

c) The financial and other costs of making the adjustment and the extent of any disruption caused;

d) The extent of the employer's financial or other resources;

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

f) The type and size of the employer.

231. The test of reasonableness is objective and will depend on the circumstances of the case.

232. The duty to make reasonable adjustments will only arise if the disabled person is put at a substantial disadvantage. The purpose of the identification of a provision, criterion or practice is to identify the matter that causes the disadvantage (*General Dynamics Information Technology Ltd v Carranza 2015 ICR 169, EAT*) and this disadvantage must not equally arise in the case of someone without the claimant's disability (*Newcastle upon Tyne Hospitals NHS Trust v Bagley UKEAT/0417/11)*. It is for the claimant to show substantial disadvantage (*Bethnal Green & Shoreditch Educational Trust v Dippenaar UKEAT/0064/*15, and *Hilaire v Luton BC [2023] IRLR* 122. However, it is not necessary for the claimant to show that the disadvantage arises because of his disability, provided they have shown substantial disadvantage in comparison with persons without the disability (*Sheikholeslami v University of Edinburgh UKEATS/0014/17*).

233. In *Project Management Institute v Latif 2007 IRLR 579, EAT*, Mr Justice Elias (who was then president of the EAT) said:

In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation,

that it has been breached. Demonstrating that there is an arrangement which causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".

234. The test of reasonableness is an objective one (*Smith v Churchills Stairlifts plc 2006 ICR 524*). The Tribunal should look at the proposed adjustment from the point of view of both claimant and employer to make an objective determination of whether or not it would be a reasonable adjustment (*Birmingham City Council v Lawrence EAT 0182/16*). The Tribunal should also consider the business needs of the employer (*Griffiths v Secretary of State for Work & Pensions [2017] ICR 160, per Elias LJ*, and *O'Hanlon v Commissioners for Inland Revenue [2007] ICR 1359)*.

235. A key question when assessing reasonableness is whether or not the proposed adjustment would be effective in preventing the substantial disadvantage. There does not have to be a good or real prospect of the disadvantage being removed, it is sufficient if there would have been a prospect of the disadvantage being alleviated (*Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10*). However, if there are no adjustments which could be made to enable the claimant to return to work, there can be no failure to make reasonable adjustments (*Conway v Community Options Ltd UKEAT/0034/12)*. Similarly, if an employee cannot give any indication of a date when they can may be fit to return to work with adjustments, the duty to make reasonable adjustments is not triggered in that regard (*Doran v Department of Work and Pensions UKEATS/0017/14*).

236. There is no duty to consult the employee about what adjustments should be made *Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, EAT*.

Harassment

237. Section 26 of the EA 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) …..

(3) …..

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

a. The perception of B;

b. The other circumstances of the case;

c. Whether it is reasonable for the conduct to have that effect.

238. In order to determine whether the conduct is related to the protected characteristic, it is necessary to consider the mental processes of the alleged harasser (*Henderson v General & Municipal Boilermakers Union [2016] EWCA Civ 1049*). This may be conscious or unconscious: as stated by Underhill LJ in *Unite the Union v Nailard [2018] EWCA Civ 1203:*

"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."

239. As set out in the Code, "unwanted conduct" can include "*a wide range of behaviour*" (at paragraph 7.7) and it is not necessary for the employee to expressly state that they object to the conduct (at paragraph 7.8).

240. When looking at the effect of harassment, this involves a subjective and objective test. The subjective test is to assess the effect that the conduct had on the complainant, and the objective test is to assess whether it was reasonable for the conduct to have that effect (*Pemberton v Inwood 2018 ICR 1291, CA*).

241. In relation to the subjective element, different individuals may react differently to certain conduct and that should be taken into account. However, as set out in *Richmond Pharmacology v Dhaliwal 2009 ICR 724* by Mr Justice Underhill (as he was then named):

"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."

<u>Victimisation</u>

242. Section 27 of the EA 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; and

d) *Making an allegation (whether or not express) that A or another person has contravened this Act.*

243. In *Waters v Commissioner of Police of the Metropolis [1997] ICR 1073*, Waite LJ said:

"The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in section 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of section 6(2)(b)."

244. In *Durrani v London Borough of Ealing UKEAT/0454/2012*, Langstaff P said

"The complaint must be of conduct which interferes which a characteristic protected by the Act……I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies…

This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances…"

245. In addition it was clarified in *Fullah v Medical Research Council UKEAT 0586/2012* by HHJ McMullen QC that:

"The person on the receiving end of a complaint of victimisation ought to be able to identify what protected characteristic it is in respect of…We accept, of course, that the word "race" does not have to appear but the context of the complaint made by a complainant does."

246. The reason for the treatment does not need to be solely because of the protected act to amount to victimisation, but it does need to have a significant influence (*Nagarajan v London Regional Transport 1999 ICR 877, HL*, and paragraph 9.10 of the Code*)*. This means an influence which is "more than trivial" (*Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 93*). The motivation does not need to be conscious (*Nagarajan,* above). It is possible for a dismissal (or detriment) to be in response to a protected act but nevertheless not amount to victimisation if the reason for the treatment is not the complaint itself but a separable feature of it such as the way in which the complaint was made (*Martin v Devonshires Solicitors [2011] ICR 352*).

247. The detriment will not be due to a protected act if the person who put the claimant to the detriment did not know about the protected act (*Essex County Council v Jarrett EAT 0045/15*).

Burden of Proof

248. Section 136 of the EA (burden of proof) states that:

> *(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.*

249. Put simply, the claimant must show facts from which the Tribunal could infer that discrimination took place, in the absence of other explanation. If the claimant cannot do that, the claim fails. If the claimant does show such facts, then the burden shifts to the respondent to show that discrimination did not take place. In *Madarrassy v Nomura International [2007] ICR 867* CA, Mummery LJ stated that "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

250. Although the burden of proof is a two stage test, there are cases where an Employment Tribunal can legitimately proceed directly to the second stage of the test (see, for example, *Laing v Manchester City Council and anor 2006 ICR 1519, EAT*).

Time Limits

251. Section 123 of the EA (time limits) provides that:

> *(1)* "*….proceedings on a complaint within section 120 may not be brought after the end of -*
>
> *a) The period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *b) Such other period as the employment tribunal thinks just and equitable.*
>
> *(2) ….*
>
> *(3) For the purposes of this section –*
>
> *a) Conduct extending over a period is to be treated as done at the end of the period;*
>
> *b) …*

252. There is a distinction between a continuing act and an act with continuing consequences. Where there is a continuing policy, rule, scheme, regime or practice, that will amount to conduct extending over a period, however where there is a one off act which has consequences over a period of time, that will not (*Barclays Bank plc v Kapur [1991] 2 AC 355, HL* and *Sougrin v Haringey HA [1992] ICR 650, CA*).

253. However, the Tribunal should not focus too heavily on whether there is a policy, rule, scheme, regime or practice. The Tribunal should ask itself whether there was an act extending over a period, rather than a series of unconnected or isolated individual acts (*Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA*). It is relevant whether the same or different individuals were involved, and a break of several months may mean that continuity is not preserved (*Aziz v FDA [2010] EWCA Civ 304*).

254. Whilst it is a broader test that that for unfair dismissal, exercising discretion to extend time is the exception rather than the rule (*Robertson v Bexley Community Centre [2003] EWCA Civ* 576). When considering whether to extend time, the Tribunal should consider all the circumstances (*Robertson, cited above*), including the balance of prejudice and the delay and reasons for it. Although *British Coal Corporation v Keeble [1997] IRLR 336* sets out a checklist approach in line with section 33 Limitation Act 1980, it is not necessary to go through the full checklist in each case, as long as all significant factors are considered (*Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23* and *Afolabi v Southwark London Borough Council [2003] EWCA Civ 15*). Factors which are almost always relevant include:

    a. The length of and reasons for the delay; and

    b. Whether the delay has prejudiced the respondent.

    The merits of the case can be taken into account when considering the balance of prejudice.

255. The fact that a delay is short does not mean that an extension of time should automatically be granted. Per *Underhill LJ* in *Adedeji (cited above)*:

    "Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less desirable in principle. As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago".

Conclusions

256. We adopt the headings used in the respondent's list of issues provided to the Tribunal and the claimant on the evening of 24 April 2023 (with corresponding references to page numbers and issues as listed in the bundle).

Knowledge

257. The respondent has quite properly now accepted that the claimant was disabled by reason of plantar fasciitis, diabetes and anxiety during the relevant period (from June 2018 onwards, or from April 2019 onwards in the case of diabetes). What remains relevant is whether the respondent knew, or ought reasonably to have known, that the claimant was disabled by reason of those conditions. This is not disputed in relation to diabetes from the point of diagnosis in April 2019, therefore it is only anxiety and plantar fasciitis which are relevant.

Did the respondent have relevant knowledge that the claimant was disabled by reason of anxiety before December 2019?

258. The respondent now accepts that this was the case. For the avoidance of doubt, whilst the respondent had knowledge of the claimant's disability, that does not necessarily mean that individual managers had that knowledge (for the purposes of whether or not direct discrimination occurred), and we have addressed that in our findings above.

Did the respondent have relevant knowledge that the claimant was disabled by reason of plantar fasciitis before January 2019?

259. Although it is now known that the claimant had plantar fasciitis since 2015 and that it amounted to a disability during the relevant period, the information available to the respondent in the period up to January 2019 was as follows:

    a. An internal DSE assessment from 2016 referencing the condition along with other conditions which said that "*Ruby could be covered by the Equalities Act*" but without specifying which condition that related to;
    b. On 4 December 2018 the claimant asking to work from home due to her plantar fasciitis:
    c. A GP letter dated 12 December 2018, stating that the claimant had plantar fasciitis and "*was last seen with this in December 2017"* (i.e. one year earlier), suggesting that the claimant had not needed medical support in the intervening period and therefore that the impact on her ability to carry out normal day to day activities was not substantial;
    d. An Occupational Health report dated 15 January 2019, detailing the condition and stating that the claimant was unlikely to be disabled under the provisions of the Equality Act.

260. We find that, prior to that Occupational Health report on 15 January 2019, the respondent did not have knowledge of the claimant's disability of plantar fasciitis, nor ought it to have known. The evidence that the respondent had indicated that the claimant had not sought medical advice for a full year and gave no indication that it might have a substantial adverse effect on her

ability to carry out normal day-to-day activities, albeit that it was known that it was by that stage a long-term condition.

Protected acts: p32 issue (iv)

Did the claimant make protected acts as alleged?

261. We set out below our position in relation to each alleged protected act raised by the claimant:

made an informal complaint via several emails to Ms King, Ms Sweet, the disability champion, and persons in internal governance in January and February 2019:

262. The claimant was unable to identify the precise emails or where they could be found in the bundle, which has made this assessment difficult, however we have considered the emails that we have identified and which the respondent noted. We have also ensured that, when considering each allegation of victimisation later in these conclusions, we have considered whether we believe the treatment to be related to the claimant having raised any concerns about discrimination, whether under these alleged protected acts or otherwise. We clarified at the hearing that the reference to "internal governance" is to the internal investigation team, including an anonymous number that can be called by employees to report allegations in confidence.

263. Taking each in turn:

    a. Emails dated 25 and 29 January 2019 from the claimant to Kerry King (pages 444 to 445). The email dated 25 January 2019 refers to bullying although referencing no specific allegation of discrimination. It does however complain about the claimant's sickness absence warning and the support provided to the claimant. Although it is raising clear concerns, it is not clear that those concerns relate to the Equality Act. However, the email on 29 January 2019 (which we find should be read together with the email dated 25 January 2019 as they form part of the same email chain) does refer not only to bullying but also to discrimination. Taken together, and in particular the reference both to discrimination in the context of a discussion about a sickness absence warning and support, we find that they do just about amount to a protected disclosure in that they make an allegation that a person has contravened the equality act, although this is a borderline case.

    b. Email from claimant to Kerry King on 14 February 2019, requesting a change in line manager (page 517). This raises simply a lack of support from Miss Parsons and no allegation that the Equality Act has been breached or doing any other thing for the purposes of or in connection with that Act. This is therefore not a protected disclosure.

    c. Telephone conversation between claimant and Kerry King on 25 February 2019 (pages 520-521). From the note of this call, it is clear that bullying has been discussed, along with the level of support provided by Miss Parsons, however there is nothing within the note to suggest that the Equality Act has been breached or doing any other

thing for the purposes of or in connection with that Act. This is therefore also not a protected disclosure.

d. Email from claimant to Chris Barker on 26 February 2019 (page 522). There is reference to lack of support and ignoring mental health issues, along with bullying, constructive dismissal and persecution for whistleblowing. Whilst there is reference to mental health, we cannot see anything sufficient to amount to an allegation that the Equality Act has been breached or doing any other thing for the purposes of or in connection with that Act. This is not a protected act.

e. Email from claimant to Chris Barker on 14 March 2019, attaching HRACC1 form (pages 572-573). We note that this does not relate to January/February 2019 however we have considered it. Although the email does not reference anything in connection with the Equality Act, the attached HRACC1 form does contain information which could be argued to hint at a breach of the duty to make reasonable adjustments. We have found that this is therefore a protected act, but as with the January 2019 email to Ms King, only just.

f. Email from claimant to Tracey Bourne of the respondent dated 11 January 2019 (page 401). Whilst this is not a disclosure to any of the persons alleged by the claimant in the list of issues, as it occurred during the relevant period of January 2019 and given that the claimant was not specific about who the "persons in internal governance" are, we have considered it. This does contain a suggestion of a breach of the duty to make reasonable adjustments and therefore again we find that this would constitute a protected act, although it is a borderline case.

Her grievance dated 15 July 2019.

264. This is clearly a protected act.

265. Before we address the specific allegations of discrimination, we would also note that during the hearing it became apparent that the claimant believed she had been treated badly by the respondent as a result of various other matters, including for example her having had involvement in supporting Ms Chauhan with her complaint a number of years earlier and Mr Ali not liking the claimant's husband following him coming into the office to deliver fit notes on behalf of the claimant. For the avoidance of doubt, the claimant's pleaded claim does not include any allegation of victimisation on those grounds, and we have not considered them (save to note that these allegations seem somewhat inconsistent with the claimant's pleaded case). In addition, in her written submissions the claimant referred to "*concerns and grievances raised informally and formally via HRACC1's to PCS*", which is somewhat wider than the protected acts set down in the list of issues.

<u>Improvement Warning under managing *attendance* process in December 2018: p93 issue 9</u>

Direct discrimination

266. Although the List of Issues agreed at the Preliminary Hearing before EJ Noons had identified this as being related to a performance warning, it was agreed at the hearing that in fact this was a drafting error and should have referred to attendance. We agreed by consent therefore to amend the issue on that basis in the interests of justice and in accordance with the Overriding Objective in the Employment Tribunal Rules.

Was the Improvement Warning on 19 December 2018 less favourable treatment than would be afforded to someone without the claimant's disability in materially the same circumstances? If so, was it because of that disability?

267. Someone in materially the same circumstances save for the claimant's disability would be someone who was also absent from work due to ill health, but who was not disabled. We find that such a person would also have been issued with an Improvement Warning. Therefore there was no less favourable treatment and there are no facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

268. It is therefore not necessary to consider whether the treatment was because of the claimant's disability, however in any event we find that it was not. The treatment was because of the claimant's significant levels of absence.

269. For completeness, whilst no allegation has been made that this amounted to a failure to make reasonable adjustments or any other type of disability discrimination, for the avoidance of doubt we also find that the respondent's actions in imposing a warning were reasonable and justified, given the extent of her absence. We do not make detailed findings on this point however given that it was not part of the claimant's pleaded case.

<u>Not allowed to apply for other jobs after being given Improvement Warning in December 2018: p95, issue 18</u>

Direct discrimination

Was the claimant refused permission to apply for other jobs after being given an Improvement Warning in December 2018?

270. A consequence of the Improvement Warning was that the claimant would be unable to apply for other roles during the period in which it remained live, therefore we agree that the practical consequence was that the claimant was refused permission to apply for other jobs. We do however note that, separate to this rule, the respondent was still exploring whether there were other roles to which the claimant could be moved so that she did not have contact with Mr Bailey.

If so, was that refusal less favourable treatment that would be afforded to someone without the claimant's disability of anxiety in materially the same circumstances, and if so, was it because of that disability?

271. Again, we find that there has been no less favourable treatment of the claimant. Someone without the claimant's disability of anxiety, but who was otherwise in materially the same circumstances, would also have had significant absence and would therefore also have been issued with an Improvement Warning as outlined above. That person would also therefore have been refused permission to apply for other jobs. The claimant said in her written submissions that others were given adjustments without having to go through formal procedures, however she made no reference to this in the hearing itself and we have seen no evidence of this. Therefore there was no less favourable treatment and there are no facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

272. For the avoidance of doubt, although we have found that there was no less favourable treatment, we also find that the treatment was not because of the claimant's disability but because of the respondent's policy which outlined that those with Improvement Warnings could not apply for other jobs.

273. Again, we also find (noting that the claimant's written submission on this point referred to indirect discrimination despite this not been an agreed issue), that the respondent's actions were justified and it would not have been a reasonable adjustment to disapply the policy, given that the respondent did in fact continue to search for alternative roles for the claimant in any case. We do not make detailed findings on this point however given that it was not part of the claimant's pleaded case.

<u>Refusal of occupational health referral in February 2019: pp92-93 issue 7</u>

Did Miss Parsons refuse an occupational health referral?

274. We find that this in fact relates to an interaction between the claimant and Miss Parsons in March 2019, and not February 2019 as stated in the list of issues. In March 2019, the claimant did ask for a referral to Occupational Health and Miss Parsons did refuse, noting that she did not believe it would achieve anything given that the claimant had already had a referral in January 2019. In reality therefore, she did refuse an Occupational Health referral.

275. We would make clear however, that this interaction related very specifically to the condition of plantar fasciitis and not to any other condition, including anxiety. There was no refusal to refer the claimant to Occupational Health in relation to any other condition as the claimant did not request this. In addition, the request for an Occupational Health report was made specifically in the context of the claimant seeking a leg rest, rather than in relation to any more general requirement such as the requirement to attend work.

276. Although the list of issues provided at the start of the hearing included an issue as to whether this was direct disability discrimination, this was actually not part of the original agreed list of issues and does not therefore require consideration.

Direct discrimination

Was the respondent's refusal less favourable treatment than would be afforded to someone not of her race in materially the same circumstances and, if so, was it because of her race?

277. There has been no suggestion at any point during the hearing that any of the treatment afforded to the claimant was in any way related to her race (whether in relation to this allegation or any other allegation), and we have seen nothing to suggest that it was. We find that the treatment of the claimant was in no way motivated by her race. Therefore there was no less favourable treatment and there are no facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

Was the respondent's refusal less favourable treatment than would be afforded to someone not of her religion in materially the same circumstances and, if so, was it because of her religion?

278. Again, there has been no suggestion at any point during the hearing that any of the treatment afforded to the claimant was in any way related to her religion (whether in relation to this allegation or any other allegation), and we have seen nothing to suggest that it was. We find that the treatment of the claimant was in no way motivated by her religion. Therefore there was no less favourable treatment and there are no facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

Reasonable adjustments

Further or alternatively, did the respondent's requirement for regular attendance at work put the claimant at a substantial disadvantage compared to persons without her disability?

279. This relates to the disability of plantar fasciitis. We have first considered whether there was a provision, criterion or practice (PCP) of requiring regular attendance at work. We have considered what the phrase "regular attendance at work" means and in the context of this case, we consider it to mean a requirement to attend the workplace rather than a requirement not to be absent from work entirely. The disability which is stated to be relevant to this issue is specifically plantar fasciitis, which did not cause any sickness absence (the absence being related to anxiety).

280. By "workplace" we mean City Centre House (noting that at that time the claimant had indicated that working from the Broadway office would alleviate the disadvantage in any event, although she later changed her position on this). Throughout the relevant period, there was a minimum requirement to attend the workplace for at least 3 days per week (with the exception of specific defined periods where ad hoc additional working from home was permitted), and from June 2019 that requirement increased to five days per week for the claimant. However, the requirement to work five

days per week from June 2019 was specific to the claimant in light of the performance concerns, and does not necessarily amount to a PCP in itself. That said, although that was specific to the claimant, it was accepted that this was not a role that could be done from home at the time and other employees were generally expected to attend the office.

281. The next question is whether the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability. Here, focussing first on a PCP to attend the workplace, we have concluded that there were a number of reasons why the claimant was disadvantaged by the requirement to attend the workplace, such as:

    a. The commute caused her with pain in her foot due to her plantar fasciitis. The respondent has said that this could have been avoided if the claimant had chosen to travel through other means, and that she chose her method of commuting for financial reasons. We find that there was certainly a significant financial element to it, but have taken on board the claimant's comments that standing at the bus stop could also cause difficulty despite the claimant not making that clear to her managers at the relevant time. Overall, we have accepted the Occupational Health report's finding that being on her feet would make the pain worse and that taking the bus would involve some time standing at the bus stop;

    b. The claimant wished to avoid contact with Dave Bailey;

    c. The claimant had caring responsibilities for elderly relatives, and it was more difficult to care for them from the office;

    d. The claimant sometimes did the school run whilst working from home and took her children or husband to appointments; and

    e. It was cheaper for the claimant to work from home, as it avoided the commuting costs.

282. Only the first of these relates to the claimant's disability of plantar fasciitis, and most do not relate to any disability at all (we note that the claimant would argue that the matter regarding Dave Bailey would alleviate her anxiety). We are mindful that it is for the claimant to establish the substantial disadvantage and that we must consider whether the disadvantage would arise equally in the case of someone without the claimant's disability. However, on balance, we are satisfied that whilst there are additional reasons for the claimant's request to work from home, her disability of plantar fasciitis was of sufficient relevance to this, and was the initial prompt for her starting to work from home two days a week under the management of Miss Parsons. Therefore we are satisfied that the requirement did place her at a substantial disadvantage. The working from home two days per week arrangement arose because of the plantar fasciitis, although the claimant then took advantage of that arrangement to use it to facilitate childcare and other caring responsibilities. There was therefore substantial disadvantage.

If so, did the respondent have knowledge of the same?

283. The respondent accepts that, if there was a disadvantage, then the respondent had knowledge of it, and we agree. Despite the claimant's inconsistent position on why she chose to walk as part of her commute, we find that the claimant did raise concerns about commuting to work in the context of plantar fasciitis. In light of this, the Occupational Health report dated January 2019 and the fact that the adjustment made by Miss Parsons to accommodate two days per week working from home was originally due to the plantar fasciitis, we find that the respondent knew, or could reasonably have been expected to know, of the substantial disadvantage to the claimant.

If so, did the refusal to make an occupational health referral constitute a failure to take such steps as it would be reasonable for the respondent to have to take to avoid that disadvantage?

284. The claimant had already had an Occupational Health referral in January 2019, dealing specifically with the issue of plantar fasciitis. That report had already addressed the question of attendance at the workplace and made no mention of any leg rest. The Occupational Health report had identified that the claimant preferred to work from an office and wished to work from a closer one.

285. When the claimant requested another Occupational Health report in March 2019, this was in the context of the claimant raising a concern that her foot rest would be taken away from her when her leg rest was provided, which as we have found above was due to a simple misunderstanding that was easily resolved. The only scenario where an Occupational Health report would be needed to resolve the point would be if the respondent had refused to leave the foot rest in place once the claimant had raised that concern. Instead, the respondent entirely appropriately liaised with the DSE assessor about a potential DSE assessment regarding the equipment. That was the entirely appropriate course of action to take and it was the claimant who refused that assessment. We note that the claimant says that this was pointless without the OHS referral, however we have seen no evidence to support that and she did not communicate that to the respondent at the time. She simply refused the assessment.

286. Had an Occupational Health report been carried out, we find that it would either not have recommended any particular equipment, or would have supported the request for a leg rest in addition to a foot stool, which the respondent did in any case provide. Obtaining an Occupational Health report would not have removed any disadvantage caused to the claimant and, in circumstances where one had been obtained very recently, it was not reasonable for the respondent to have to obtain another one.

287. The appropriate adjustments that we have identified at this stage to alleviate the substantial disadvantage caused by the claimant having to regularly attend work are:

    a. to provide recommended DSE equipment within a reasonable period of time – which the respondent did (we note that the respondent did not in fact remove the foot rest, and see our separate conclusions regarding the provision of the leg rest more generally); and

b. to allow partial working from home and/or from another closer office where this could be done without impacting on the claimant's ability to perform her role to a reasonable standard. The respondent had at that time facilitated this, and when the partial working from home was removed, it was because it was no longer reasonable for the respondent to have to take that step in light of the respondent's performance concerns (see our more detailed conclusions elsewhere on that point).

288. There was therefore no failure to make a reasonable adjustment.

289. For completeness, we have also considered whether there was a failure to make a reasonable adjustment in not sending the claimant for an occupational health assessment in relation to her other disabilities of anxiety and diabetes. At this stage, her diabetes was not diagnosed and there can be no failure there. In relation to anxiety, her absences related to anxiety had been some months earlier and triggered by specific events. She was receiving appropriate support internally for this. We see no failure to make reasonable adjustments in not also getting an OH referral specific to anxiety at this stage.

<u>Failing to send the claimant for a DSE assessment in relation to stress and a foot stool in February 2019: p32 issue 1st (b)</u>

Victimisation

Did the respondent fail to send the claimant for a DSE assessment?

290. In her written submissions, the claimant said that this was an alleged failure to send her for an OHN / OH assessment and not an internal DSE assessment. That is not what her pleaded case was. In this issue we have however included the OHN assessment in addition to the other DSE assessments in our conclusions.

291. It is worth setting out the timeline of events here during the relevant period:

a. A DSE assessment was completed on 9 November 2018;

b. On 15 January 2019 an OHS report was provided in relation to the claimant. Although that did recommend a home based DSE assessment, the claimant was not a home based worker and in addition the claimant's claim does not relate to any failure to carry out a home based DSE assessment;

c. On 18 January 2019 Miss Parsons confirmed to the claimant that the equipment recommended by the DSE assessor had arrived and was working;

d. On 13 February 2019 the claimant completed a DSE checklist. Miss Parsons responded to the information provided by the claimant, explaining that a further risk assessment may be required as a foot stool had not been shown as recommended on the previous DSE assessment;

e. On 15 February 2019 Miss Parsons liaised with the DSE team, and following discussions with the claimant where the claimant said that all she required was a leg rest to enable her to raise her knees and feet, the DSE team informed Miss Parsons that this could be ordered without a DSE assessment;

f. Following the claimant raising concerns about having the equipment without a DSE assessment, Miss Parsons went back to the DSE team to ask for a face to face risk assessment for the claimant on 15 March 2019;

g. The DSE team made contact with the claimant to arrange this, however on 4 April 2019 the claimant said that she did not require a DSE assessment at present. No reasons were given and no concerns were raised by the claimant. By this time, the equipment she had requested had been provided to her and was sitting (unopened) under her desk;

h. When the claimant raised the issue again out of the blue on 9 May 2019, Mrs Campbell asked the claimant to complete a DSE checklist on 13 May 2019 (her next working day). An appointment was then arranged for 12 June 2019. That DSE assessment suggested a soft footrest (which we now know was meant to be a reference to a leg rest) be provided;

i. By 17 June 2019, Mrs Campbell had carried out an OHN Workplace DSE referral. That appointment was due to take place on 3 July 2019, although was postponed to 9 July 2019 due to availability. In any case, the claimant was off sick on both 3 and 9 July 2019 and unable to attend. She remained off sick until 23 August 2019.

j. The OHN Workplace DSE referral was re-arranged for 13 September 2019, but cancelled at the claimant's request so that she could do the school run;

k. The assessment took place on 17 October 2019.

292. There was no failure to send the claimant for a DSE (or any other) assessment. Assessments were arranged promptly once recommended and/or requested and the main reason why it took so long for the OHN Workplace DSE referral to take place was due to the claimant's sickness absence and the claimant choosing to do the school run (during her working hours, without having sought permission in advance to do so) in preference to attending the appointment.

If so, was that failure because of the protected acts relied upon?

293. We have already found that there was no failure, but in any case the claimant has not provided any basis for her assertion that this was linked to any protected act. We conclude that any delay was not because of any protected acts relied upon, for the reasons set out above.

<u>Failure to provide leg rest, March 2019: p91-92 issues 1 and 6</u>

Reasonable adjustments

Issue 1. Did [*the requirement for regular attendance at work?*] *put the claimant at a substantial disadvantage compared to persons without plantar fasciitis*?

294. No specific PCP was set out in the issues identified at the Preliminary Hearing with EJ Noons. The respondent has suggested that the appropriate PCP would be the requirement for regular attendance at the workplace, and we agree. We have separately identified our conclusions in relation to this PCP above.

295. In the event that it was argued that the PCP should be that there is a PCP of not providing leg rests, then we conclude that there is no such PCP as leg rests have been provided, both to the claimant and to Mrs Campbell who we understand uses a similar one.

If so, did the respondent have knowledge of the same?

296. We repeat our conclusions set out above regarding the PCP of regular attendance at work.

If so, did the respondent's failure to provide a leg rest after 13/3/19 [the date of the HRACC1, p573] constitute a failure to take such steps as it would be reasonable for the respondent to have to take to avoid that disadvantage?

297. We have started by considering what steps could have been taken to avoid the disadvantage and we conclude that the provision of equipment, specifically a leg rest, would be a reasonable step for the respondent to take to avoid the disadvantage caused to the claimant.

298. However, we conclude that the respondent satisfied its duty to make reasonable adjustments by taking reasonable steps to identify what equipment the claimant might need (through the various DSE assessments, OH referral and discussions with the claimant), and organising the provision of the leg rest promptly upon becoming aware that it might assist the claimant. The claimant, on the other hand, chose not to engage with the DSE process in April 2019 and chose not to open the leg rest when it arrived on 20 March 2019 or to raise any concerns about it until May 2019. Any subsequent delay in obtaining further equipment was caused by the claimant's absence from work and her requesting that an appointment be rearranged so that she could do the school run. In these circumstances any delay in the claimant receiving any equipment was entirely her own doing.

Direct discrimination

Issue 6. Further and alternatively, did the respondent fail to order the leg rest in a timely manner?

299. We conclude that the respondent acted promptly and reasonably upon become aware that a leg rest (or any other equipment) might assist the claimant in the workplace. We refer to the timeline set out above and our finding that any delay was caused by the claimant's ill health, the claimant

wanting an appointment to be rearranged so that she could do the school run, the claimant's failure to communicate effectively with the respondent, the claimant refusing to undergo a DSE assessment and the claimant refusing to open the leg rest she did receive.

If so, was that failure less favourable treatment that would be afforded to someone not of her race in materially the same circumstances and, if so, was it because of her race?

300. The claimant raised no allegations at the hearing to suggest that this was in any way linked to her race, and we have found nothing to suggest that it was. The claimant cited Ian Robinson and Sandra Poole as comparators but made no reference to their treatment during the hearing. We conclude that the respondent would have treated others of different races in exactly the same way. She has not satisfied the first stage of the burden of proof. In addition, there was no failure as identified above.

Failure to offer mediation following Miss Parsons' grievance: p92 issue 5

Direct discrimination

Was the respondent's failure to offer mediation less favourable treatment that would be afforded to someone without her race in materially the same circumstances, and if so was it because of her race?

301. It is accepted that the claimant was not offered mediation in relation to Miss Parsons' grievance. However, the claimant has not put forward any reason whatsoever why she believes that this was in any way connected to her race, and there are no facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

302. In any case, we are satisfied with the respondent's explanation that mediation is a voluntary process and that unless Miss Parsons wished to undertake mediation, the respondent could not offer it to the claimant. In addition, it was Miss Parsons' right to have her grievance heard formally and investigated, just as it was the claimant's right to do the same in relation to her own grievance.

Was the respondent's failure to offer mediation less favourable treatment that would be afforded to someone without her religion in materially the same circumstances, and if so was it because of her religion?

303. Again, the clamant has not put forward any reason whatsoever why she believes that this was in any way connected to her religion, and there are no facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

304. As outlined above, we are also satisfied with the respondent's explanation that mediation is a voluntary process and that unless Miss Parsons wished to undertake mediation, the respondent could not offer it to the claimant. In addition, it was Miss Parsons' right to have her grievance heard formally

and investigated, just as it was the claimant's right to do the same in relation to her own grievance.

Review of stress reduction plan, end of March 2019: p95 issue 17

Reasonable adjustments

Did the respondent's requirement for regular attendance put the claimant at a substantial disadvantage?

305. We consider the reference to "regular attendance" to be to a requirement that employees have regular attendance in the sense of not being off sick (as opposed to attending the physical workplace rather than working from home). We accept that the respondent does have a requirement that employees maintain good attendance records, with formal warnings and ultimately dismissal being a potential consequence if they do not. In relation to plantar fasciitis and diabetes, we have seen no evidence that either of these conditions were more likely to cause the claimant to be off sick. However, in relation to anxiety, we can see that the claimant was more likely to have periods of sickness absence due to her anxiety.

306. On the one hand, we conclude that the claimant's reaction to the various events which preceded her absences were because of the way she interpreted and perceived things, rather than because of the way in which she had actually been treated by the respondent. However, we also accept that her reactions were genuine, albeit misguided, and that they related to her anxiety which has impacted her perspective of things. Therefore, the claimant's anxiety was more likely to cause her to have increased absence from work as she was prone to reacting in a certain way to events in the workplace. Therefore, the requirement for regular attendance would place the claimant at a substantial disadvantage compared with a person without her disability of anxiety.

307. For completeness we have also considered the position in the event that the PCP was for regular office-based attendance as opposed to working from home. We have set out some conclusions above on this in relation to plantar fasciitis, but here we are concerned with anxiety. There are two key aspects related to working in the office which the claimant says triggered her anxiety: the first being proximity to Mr Bailey and the second being the general noisy office environment. In relation to the former, we can see that the claimant's fear of seeing Mr Bailey has triggered a genuine anxiety response in her, however this can only reasonably be from April 2019 when he moved to the claimant's place of work (notwithstanding that prior to that date they were part of the same area of the respondent's organisation and notwithstanding the fact that there appears to have been one team event at which both would be present, which we acknowledge).

308. In relation to the noisy environment, we have not found any medical evidence to support the claimant's assertion that being in the workplace triggered her anxiety and we find that she also raised concerns about isolation associated with working on other floors away from her team, and therefore in fact she preferred to be working alongside her team.

309. We therefore find no substantial disadvantage in relation to working conditions in the office more generally, and in relation to Mr Bailey whilst she had a genuine anxiety response to being close to him and this caused her a substantial disadvantage, we do not find this to have been a consequence of attendance at work, but rather her inability to move past her perceived issues relating to him or to engage with the respondent to address those.

If so, did the respondent have knowledge of the same?

310. The claimant made her position to the respondent clear about Mr Bailey, and therefore the respondent did have knowledge.

If so, did the respondent's failure to review and update the stress reduction plan after Ms Campbell became the claimant's line manager at the end of March 2019, constitute a failure to take such steps as it would be reasonable for the respondent to have to take to avoid that disadvantage?

311. First of all, we have considered whether there was a failure to review and update the stress reduction plan following Mrs Campbell taking over as line manager in March 2019, and we conclude that there was not. The timeline was as follows:

    a. The stress reduction plan was discussed on 3 April 2019, and it was agreed that it would be reviewed on another day, with no objection raised by the claimant.

    b. It was due to be reviewed on 29 April 2019, but the claimant chose to take leave. Mrs Campbell specifically informed the claimant that taking leave would mean that the stress reduction plan would need to be rearranged.

    c. It was then due to be reviewed on 29 May 2019 but due to how long that meeting took, both Mrs Campbell and the claimant said that they would prefer to discuss it another time. The claimant then went off sick for 2 weeks;

    d. They then agreed to review it again on 12 June 2019, but before it was reviewed the claimant went off sick again in early July. It could be argued that there was sufficient time between 12 June 2019 and early July to have reviewed the stress reduction plan and it would have been prudent to do so, however I cannot see that the claimant pushed for this and it was not known that she would soon go off sick again. The delay is not sufficient to constitute a failure to review and update the plan;

    e. The plan was discussed following the claimant's return to work on 27 August 2019 and the claimant said that a number of her stressors were now a lot lower. They agreed to therefore draw up a new plan. The claimant then raised more concerns following that meeting and Mrs Campbell said that a new one should therefore be drawn up. This takes us beyond the relevant period for the purposes of this claim, the claimant having brought her claim in July 2019.

312. We conclude that there was no failure to review and update the stress reduction plan. We also conclude that the claimant saw the stress reduction plan as no more than a tick box exercise in any event, and that it would not have made any difference whatsoever to the claimant's anxiety and/or the likelihood of her having sickness absence.

313. Even if there had been a failure to update the stress reduction plan, applying the case of *Tarbuck* referenced above, this would have involved consultation about what potential adjustments could be made, and would not have been an adjustment in itself.

314. The steps that it would have been reasonable to take to avoid the substantial disadvantage suffered in our view would have been seeking to understand the issues with Mr Bailey, and taking steps to help the claimant manager her anxiety more generally. In relation to the former, we conclude that those steps were taken by the respondent and it was the claimant's refusal to share details of her concerns with the respondent that prevented the respondent from addressing the matter further. It was a reasonable position for the respondent to take that the claimant would need to explain her concerns properly to it in order for them to take action based on something that happened a number of years ago and in circumstances where Mr Bailey and herself were based on the same floor but did not work directly with each other in any event.

315. In relation to the latter, the respondent did seek to support the claimant appropriately throughout her employment in relation to her anxiety. Where the claimant raised concerns, the respondent sought to address those with her. We also find that the claimant's reactions to events which triggered her anxiety, whilst genuine, were not logical, and therefore the respondent would never be able to implement adjustments to remove that disadvantage because the claimant would continue to react in illogical ways.

<u>Request for volunteer leave April 2019: p93 issue 11; and p33 issue (c)</u>

Direct discrimination

Issue 11. *Did Mrs Campbell cancel the claimant's request for special volunteer leave?*

316. We conclude that there was no cancellation of any request for special volunteer leave in the first place. The claimant had never been told that it would or had been agreed, to the contrary she had been clearly told that it could not be agreed for any more than one day (given that at the end of April she would already have taken two of her three day allowance within a 12 month rolling period), and for the avoidance of doubt we conclude that this was a reasonable position on the part of the respondent. Even in respect of the one day for which leave could potentially have been granted there would need to be evidence that it met the respondent's criteria for volunteering leave, which concerns were expressed about. It is astonishing that the claimant believed that the request would or had been approved based on the email interactions prior to April 2019 about the matter. Volunteering leave is discretionary and unless and until formal approval was

received the claimant should never had relied on it as being something she was entitled to.

317. We also find that the respondent's conclusion that it did not meet the volunteering criteria was a reasonable one. Although the claimant submits that it was different to the previous volunteering she had done for that organisation, we find that she did not make this clear and even if she had that did not mean that it met the criteria. The respondent's criteria are clear that there must be some business benefit and whilst the claimant identified personal benefit, she could do no more than submit that if something benefitted her personally, then by implication it must also benefit the business. We find that unconvincing. In addition, the work that her team did was at that time considered business critical making it more difficult for the respondent to justify approving volunteering leave at that time.

If so, was that less favourable treatment that would be afforded to someone without her disability of diabetes in materially the same circumstances, and if so was it because of her disability?

318. As outlined above, the leave was not cancelled as alleged or at all. However, for the avoidance of doubt, we also conclude that the refusal to allow volunteering leave had nothing to do with the claimant's disability and was not less favourable treatment than would be afforded to a non-disabled person in materially the same circumstances. Any other person who had taken the maximum number of volunteering days already, who had not shown the required business benefit, and who had volunteered for the same organisation for a number of years already would have been treated in the same way. Again, the fact that the claimant feels in some way mistreated and links it to her disability is an indication of how the way she perceives the respondent's treatment of her is significantly different to reality. The claimant has not identified facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

Further and alternatively, was that less favourable treatment that would be afforded to someone not of her race in materially the same circumstances, and if so was it because of her race?

319. We repeat the points set out above in relation to disability, save that we would add that at no point during the hearing did the claimant allege that her treatment in this regard was in any way connected to her race. The claimant has not identified facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

Further and alternatively, was that less favourable treatment that would be afforded to someone not of her religion in materially the same circumstances, and if so was it because of her religion?

320. We repeat the points set out above in relation to disability, save that we would add that at no point during the hearing did the claimant allege that her treatment in this regard was in any way connected to her religion. The claimant has not identified facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

Victimisation

p33 issue (c). Further or alternatively, was that because of the protected acts relied upon?

321. We repeat the conclusions set out above about the reasons why the claimant's volunteering leave request was declined. There is no evidence to support her assertion that it was in any way connected to any protected act and we conclude that it was not.

Requirement to work in office 5 days a week, notified 29/5/19, with effect from 10/6/19: p91 issue 4 (*as narrowed down: p99*; *and issue 12 - dismissed*) and p32 issue (a)

Direct discrimination

Issue 4. Was the respondent's requirement that the claimant work in the office 5 days a week from 10/6/19 [ET1 p9] less favourable treatment that would be afforded to someone without her disability of diabetes in materially the same circumstances, and if so was it because of her disability of diabetes?

322. It is worth noting at this point that someone in materially the same circumstances as the claimant would be someone who was also struggling to perform their role to the required standard, despite the support that had been provided to her. We conclude that such a person would also have been asked to work from the office five days a week in order for the respondent to support them to improve their performance to the required standard. In these circumstances the claimant has not identified facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

323. The claimant relies on comparators of Mohammed Hussain, Stacy Parsons, Simon Bedford and a hypothetical comparator. We have seen nothing to suggest that there were performance concerns in relation to any of those named individuals and therefore we conclude that they were not appropriate comparators.

324. We also conclude that the reason for the claimant being required to attend the office 5 days per week was genuinely due to her performance, as shown by the clear message to her that, once her performance did improve, partial working from home could be considered again.

Reasonable adjustments

Further and alternatively, did that requirement put the claimant at a substantial disadvantage compared to persons without her disability?

325. In the issues as agreed at the Preliminary Hearing with EJ Noons, the claimant relied upon her disability of diabetes in relation to the allegation that being required to attend the office five days a week was discriminatory.

We conclude that the claimant was not put to a substantial disadvantage in relation to the disability of diabetes in this regard: there is no evidence that the diagnosis of diabetes gave rise to any concerns about the claimant attending the office to work. We do accept the claimant's evidence that she needed to be situated near to a toilet with wash basin due to the effect of her medication, however we find that a suitable desk was provided for her once it became clear what her precise requirements were and therefore no substantial disadvantage was caused by that requirement.

326. In addition, for the avoidance of doubt, we also find that there was no substantial disadvantage caused to the claimant by a requirement to attend the workplace in relation to her anxiety as set out above.

327. However, we do find that there was substantial disadvantage caused to the claimant by a requirement to attend the workplace five days per week in relation to the disability of plantar fasciitis, for the reasons set out earlier in these conclusions.

If so, did the respondent have knowledge of the same?

328. Here, we find that the respondent had knowledge in relation to the condition of plantar fasciitis. We have already concluded that there was no substantial disadvantage in relation to the claimant's other pleaded disabilities.

If so, did the respondent's failure to allow the claimant to work from home for 2 days a week from that point constitute a failure to take such steps as it would be reasonable for the respondent to have to take to avoid that disadvantage?

329. Although we have concluded that there was no substantial disadvantage in relation to diabetes, given that there was in relation to plantar fasciitis we have decided for completeness to address this point in relation to that condition, despite it not being pleaded in the list of issues.

330. We conclude that being able to work from home in these circumstances would certainly be a potential step that could alleviate the disadvantage caused to the claimant. In the absence of performance concerns we would have found that allowing some element of homeworking and/or working from an alternative office which did not present the same difficulties would have been a reasonable adjustment. In addition, in the event that the condition was permanent (and not temporary), we would also find that an additional screen for homeworking and a work mobile so that calls to customers from home could be made, would be potential reasonable adjustments for the respondent to make (notwithstanding that at that time the team did not generally provide screens or phones for use at home except for contractual homeworkers).

331. However, the claimant's performance was not up to the required standard, despite the support that had been provided to the claimant. In those circumstances, it was reasonable for the respondent to take the view that the claimant needed to attend work five days per week to receive additional support and see her colleagues, line manager and Miss Malik, until such time as her performance improved. Allowing homeworking for someone whose performance was at the level of the claimant's was not in our view a

step that it would be reasonable for the respondent to have to take to avoid the disadvantage. We also find that provision of a screen and/or phone would not have resolved matters given the claimant's poor performance: the evidence showed that her performance was poor even when in the office.

332. The alternative steps that we believe would have been a suitable reasonable adjustment in this scenario, was to explore partial use of the Broadway office. The respondent did this, and in fact it was ultimately the claimant who chose not to work from that location. Again, there was no failure on the respondent's part.

Victimisation

p32 issue (a). Was that failure because of the protected acts relied upon?

333. As outlined above, there was no failure. However, for the avoidance of doubt, we conclude that the treatment of the claimant was in no way connected to do with any protected acts.

Failure to put personal evacuation plan in place: p94 issue 16

Reasonable adjustments

Did the requirement that the claimant work in the office 5 days a week from 10/6/19 put the claimant at a substantial disadvantage compared to persons without her disability?

334. We refer to our conclusions above on this point. However, in evidence, the claimant also suggested that her concerns about a personal evacuation plan were focused on her time working on the 9th floor. This would have therefore been prior to 8 November 2018, and at that time the claimant had not indicated that working from the office was causing her issues in relation to her plantar fasciitis or any other condition (this being raised with Miss Parsons on 4 December 2018). The requirement to work in the office 5 days a week from June 2019 cannot have put the claimant at a substantial disadvantage in 2018. In any case, prior to December 2018 we do not conclude that the claimant suffered any substantial disadvantage caused by being required to work in the office five days per week.

If so, did the respondent have knowledge of the same?

335. In relation to the period prior to November 2018, we find that the respondent did not have knowledge, and could not reasonably have been expected to know, that travelling to the office five days per week would place the claimant at a substantial disadvantage. In relation to the later period, we have already found that the respondent did have the requisite knowledge.

If so, did the respondent's failure to put a personal evacuation plan in place constitute a failure to take such steps as it would be reasonable for the respondent to have to take to avoid that disadvantage?

336. When the claimant was on the 9th floor, the respondent had no knowledge that the claimant would have any substantial difficulties in relation to plantar fasciitis and we conclude in fact that the claimant did not have any difficulties in making her way around the building.

337. The first time that the claimant mentioned a personal evacuation plan was on 22 July 2019, as an afterthought to her grievance. She had raised no concerns about the matter prior to that. In addition, when offered a personal evacuation plan, she said she did not want one and it was reasonable for the respondent to assume that one was not required.

338. In evidence the claimant suggested that she could move around her floor and up/down one floor without difficulty but would have trouble evacuating. She never raised this and we find that, as a first aider who would presumably be required to move around the building as part of those responsibilities, that it was reasonable for the respondent to assume that any first aider had sufficient mobility for that. In addition, as a first aider, we find that the claimant would have known to request a personal evacuation plan if she wanted one.

339. Furthermore, considering that the substantial disadvantage relied upon was coming into the office five days a week, we do not find that a personal evacuation plan would have changed what was in reality the only real difficulty for the claimant caused by that in 2019: her commute. There was no failure to make reasonable adjustments.

Allowing 1 week phased return, July 2019: p93 issue 13 (or June 2019: ET1 p9]

Direct discrimination

Did the claimant's doctor say that she needed a 3 month phased return to work in July 2019 (or June 2019: ET1 p9)?

340. We first need to address what time period this relates to, as there are two distinct periods of absence, one being in early to mid June 2019, and the other being July/August 2019. Although there are references in the documentation to concerns being raised about the length of the phased return in relation to the July/August 2019 absence, and the date given in the List of Issues is July 2019, given that the claimant's claim form was submitted on 23 July 2019, it cannot have related to the absence that went on into late August 2019 as there can have been no failure in July 2019. We therefore treat this as an allegation relating to the two week absence in early June.

341. We did not have a copy of the relevant fit note, however the medical excerpt provided referred to the claimant having requested a three to four week phased return and the doctor agreeing to put that forward. Therefore, we conclude that the doctor did not say that the claimant needed a three month phased return, we conclude that the doctor suggested a three to four week phased return, and that the doctor did this at the claimant's request (rather than it being specifically "needed").

If so, was the respondent aware of that?

342. We conclude that the respondent would have received a fit note at the time, which would in all likelihood have referred to the three to four week suggested period.

Did the respondent only grant the claimant one week's phased return?

343. The suggested phased return was a period of 8 days, followed by two days of training, making it a two week period in total.

If so, was that less favourable treatment that would be afforded to someone without her disability of diabetes, anxiety and plantar fasciitis in materially the same circumstances, and if so was it because of the claimant's disabilities?

344. A non-disabled colleague who had had a two week period of absence and who had received a fit note in the same terms would, in our conclusion, have been treated in exactly the same way as the claimant. The claimant has not identified facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. In any case, we are satisfied by the respondent's explanation that the length of the phased return was in accordance with the respondent's internal policy of not normally having phased returns of longer than 4 weeks, and taking into account the relatively short length of this particular absence period (noting that the phased return was already the same length as the period of absence itself).

Reasonable adjustments

Further and alternatively, did the requirement for attendance at work put the claimant at a substantial disadvantage compared to persons without her disabilities?

345. Please see our earlier conclusions on this point.

If so, did the respondent have knowledge of the same?

346. Please see our earlier conclusions on this point.

If so, did the respondent's failure to give a 3 month phased return to work in July 2019, constitute a failure to take such steps as it would be reasonable for the respondent to have to take to avoid that disadvantage?

347. We do not accept that implementing a three month phased return would have removed any substantial disadvantage associated with attending the workplace. Whether on a phased return or not, the claimant would still have had to make the same commute to work. The absence was also due to stress/anxiety, whereas the only substantial disadvantage we have found in relation to attending the workplace was in relation to plantar fasciitis. In the event that the reference to "attendance at work" is intended to mean not being off sick (as opposed to being physically present in the respondent's building), we have seen nothing to suggest that the claimant's later absence

was caused by the lack of any phased return to work. We conclude that it was not, it was caused by the claimant's (incorrect) perception of the way that the respondent treated her.

348. We note that the doctor did suggest a longer phased return that the one that was implemented. However, it is not a reasonable adjustment to accept everything that a doctor says at face value, without considering individual circumstances. In this case, given the length of absence, a two week phased return appears to be reasonable. Had it not been long enough, it would have been possible for the claimant and Mrs Campbell to have had further discussions about potentially extending it at the end of the two week period. Similarly, although we have said that the phased return in question related to the June absence, in relation to the July/August absence we would equally find that it was appropriate to plan for an initial four week phased return, with ongoing discussions which we conclude could have led to the phased return being extended if needed.

349. Therefore, there was no failure to make reasonable adjustments in not implementing a three month (or three to four week) phased return.

Harassment

Further and alternatively, did the failure to give a 3 month phased return to work in July 2019 constitute harassment related to the claimant's disability within s. 26 EA 2010?

350. During the hearing we have not seen any evidence to suggest that this was harassment related to the disability in any way. The length of the phased return was in line with the respondent's usual approach for the length of absence and was motivated by what Mrs Campbell reasonably felt was needed at the time.

351. Even if the length of the phased return was unwanted, it was not related to disability and did not have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. To the extent that the claimant says (although she did not expressly make that statement) that it had that effect, we take into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect and conclude that it was not.

<u>Designation of sick leave, July 2019: p91 issue 2; and p33 issue (h)</u>

Reasonable adjustments

Issue 2. Did the absence management policy put the claimant at a substantial disadvantage compared to persons without her disability?

352. Given that the claimant's periods of sick leave were due to her anxiety, we have considered this issue with reference to the disability of anxiety.

353. Given that we have accepted that the claimant's anxiety genuinely caused her to react excessively to (reasonable) actions of the respondent, then we conclude that the respondent's absence management policy did place the claimant at a substantial disadvantage compared to persons without her disability, in that she was more likely to have increased sickness absence due to her tendency to react excessively to the respondent's acts.

If so, did the respondent have knowledge of the same?

354. We find that it did, for the reasons set out above.

If so, did the respondent's failure to designate, on 15/7/19 [ET1 p9], sickness absence as Disability Adjusted Leave, constitute a failure to take such steps as it would be reasonable for the respondent to have to take to avoid that disadvantage?

355. Disability Adjustment Leave is a mechanism through which additional time off can be granted to disabled employees at the respondent to attend appointments or undergo treatment. The respondent's policies specifically state that it is not to be used in cases of actual sickness absence. Therefore, we conclude that the claimant is entirely misconceived in suggesting that her sickness absence should be treated as Disability Adjusted Leave, which is expressly not for that purpose. That would not be a reasonable step for the respondent to have to take.

356. More generally, we have also considered whether (as we suspect the claimant intended to plead, although her pleaded claim does clearly refer to Disability Adjusted Leave), whether it would have been a reasonable adjustment for the respondent to discount some/all of the claimant's absences in considering whether to take formal action under its attendance procedures. We conclude that the claimant's absence levels were so high that, notwithstanding her disability and any disadvantage caused by it, it would not be a reasonable step for the respondent to have to take to avoid giving the claimant any formal warning in relation to her attendance. There was again no failure to make reasonable adjustments.

Victimisation

p33 issue (h). Was that failure because of the protected acts relied upon?

357. Again, we have seen nothing to connect the treatment of the claimant in this regard to any protected acts, and we conclude that it was not connected.

Discussions about the claimant in breach of confidence: p94 issue 14 (*as narrowed down: p100*)

Direct discrimination

Did managers have discussions about the claimant in breach of confidence? If so, when?

358. We have seen no evidence of discussions about the claimant in breach of confidence, in relation to her health or otherwise. We have seen some evidence of managers sharing some information regarding the claimant's health amongst themselves, for the purposes of supporting the claimant (for example finding her work that could be done from home or as part of a handover between managers), and also for the purposes of the manager ensuring that their own management chain was aware of the issues they were faced with. We conclude that this was not in breach of confidence, but was reasonable, lawful and appropriate. We further note that Miss Malik was only privy to certain information about the claimant's health, insofar as it meant that the claimant worked from home two days a week, but not detailed information regarding her anxiety. This demonstrates that consideration was given by the respondent to ensuring that information was only shared on a "need to know" basis.

359. To the extent that the claimant alleged that she knew that Mr Ali had shared confidential information about other employees in breach of confidence (and that this should be taken to mean that he would have also done so in relation to the claimant), we have not found any communications from Mr Ali about any of the team to be in breach of confidence.

360. We also note that the claimant has raised inconsistent arguments in this regard, arguing on the one hand that managers discussed her health in breach of confidence, but on the other hand that she was treated badly because she had to repeat information about her health to her managers when she believed there should have been a more thorough handover. It appears the claimant is arguing both that too much information was shared, and also not enough information, about the same thing.

If so, was that less favourable treatment that would be afforded to someone without her disability in materially the same circumstances, and if so was it because of the claimant's disability?

361. A non-disabled employee with medical conditions would have been discussed in the same way, and we conclude that the discussions that took place were not directly because of the claimant's disability. The claimant has not identified facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred.

<u>Failure to give working adjustments passport: p94 issue 15</u>

Reasonable adjustments

Was there a PCP that the claimant discuss and repeat details of all her health conditions every time she had a new manager? If so, when did those discussions take place?

362. There was no PCP that the claimant discuss and repeat details of all her health conditions every time she had a new manager. There is a difference between requiring someone to discuss and repeat their health conditions (which is not what happened here) and a conversation between an employee and a new manager during which the new manager tries to find

out relevant information about the employee in order to support them during their time as line manager (which is what did happen here and which we find to be good management practice). We also note that the claimant disclosed different conditions to different managers at different times, indicating that she did not see any requirement to disclose a complete list of everything at one time. We would further note an inconsistency between the claimant's concern on the one hand that she was required to discuss and repeat details regarding her health, and her separate concern that managers discussed her health without her consent.

363. There was also no requirement that the claimant's health was not formally documented, so as to require her to discuss and repeat details of her health conditions every time. The claimant had the ability to document her health if she so wished and to pass that onto her new manager by way of information. The claimant could have chosen to prepare a Workplace Adjustment Passport. She criticises the respondent for not having done so, but it is a document which the employee completes themselves to inform their manager of their needs. The respondent would not have been able to complete it for her. It would also have been for the claimant to share it with her manager at the relevant time, and no doubt it would have prompted a discussion about her health in any event as it would be good management practice to discuss such a document even where one does exist.

If so, did that put the claimant at a substantial disadvantage compared to someone without her disability?

364. As explained above, we have found that there was no such PCP. However, for the avoidance of doubt, we would add that we believe that it is in fact useful for new managers to discuss health matters with employees, regardless of whether or not there are also written documents discussing these. This ensures that information is up to date and relevant to the employee's actual needs at that time, and we would add that the respondent could in fact have been criticised had it not sought to discuss such matters. There is no substantial disadvantage.

If so, did the respondent have knowledge of the same?

365. The respondent could not have known of any substantial disadvantage given that on the face of it such discussions appear to be beneficial to employees in these circumstances, and given that the claimant had not requested a workplace adjustment passport in any event documenting any concern with discussing her health conditions or otherwise.

If so, did the respondent's failure to give the claimant a working adjustments passport, constitute a failure to take such steps as it would be reasonable for the respondent to have to take to avoid that disadvantage?

366. There was no failure to provide a workplace adjustments passport, for the reasons outlined above, and the claimant did not request one. This was a document the claimant could have prepared at any time of her choosing. In addition, whether or not a formal document was in place does not change

the fact that the respondent's discussions with the claimant about her health were reasonable and appropriate.

367. Even if there had been a disadvantage caused by a requirement for the claimant to discuss her health with new managers (which there was not), a workplace adjustment passport would not have alleviated that disadvantage. As described above, a good manager would still have met with the claimant to go through that document to ensure a full understanding and that it was up to date for the claimant's needs at that time: it would have been used as a framework for discussion. There was no failure to take such steps as it would be reasonable for the respondent to have to take to avoid any disadvantage: we find that it is a necessity for disabled colleagues to be willing to disclose matters relating to their health in order to access appropriate support.

368. We would add that, despite the absence of a workplace adjustment passport, it was clear to us that wherever the claimant raised a request for an adjustment and/or a concern about her health more generally, the respondent considered properly whether any adjustments could reasonably be made.

<u>Over-scrutinising of flexitime from September 2019 onwards: p33 issue 2nd (b)</u>

Victimisation

Did Mrs Campbell over-scrutinise the claimant's flexitime from September 2019 onwards? If so, when?

369. We conclude that she did not. We accept that she did review the claimant's flexitime, but we conclude that:

    a. It is normal practice for managers, both within the respondent and more generally, to ensure that flexitime records are accurate;

    b. the claimant's previous managers also reviewed her flexitime records, not just Mrs Campbell;

    c. the claimant's flexi-time records were inaccurate, and that in these circumstances it was entirely appropriate for Mrs Campbell to take steps to ensure that they were reviewed and accurate, including using the fast track process to go through this (and we further find that this could have been treated as a disciplinary matter).

If so, was that because of the protected acts relied upon?

370. We see nothing to connect Mrs Campbell's actions to any protected act, and find that any scrutiny of flexi-records was genuinely because of her normal management processes and/or because of the mistakes she had found on the claimant's records.

<u>Failing to provide equipment between date of claimant's request in July 2019 and October 2019: p33 issue (e)</u>

Victimisation

Was the respondent's failure to provide equipment between July 2019 and October 2019 because of the protected acts relied upon?

371. We conclude that there was no failure to provide equipment. Looking at specific equipment in turn:

    a. In relation to the leg rest, as outlined above, there was no failure to provide a leg rest and in fact it sat under the claimant's desk for a lengthy period after it arrived because the claimant failed to open it. Between July 2019 and October 2019 specifically, any failure to provide equipment relating to a leg rest was because the claimant's workplace assessment was cancelled due to the claimant's absence and due to her doing the school run.

    b. In relation to a heater, whilst not part of her pleaded case, the claimant's original request for a heater was linked to a specific temporary radiator fault and not to any ongoing medical need. In addition, when the claimant tried to assert in evidence that she did have an ongoing need linked to a medical condition, the medical condition appeared to be the menopause and not any of her pleaded disabilities.

    c. More generally, there was no equipment that we found should have been provided to the claimant which was not. As noted earlier, had the claimant had a permanent arrangement to work from home two days per week with no performance concerns, then we would have been inclined to find that a screen and phone should have been provided to her at home, however in the relevant period she was office-based (and that was in itself reasonable as outlined above) so this does not apply.

372. We further find that no treatment of the claimant in relation to provision of equipment was in any way linked to any protected act.

<u>Failure to do follow-up assessment after arrival of equipment in October 2019: p33 issue (g)</u>

Victimisation

Did the respondent fail to do a follow-up assessment?

373. The claimant believes that she was told that a follow-up assessment would be required after the provision of equipment in October 2019.

374. We were shown the report provided following the initial assessment, and that did not mention any specific follow-up report, save that it said that "from time to time" a further assessment may be required. We conclude that this was standard wording included in all such assessments and did not mean that anything specific was required in this case.

375. It may however be that the assessor did verbally tell the claimant that a follow up assessment would be done, although they then did not write this into the report if so. We conclude that if this had been essential, the assessor would have made sure that Mrs Campbell was aware of this and/or would have arranged this, whereas Mrs Campbell had no knowledge of it. There was no failure.

If so, was that because of the protected acts relied upon?

376. Even if there was a failure, we have seen nothing to suggest that it was linked to any protected act and we conclude that it was not: if there was a failure, it was because the assessor failed to record it on the report and therefore Mrs Campbell reasonably did not know that one was to be arranged. That assessor would of course not have been aware of any protected acts.

Failing to comply with recommendation of DSE assessor to situate the claimant near a window and closer to restrooms: p33 issue (f)

Victimisation

Did the DSE assessor recommend that the claimant be situated near a window and closer to restrooms?

377. The 2016 DSE assessment made reference to sitting near a window. This was however due to heat, not plantar fasciitis or anxiety, and at that time the claimant was on the 9th floor and not the 5th or 4th floors. By the time of the events relevant to this claim, that assessment was entirely out of date. The 2019 DSE assessment made no suggestion of being placed next to a window.

378. The 2019 DSE assessment did however suggest that the claimant was placed near a toilet with wash facilities. We accept that this was connected to the claimant's diabetes.

If so, did the respondent fail to comply with that recommendation?

379. There was no failure on the respondent's part. Initially there was some confusion in that it was reasonably thought that the claimant's requirements were to be near any toilet with wash basin, whereas in reality the claimant did need to be near a toilet with a wash basin within the cubicle itself. Once that was appreciated, steps were taken to locate one.

380. Despite there being no official recommendation that the claimant sit next to a window, the respondent also took steps to try to facilitate that. We would add at this point that the requirement to sit near a toilet with wash basin, at the same time as also sitting next to a window, combined with other requirements that the claimant referenced (such as not sitting near Mr Bailey, sitting near a kitchen, not sitting near a walkway or printers and not sitting in the middle of a bank of desks) would be quite difficult to accommodate. We find that Mrs Campbell in particular went out of her way to try to find an appropriate space for the claimant, in the end asking Mr

Bailey himself to move and give his desk to the claimant (which he did). We also find that Mrs Campbell engaged with the claimant throughout that process, including asking her to do a floor walk to assess suitability.

If so, was that because of the protected acts relied upon?

381. As outlined above, there was no failure, but we would further note that there is nothing to suggest that any treatment of the claimant in relation to the situation of her desk was in any way linked to any protected acts.

Rejecting or delaying authorising applications for leave: p33 issue (d)

Victimisation

Did the respondent reject, or delay authorising, applications for leave? If so, when?

382. There was some lack of clarity about what this was referring to, with three separate options identified:

    a. The rejection of the claimant's request for volunteering leave. On this point, the respondent did reject the claimant's application for leave;

    b. Miss Parsons rejecting the claimant's application for leave, on the basis that her line management was moving to Mrs Campbell so that it was for Mrs Campbell to reject or accept it. On a pure technical level, this leave was rejected (although not intended to mean that the claimant couldn't actually take the leave); and

    c. The claimant attempting to book all of her leave for the whole year in one go, and Mrs Campbell telling her that she had booked it too early. This is what the claimant submitted in her submissions, however it was the first time she had referenced this and therefore we had not heard any evidence from Mrs Campbell on this point. We cannot therefore say for sure whether Mrs Campbell did reject leave on this basis but for the purposes of analysing whether or not that would have been reasonable we assume that she did.

If so, were such rejection or delays because of the protected acts relied upon?

383. We conclude that none of the above matters were connected in any way to protected acts. In relation to the issue regarding booking leave for the whole year, as that is what the claimant now asserts is the real issue here, we conclude that it would be a reasonable management practice to ask that employees do not book all of their leave at an early stage, thereby depriving other colleagues of requesting the same periods. Different managers approach leave in different ways (and we note that some managers take the contrary view and encourage the early booking of leave), but neither approach is wrong. Importantly, we see nothing to link it to any protected act.

Jurisdiction: time

ACAS Early Conciliation was 22/7/19. The Claim was presented on 23/7/19 (with the claimant providing her home address by email on 16/8/19).

Was each complaint presented in time? The Tribunal will decide:

(1) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
(2) If not, was there conduct extending over a period?
(3) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
(4) In relation to any omissions: In the absence of evidence to the contrary, when did the person do an act inconsistent with doing it, or if the person did no inconsistent act, when did the period expire in which the person might reasonably have been expected to do it?
(5) Was the claimant made to the Tribunal within three months (plus early conciliation extension) of that date?
(6) If any complaints were not made in time, what was the reason for that?
(7) In any event, is it just and equitable in all the circumstances to extend time?

384. Based on the date on which early conciliation started, only acts occurring after 23 April 2019 would have been brought within the primary time limit.

385. However, we conclude that, whilst the claimant has raised a number of distinct allegations, she is in fact asserting that there was discriminatory conduct extending over the entire period to which her claim relates. The claim was made to the tribunal within three months (plus early conciliation extension) of the end of that period.

386. In these circumstances we find that the claimant did bring her claims within the required time period.

Conclusion

387. We have not found in favour of the claimant in relation to any of her allegations and the claimant's claims are dismissed in their entirety. The claim fails and there is no question of remedy to be determined.

388. We are aware that the claimant remains in the respondent's employment, and continues to be in dispute with the respondent about a number of other matters. We would urge the claimant, in her future discussions with her managers and with the respondent more generally, to be as detailed and clear as she can be about anything that she feels she needs in the workplace so that the respondent can fully understand both what adjustments she seeks and exactly why. We would also encourage the claimant to keep an open dialogue (either over email or in person) with her managers with a view to trying to resolve issues. This may assist the claimant to have a more productive working relationship moving forward.

Employment Judge Edmonds
Date: 25 May 2023