EMPLOYMENT TRIBUNALS

Claimant: Ms XYZ

Respondent: Network Rail Infrastructure Ltd

Heard at: Employment Tribunal sitting at Bedford County Court

On: **10-11, 14-18, 21-25, 28 June to 2 July 2021**

Before: Employment Judge Quill; Ms H Edwards; Mr D Sutton

Appearances
For the claimant: Mr M Hodson, counsel
For the respondent: Ms I Ferber, counsel

RESERVED JUDGMENT

(1) There was no direct sex discrimination. The complaints in section 2 of the list of issues fail and are dismissed.

(2) The Claimant did like work to that of her male comparator. The Respondent has proven that the difference in pay was because of a material factor and that section 69(1) of the Equality Act 2010 is satisfied. The Equal Pay claim fails and is dismissed.

(3) The Respondent did not subject the claimant to disability discrimination within the definition in section 19 of the Equality Act 2010 (indirect discrimination).

(4) There was disability discrimination within the definition in section 15 of the Equality Act 2010 (discrimination arising from disability) by:
    (i) Suspending the Claimant around 14 November 2016
    (ii) Not giving grievance appeal outcome prior to end of employment
All the other allegations of section 15 discrimination fail and are dismissed.

(5) The Respondent did not subject the claimant to disability discrimination within the definition in section 13 of the Equality Act 2010 (direct discrimination).

(6) The Respondent did not subject the claimant to disability discrimination within the definition in section 21 of the Equality Act 2010 (reasonable adjustments).

(7) The Respondent did not victimise the Claimant within the meaning of section 27 of the Equality Act 2010.

(8) The Respondent did not dismiss the Claimant. All the complaints based on dismissal, including unfair dismissal and automatically unfair dismissal fail and are dismissed.

(9) The Respondent did not subject the Claimant to any detriment on the ground that she had made a protected disclosure.

REASONS

Introduction

1. The Claimant is a former employee of the Respondent. Her claims relate to events during her employment and to the termination of that employment.

Procedural History

2. There were several preliminary hearings in these proceedings, and it is not necessary for us to list all of them. We will set out some of the relevant dates.

3. While the Claimant was an employee of the Respondent, she issued what we will call "Claim 1" (case number 3401026/2016).

   3.1 This was presented on 4 October 2016 and followed ACAS early conciliation which commenced on 11 August 2016 ("Day A") and ran to 5 September 2016 ("Day B"). In other words, the claim was presented within a month of Day B. The boxes ticked in Section 8 of the form ET1 were "disability", "arrears of pay" and "other payments" and "another type of claim which the Employment Tribunal can deal with". In the claim form, the Claimant stated that she would like her claim to include events which post-dated the early conciliation.

   3.2 The text alleged that certain effects had been caused by the Respondent since "early ?15" (meaning early 2015). It also stated:

   At no point has the Company addressed injury caused. Both the original trauma and other failings have materially contributed to my diagnosis of work-related anxiety, stress and depression. For avoidance of doubt, the work environment and Company errors/failure to adequately manage decision-making, behaviours and [risk assessment] is the root cause of the injury I have sustained; but for the victimisation, bullying, prejudice, etc. to which I have been subjected I would not be thus disabled.

   3.3 In response, amongst other things, the Respondent stated: "*The Respondent admits that the Claimant was disabled in accordance with section 6 of the Equality Act 2010 from 7 May 2016 onwards, although the precise effects of the Claimant's disability will be a matter for witness evidence. Pending receiving further medical evidence, the Respondent reserves its position on whether the Claimant was disabled in accordance with section 6 of the*

Equality Act 2010 prior to 7 May 2016. In particular, the Respondent received a medical report on 14 December 2015 advising it that the Claimants condition was unlikely to be considered to be a disability."

4. On 5 January 2017, the Claimant presented another claim. The boxes ticked were "disability" and "another type of claim which the Employment Tribunal can deal with". In the form, the Claimant stated that she had been seeking to amend Claim 1 and that she was presenting the new claim form in case that was required to bring alleged "continuing acts" into the "scope" of the claim. The claim form mentioned both the ACAS certificate number from Claim 1, as well as another certificate number. This was eventually given case number 3302838/2018. (The years are not typing mistakes; the presentation date was in 2017 and the case number 2018. The reasons for this are alluded to in paragraph 2 of EJ Ord's summary of the 19 February 2018 hearing). It was stayed by consent, on 15 November 2018, until after the conclusion of this litigation.

5. On 2 June 2017, there was a preliminary hearing in relation to Claim 1 before Employment Judge Sigsworth. The Claimant's intention to issue Claim 2 (see below) was mentioned, as was her desire to apply to amend Claim 1. She was ordered to supply Further and Better Particulars by 14 July 2017, and to include any application to amend Claim 1 in the same document. She did so, and the document is at pages 73 to 111 of the bundle for this claim. She was also ordered to produce a Disability Impact Statement, and she did so, and that document (including February 2019 additional comments/updates) appears at pages 230 to 239A.)

6. After the end of employment, the Claimant presented what we will call "Claim 2" (case number 3324918/2017).

   6.1 It was presented on 2 June 2017 and followed early conciliation which commenced 5 March 2017 ("Day A") and concluded 22 March 2017 ("Day B"). The certificate number for this latter period of early conciliation was the only one referred to in the form. Claim 2 was presented more than a month after 22 March 2017. As we will explain below, the effective date of termination was 4 March 2017 and so Claim 2 was presented less than 3 months after the effective date of termination.

   6.2 The boxes ticked were "unfair dismissal", "age", "disability", "sex", "other payments" and "another type of claim which the Employment Tribunal can deal with". Within the section "remedy", reinstatement, recommendations and compensation were mentioned. There was no separate attached document detailing particular incidents. The full text of what was written in Boxes 8.1 and 8.2 was:

   Breaches of:

   (a) Employer duty of care;

   (b) Human rights;

   (c) Contract terms, both implied and express;

(d) Public interest disclosure rules

HEADS OF CLAIM

Comprising 'continuing, events' throughout the period September 2014 to March 2017 (date of Claimant's resignation)

(a) Disability discrimination:

i. Direct;

ii. Indirect;

iii. Harassment;

iv. Victimisation;

v. Failure to make reasonable adjustments, and.

vi. Discrimination arising out of disability.

(b) Age discrimination;

(c) Sex discrimination

(d) Breach of employer duty of care

(e) Breach of human rights;

(f) Breach of contract terms:

i. Implied; and

ii. express.

(g) Breach of public interest disclosure protections

(h) Unlawful deduction from wages; and

(i) Constructive unfair dismissal.

6.3 In its response to Claim 2, the Respondent effectively repeated its position from Claim 1 in relation to disability. It acknowledged receipt of an email of 4 March 2017 which stated that the Claimant was resigning with immediate effect, but suggested that her employment with the Respondent continued until 28 March 2017.

6.4 The Respondent also stated that Claim 2 lacked particulars. On around 11 September 2017, the Claimant submitted what she described as "Further and Better Particulars of Claim". The document mentions Claim 2 and appears at pages 153 to 204 of the bundle.

7. On 15 September 2017, a public preliminary hearing took place before Employment Judge Moore.

   7.1 The judgment was that: Claim 1 included complaints of disability discrimination, unlawful deduction from wages and equal pay, and mentioned (paragraphs 2.1 to 2.5) the alleged incidents relevant to those claims; and that Claim 2 contained a complaint of constructive unfair dismissal (and nothing else, for the reasons attached to the judgment).

   7.2 Claims 1 and 2 were consolidated.

   7.3 The equal pay claim was stayed (in its entirety)

   7.4 A further preliminary hearing to consider the application to amend.

8. The Respondent set out its position in relation to the issue disability in a letter dated 24 January 2018.

9. The preliminary hearing to consider the application to amend had been listed for 19 and 20 February 2018, but for the reasons given in his summary and orders, EJ Ord postponed that decision and converted 19 February to a hearing to deal with other relevant matters.

10. A further preliminary hearing took place on 26 September 2018 before EJ Ord. This included a detailed list of proposed adjustments for the final hearing. It made some orders in relation to a hearing to consider the applications to amend, and that hearing took place in public on 15 November 2018. The judgment included that:

    10.1 "*The claimant's complaints of detriment relating to protected disclosures and the complaint that she was unfairly dismissed contrary to section 103A of the Employment Rights Act 1996, are out of time. It was not reasonably practicable for them to be presented in time and the claimant presented them within a reasonable time thereafter. Time is extended to allow those claims to proceed*." and

    10.2 "*By consent, the case proceeding under case number: 3302838/2018 is stayed pending the final hearing in case numbers: 3401026/2016 and [3324918/2017] (already consolidated). Case number 3302838/2018 will be considered for case management purposes along with the equal pay elements raised in cases numbered: 3401026/2016 and [3324918/2017] (those claims were previously stayed), at the conclusion of the hearing of this consolidated action*."

11. The detailed reasons given for the decision included that the September 2017 further and better particulars document related to both claims and stated that:

    [26]. Accordingly, the applications made by the claimant to amend her claim form to include the claims for detriment for having made protected disclosures and automatically unfair dismissal for having made protected disclosures are allowed.

and

[40.1] The claimant has leave to amend her claim. The claims that will proceed to the final hearing are those set out in the consolidated further and better particulars which have been provided by the claimant;

12. The combined effect of EJ Moore's 15 September 2017 judgment, EJ Ord's 15 November 2018 decisions, and the fact that age discrimination is not referred to in the September 2017 Further and Better Particulars is that there is no age discrimination complaint before the tribunal.

13. At a hearing before EJ Ord on 21 November 2019, it was agreed that the stay should be lifted in relation to the Equal Pay claim insofar as this was based on 'like work' but that the Work of Equal Value claim should remain stayed.

The Claims

14. Thus, as a result of the above, the claims for us to determine are:

    14.1 Direct Sex Discrimination

    14.2 Equal Pay

    14.3 Indirect Disability Discrimination

    14.4 Discrimination Arising from Disability

    14.5 Direct Disability Discrimination

    14.6 Failure to Make Reasonable Adjustments

    14.7 Victimisation Because of a Protected Act

    14.8 Detriment on the ground of protected disclosure

    14.9 Unfair Dismissal

The Issues

15. Following earlier drafts, during the course of this hearing, the parties produced an agreed list of issues which runs to 28 pages including appendices. It lists 58 factual issues, and we will itemise those as part of our findings of fact, using the parties' numbering system, namely F1 to F58. In doing so, we will mention which are expressly agreed by the Respondent.

16. The agreed list of issues also lists the individual complaints making up the various claims, and we will itemise those as part of our analysis. In his opening note, Mr Hodson mentioned the possibility of making an application to amend, and referred to a discussion at a preliminary hearing in 21 January 2019; however, Ms Ferber confirmed that no application was necessary and the Respondent was ready and willing to proceed on the basis that everything mentioned as a complaint in the agreed list of issues was a complaint that we needed to determine (subject, of

course, to the Respondent's arguments that for some of the complaints we should decide that we did not have jurisdiction because they were out of time).

17. Although not expressly mentioned in the agreed list of issues, it is common ground that the unfair dismissal complaint relates both to alleged automatically unfair dismissal (contrary to s103A of the Employment Rights Act 1996), as well as so-called "ordinary" unfair dismissal. The Respondent denies that the Claimant was dismissed, and so that is one matter which falls to us to decide.

18. The Respondent makes some admissions (as made clear in the agreed list) in relation to disability and knowledge of disability, but there remain some disputed issues for us to resolve.

19. This hearing was to determine issues of liability only. Other than findings and decisions in relation to Polkey, remedy issues are to be dealt with separately.

The Hearing and the Evidence

20. The final hearing proceeded in accordance with the recommendations made by EJ Ord on 26 September 2018 (see pages 249 to 255 of the bundle). Break times and start/finish times were decided upon by mutual agreement during the hearing.

21. There had been a decision at a preliminary hearing on 22 March 2021 that the final hearing would be a hybrid hearing. However, the Claimant had not realised that two of the panel members would be remote. The panel members were only remote because of the need to comply with social distancing within the hearing room and not as a result of any personal preference or requirement of the panel members. At the outset of Day 1, it did not appear that there would be any configuration of the hearing room that would comply with the relevant distancing requirements and also allow the full panel to be present in person. However, due to the combined efforts of several members of HMCTS (for which the panel is extremely grateful), a suitable configuration was eventually found. From Day 3 onwards, the parties and the full panel were all in person. The hearing proceeded as follows:

    21.1 Day 1 was taken up with preliminary matters and timetabling issues.

    21.2 Day 2 was a reading day without the parties.

    21.3 Day 3 commenced at 12pm with one of the Respondent's witnesses (Ms Carruthers) attending by video.

    21.4 Days 4 and 5 were the Claimant's evidence.

    21.5 Days 6 to 11 were the Respondent's remaining witnesses. Ms Hayes (on Day 11) attended by video, and all the others were in person.

    21.6 Day 12 was submissions.

    21.7 As per the timetable previously fixed, Days 13 to 17 were for deliberations in the absence of the parties and the public.

22. Public access via video (CVP) was permitted on Days 1 and 3, as the hearing had been listed as a hybrid hearing. On all of Days 1 and 3 to 12, public access in person was available. As a reasonable adjustment for the Claimant, it was agreed that if any of the Respondent's witnesses wished to observe proceedings (other than on days when they attended the hearing centre to be available to give evidence that day), they would observe remotely via CVP. That was accomplished by having the witnesses use separate devices for video and audio and was largely successful, albeit there were some periods for which the witness's audio connection was unavailable and so they could not be heard in the CVP room. (The issue did not prevent all those present in person from being able to hear the witness).

23. The Claimant did not attend on the morning of Day 6, but had given her instructions to her counsel that she did not wish to request a postponement, and that she wished the hearing to continue in her absence, which it did. She attended after lunch (missing just the first few minutes of the afternoon session). She was present for all the other days.

24. The following witnesses on behalf of the Respondent had prepared written statements, and attended the hearing to give evidence and be cross-examined. In the order in which they gave their evidence, these were:

    24.1 Ms Caroline Carruthers, Chief Data Officer

    24.2 Manager ONE

    24.3 Ms Sarah Bond (who was known as Sarah Downing at the relevant times), Planning and Scheduling Manager

    24.4 Mr Kevin Bowsher, Diversity and Inclusion Manager.

    24.5 Manager FOUR

    24.6 Ms Paula Armstrong, Investment Manager – Property

    24.7 Manager TWO

    24.8 Ms Lisa Belsham, Lead HR Business Partner for Safety, Technical and Engineering

    24.9 Manager THREE

    24.10 Ms Paula Hayes, Head of Reward and Benefits.

    24.11 Ms Hayley Clarke, Programme Manager

25. In addition, we were also invited to read the statement of Ms Megan Taylor (known as Maytham at work), which we did. She did not attend, and so we have given it such weight as we see fit.

26. After Manager ONE's evidence, the Claimant obtained a signed written statement from David Walgate, member of the Industry Access Programme team during a

relevant period. The Respondent did not object to his evidence. We were told that he was willing in principle to attend and take the oath and be cross-examined. However, neither the Respondent nor the panel had any questions for him, and it was therefore agreed that his attendance was not necessary. We have given his statement the same weight that we would have given it had he testified.

27. For the Claimant's statement, there were two documents which the parties referred to as "XYZ 1" and "XYZ 2". EJ Ord's opinion was that a fair hearing would require that the Claimant had professional assistance in the drafting of her witness statement. He suggested that HMCTS consider making a reasonable adjustment, because of the Claimant's disability, to provide funds so that the Claimant could have legal assistance in preparing her statement. That suggestion was not adopted, and the Claimant did not have legal assistance in preparing a statement. By consent, therefore, XYZ 1 and XYZ 2 have been treated as the Claimant's evidence in chief. On Day 1, Mr Hodson indicated that he might wish to make an application to ask supplementary questions *after* cross-examination. We pointed out that, while the timing of any application to ask supplementary questions was ultimately a matter for him, we thought that it would potentially be more appropriate to make such an application *before* cross-examination. In the event, he made no application for supplementary questions at either point in time and stated that he was satisfied that XYZ 1 and 2, and the answers given by the Claimant in oral evidence, were sufficient.

    27.1 Neither XYZ 1 nor XYZ 2 was a finished document. They would have been used as material to assist a legal representative to help the Claimant prepare a formal statement.

    27.2 XYZ 1 is a spreadsheet document. It is 38 pages of landscape, and includes 425 rows. The first 141 rows each mention a date (or approximate date) in chronological order from August 2014 to August 2015. Rows 142 to 425 are in a similar format for the date range August 2014 to June 2017, some dates/information are repeated and with additional commentary/information in a column headed (for WS). Each row contains what appears to be a diary entry (in most cases, in fairly brief bullet point form; a few are longer and are narrative). Not every row contains relevant information

    27.3 XYZ 2 is a 40 page text document. The first 17 pages are numbered paragraphs under 9 headings. The remainder is made up of appendices A ("definitions"), B ("welfare timeline to December 2015") and C ("discrimination"). The text makes various comments in bullet point form. In turn these documents cross-reference annexes which are approximately 1100 pages of further documents.

    27.4 The adjustments which we make are to try to absorb what information we can from XYZ 1 and XYZ 2, and assess relevance to the claims. We do not draw any adverse inferences from any failure to specifically deal with a point that we think is relevant.

28. In fairness to the Respondent, we informed the parties that we would not take the Respondent to be admitting a fact asserted in XYZ 1 or 2 just because there was a failure to cross-examine on it. On Mr Hodson's request, we agreed that he could

have the same latitude in relation to the Respondent's witnesses. We mentioned that we would expect both representatives to challenge the other side's witnesses on important factual disputes where necessary.

29. The document bundle was in 25 lever arch files, with pages numbered 1 to 8452 (with some inserts), plus 221 page index. The witness statement bundle was in 3 lever arch files, and was about 1454 pages, including the index and the annexes. The panel and the representatives used electronic versions, and the in person witnesses used hard copies.

30. During submissions, a point arose about Ms Belsham's evidence and it was specifically alleged that she had deliberately lied about when she first discussed the Claimant's case with Dr Peters. He was mentioned in paragraphs 154 and 155 of her written statement (and also in cross-examination) and also in paragraph 3 of Taylor's. The Claimant's counsel purported to place additional evidence about Dr Peters' start date before the tribunal by way of his written submissions. The Respondent sought permission to produce their own new evidence in reply, to which the Claimant consented provided she had the opportunity to comment. For this reason, we received a supplementary statement from Ms Belsham together with Mr Hodson's comments on it. We received both items together on Day 13. The timing of the covering emails is not of huge significance to us, but, for completeness, the order that we made was for the Respondent's evidence to be submitted by 4pm on Day 12 (25 June 2021), and the Claimant's comments by 12pm on Day 13 (28 June 2021). The Claimant asked us to move the Respondent's deadline forward to 3pm and we asked them to try for that if possible; we also made clear that the parties should keep each other informed if there were delays, but that we did not need a running commentary so long as we would have the documents as early as possible in the week commencing 28 June 2021.

The findings of fact

31. The Claimant started work for the Respondent in January 2013. She sent an email at 17:35 on Friday 4 March 2017 to, amongst other people, the Respondent's chief executive; her line manager at the time (Manager FOUR); the Lead HR Business Partner for the part of the business she worked in (Ms Belsham). The email stated that the purpose of the email was to resign "with immediate effect". Our finding is that the email was read the same day, 4 March 2017, and that the effective date of termination was 4 March 2017. She had therefore been employed for 4 years as of the date of termination.

32. She commenced as being paid on Band 5 on the payscale and in November 2013, went to a higher band, Band 4.

33. For the complaints which are part of this claim, the relevant period can be broken down as follows:

    33.1 Starting from around September 2014, the Claimant's job title was JOB ONE. She was on the Industry Access Programme (IAP) team. Her line manager was Manager ONE. Manager ONE's line manager was Mr Greg Sugden. This was her first post at Band 3, and the other posts mentioned below were also Band 3.

33.2 The Claimant changed jobs and teams with effect from 23 September 2015. Her job title was JOB TWO. At first, her immediate line manager was Manager TWO and Manager TWO's line manager was Manager THREE. Later, she was line managed directly by Manager THREE. This is the job and the time period to which the Equal Pay claim relates. The Claimant's comparator is male, Mr Fotis Nikolaidis.

33.3 The Claimant changed jobs and teams with effect from 26 September 2016. Her job title was JOB THREE. Her line manager was Manager FOUR. She remained in this post until the end of her employment. She was suspended from duty on around 14 November 2016, and the suspension continued until the end of her employment.

Medical History and Events prior to joining the Respondent

34. In August 2010, the GP notes record that the Claimant was feeling anxious at work. A fit note was issued suggesting that the Claimant was not for 2 weeks and could either: do 1 or 2 days work from home in that period, or, otherwise, should not work at all for 2 weeks. On 2 September 2010, the Claimant told her GP that she could not stop work due to project that she only she could finish, and a fit note for 3 weeks suggesting altered hours for 1 September to 22 September 2010 was issued. By 1 November 2010, the Claimant's opinion had become that there was no point in continuing he project as she did not believe that it would meet objectives. She had had meetings with her employer to try to come up with a solution. She was still in that as of further consultations with her GP in January 2011.

35. The Claimant confirms that the GP entry of 25 November 2011 is a date when she had been in a new job for approximately 3 months. The GP comment was: "*was doing well until her occ health doctor to{d her line manager about her case. She's very upset about this - 'not good - I don't want to be there'*."

36. The entry for 28 June 2012 includes the following: "*she has been reading about borderline personality disorder and thinks that she has this. can't understand why psych didn't spot it. admits she mostly refused to talk to them says she has had to make her own diagnosis. refuses to talk any further, but agrees that if I ask psych to see her again she will go and try to be more open with them."*

37. For the period starting with the commencement of the Claimant's employment we will structure our decision by addressing the assertions F1 to F57 in the agreed list of issues. The format of each is that it is posed as an assertion made by the Claimant, which is not accepted by the Respondent unless otherwise stated.

F1 September 2014 onwards: The Respondent required the Claimant and her team ('the Programme Team') to work considerably longer hours than those contractually agreed, estimated as 65-70 hours per week.

38. As Manager ONE accepted in evidence, October 2014 was a particularly challenging month. The workload continued to be high from November through to April 2015. The situation improved considerably in April, as the result of a reorganisation and as the result of Manager ONE pushing back internally within

the Respondent leading to an improvement in the way that work was allocated to her team and the demands which the project sponsors placed on her team.

39. We accept Manager ONE's evidence that she sought to make clear to the Claimant in October that the Claimant was going into more detail than was necessary, and therefore spending more time working than was necessary.

40. We were not provided with any contemporaneous evidence about the exact start finish times on particular days/weeks. Manager ONE accepts that she herself worked long hours (60 to 70 per week), and that her team, on average, worked more than their contractual requirement. She did not believe that any of her team were working the same hours as her (or that her pattern of work implied that they should do so); she accepted that the Claimant probably was one of the team members who worked longer than the average.

41. Our finding is that the Claimant averaged less than 65-70 hours per week. In the period up to around April 2015, her hours were perhaps 55 to 60, which was higher than some of her colleagues, but less than Manager ONE. Manager ONE wanted her to do fewer hours and sought to persuade her to do fewer hours, and the Claimant would not have been disciplined or criticised if she had done fewer hours.

42. From April 2015, the team's workload reduced and the Claimant was able to reduce her hours. The Claimant continued to arrive closer to 8am than to the 9am required start time, but did so out of choice, including because the parking/travel arrangements suited her better at that time of day, and not because the Respondent wanted her to start before 9am. She was required to stay until 5pm, but not later (and, in fact, was strongly encouraged to leave by no later than 6pm).

<u>F2 September 2014 onwards: The Respondent required the Claimant and the Programme Team to complete projects with irreconcilable goals, an example of which was the requirement to provide an 'Olympics Timetable' while at the same time delivering a 'cash' saving;</u>

43. The Claimant was asked to lead a project, the brief for which commences on page 836. As an example of something which had been done in the past, she was shown the 2012 Olympic timetable. She was not required to exactly replicate that timetable and was not given the same budget that had been used for the Olympics, and nor was there the same general willingness from other parties to come together to get things done. The project had particular aims and objectives, including in relation to the benefits that were hoped for, and the budget.

44. It is not part of our function to purport to decide if the overall aim of achieving a baseline timetable was an impossible one for the Respondent to achieve. However, the Claimant's specific task was not impossible. One of the ways in which she could have completed her own task successfully would have been if the project had reported back to the Respondent that the Respondent would not be able to implement the hoped for baseline timetable, and/or would not be able to do so without exceeding the intended budget and allocation of resources. The purpose of the project was to identify what was achievable. Based on the work of the project led by the Claimant, it would have been other people within the Respondent who made the decision about whether implementing a baseline

timetable was something which the Respondent would commit to achieving. If the project which the Claimant managed had put forward one or more suggested methods by which a baseline timetable could have been achieved, then the report would be expected to comment on the costs of implementation, potential savings moving forward, etc, and to make clear what assumptions had been made when coming up with these projections, but it was not the Claimant's responsibility to deliver an outcome which purported to achieve particular savings.

F3 September 2014 onwards: the Respondent evaluated the Claimant's performance as an employee without reference to objectively ascertainable and measurable objectives or criteria, but instead by using subjective descriptors such as 'good'

45. The Claimant's performance review for April 2013 to March 2014 was in the bundle at page 701. The potential rating for employees generally are: outstanding; exceeded; good; partially achieved; substantial performance improvement required; new to role (0-6 months). The Claimant was rated as "new to role" because she been in it less than 6 months. She had been in that role – a promotion to Band 4 – for about 4 months (since November 2013). The Claimant's comments included stating that she had not met some of her objectives for reasons beyond her control, but had used her initiative to attempt to solve problems. She believed that credit for her work was inappropriately given to others, and suggested that she would have been allocated work with greater levels of responsibility but for what she regarded as sex discrimination.

46. The Claimant joined Manager ONE's team in September 2014, in other words about half way through the review year April 2014 to March 2015. The review for that year is at page 735. The Claimant was rated "good". The Claimant had made the transition from Band 4 to Band 3 well in the first 6 and a bit months in the new role. Within the document, it was noted that objectives included: the Claimant going to gym 2 to 3 weeks per week; the Claimant not leaving work later than 1 hour after the end of the contracted leaving time; the Claimant not exceeding 40 hours per week.

47. Manager ONE gave the Claimant the rating "good" based on her own honest opinion about the Claimant's performance in the slightly more than 6 month period, and on the feedback received from the previous manager. At the start of the Band 3 role, the Claimant had been given objectives which were suitable to the new role. The nature of the role of JOB ONE is that it is not necessarily possible to state, with precision, in advance of the project what things the JOB ONE will need to do in connection with that project. Whereas for more junior roles, it might be possible to set, as objectives, a list of specific tasks that need to be completed within the year, project management requires the ability to react well to circumstances which might have been unforeseen at the outset. Manager ONE set the Claimant objectives which were as clear as possible in the circumstances, which included the fact that (a) the objectives were being set for a period of less than 7 months; (b) the team itself was under pressure, as mentioned above, until the reorganisation in April 2015; (c) it is normal for things to change in a project and for things to have to be reworked and reassessed, during the lifetime of the project, meaning that it is sometimes necessary to assess the performance of the JOB ONE retrospectively, taking into account things that were unknown at the time the

objectives were set. Part and parcel of the Band 3 JOB ONE role was the ability to define the course of action for a project and not just steer a course set by others.

48. The Claimant was disappointed with the rating of "good" and sought to spend a lot of her own time, and to use a lot of Manager ONE's time, attempting to persuade Manager ONE to specify in advance what would lead to the Claimant being rated as "outstanding" or "exceeded" at the end of 15/16. Manager ONE did her best to assure the Claimant that the review would be conducted fairly and would take into account the work that the Claimant did during the year. She informed the Claimant that she was willing to set objectives that were as clear as she could make them in the circumstances, but that it was not necessarily possible to come up with an exact set of criteria in advance which would mean "outstanding" or "exceeded" had been achieved.

49. Discussions about finalising the objectives for 15/16 continued into June 2015. The Respondent's practice was that, where possible, the objectives would be agreed between the employee and the line managers. Agreeing the objectives (and the measures which might be used to assess the extent to which the employee had achieved each one) was a two way process. Manager ONE invited the Claimant's comments including, for example, in her 10 June 2015 email, which gave extracts from the guidance and made clear that she wanted the Claimant to able to work towards objectives (and success measures) which reflected the autonomy required of the role.

50. The Claimant wished to have Human Resources become involved in the process. This was out of the ordinary, but both Manager ONE and Human Resources were content for HR to support the process. To the extent that the Claimant suggests that Manager ONE deliberately made agreeing the objectives for 15/16 difficult because the Claimant had disagreed with the rating for 14/15 (or for any other reason), we reject that. Manager ONE explained the process thoroughly to the Claimant in writing and at meetings, and believed that the HR support (which the Claimant initiated) also made clear to the Claimant what was the purpose of, and limitations of, the process for agreeing objectives (and measures).

51. There followed exchanges of lengthy emails in which each of Manager ONE and the Claimant explained to the other what they wanted from the agreed list of objectives/measures for 15/16. In the event, the Claimant moved to another team within the Respondent less than 6 months into the April 2015 to March 2016 period.

<u>F4 10.08.15: Manager ONE moved the Claimant's leaving date from August to October 2015 without any email or warning and refused to change this course of action despite the Claimant stating that she was unhappy;</u>

52. Our finding is that there was not a change of a specific date. A leaving date in August had not been agreed.

53. In June 2015, the Claimant had been continued with internal discussions with a view to moving into the role of JOB TWO. She met Manager TWO and Manager THREE and, in due course, was offered the chance to move to Manager TWO's team. She informed Manager ONE of this around 16 July and an announcement

that the Claimant was going to be leaving the team was made to colleagues around 20 July.

54. Prior to the Claimant going on leave in early August 2015, the Claimant had not agreed a specific start date with Manager TWO, or a specific departure date with Manager ONE, and had not finalised her salary arrangements on Manager TWO's team. On 27 July, she sent a chaser to Manager THREE reminded him that she was waiting on the formal written offer, and he replied (the following day) to say that he hoped it would come out the following week. Negotiations over pay continued in August. On 11 August (pages 870 to 871A of bundle), the Claimant and Manager TWO had a further email exchange about the Respondent completing the formalities of the offer process. As late as 10 September 2015, Manager TWO's view was that the Claimant would not necessarily join his team at all (let alone on a specific date that he had previously agreed with her) if salary for the post could not be agreed between her and the Respondent. He wrote to colleagues: "Keen to get XYZ in but don't intend to pay over the market rate. I'll review her response today and feedback to you by close of play today." (923D)

55. While the Claimant was on leave in early August, Manager ONE contacted Manager TWO to find out when he was hoping to have the Claimant join his team. The Claimant was working on a particular project, which had a milestone date at end of September, and it was Manager ONE's preference that the Claimant would remain on her team until that milestone. She informed Manager TWO of this, and he was content with that. The two of them agreed that Monday 2 October 2015 was a mutually satisfactory date, as far as they were both concerned, for the Claimant to move into his team.

56. On 10 August 2015, the Claimant's first day back at work after her leave, Manager ONE informed the Claimant that she and Manager TWO had agreed that 2 October was mutually acceptable to them. The Claimant became angry because this was later than she had expected. Her opinion (which was incorrect) was that Manager ONE had given a commitment to release her in August (which was not, in fact, a date that she had agreed with Manager TWO or Manager THREE in any event). The Claimant was also angry at the timing of the conversation, which delayed her planned visit to the gym and because it was her perception that Manager ONE ought to have realised both that (a) this would be distressing information for her and (b) which should not (therefore) have been conveyed as she was about to go to gym. In fact, it was Manager ONE's opinion at the time that (a) it was important to inform the Claimant promptly about what she and Manager TWO had agreed and (b) the information would not be controversial, as the Claimant was aware that the precise leaving date was subject to the agreement of Manager TWO and Manager ONE (as well as the Claimant) and (c) it would be a short and calm conversation, which would not delay the Claimant's gym attendance by more than a minute or two.

<u>F5 25.11.15: Managers TWO cancelled the Claimant's attendance on the MSP training course without obtaining medical information from the Claimant's GP, without a prognosis, without a Stress Risk Assessment, without discussing the potential consequences with the Claimant and without exploring any potential adjustments which might have enabled her to attend;</u>

57. The team which the Claimant joined (reporting to Manager TWO who reported to Manager THREE) was … responsible for managing the assurance of change programmes within Network Rail. The term "change programme" is used within Network Rail to refer to any potential change to business practices that has an effect on its people or processes. The term "assurance" was used to describe a process through which the business assessed whether a change programme complied with Network Rail's framework for change, known as MSP4NR or “MSP”. The assurance process included recommending improvements to improve the likelihood of a programme succeeding.

58. Familiarity with MSP was a requirement of the role. This was stated in the published advert (393-395). However, because of difficulties in recruiting to that advertised role, and because Manager TWO and Manager THREE had been impressed by the Claimant during their discussions with her, it was agreed the Claimant could start in the post without having had formal training in MSP. The intention was that she would complete an MSP Practitioners course sooner rather than later once she was in post.

59. The MSP Practitioners course is one which is run by the Respondent from time to time for employees across the business. The normal process is that employees register their interest in doing the course with the training team which, once it has a high enough number of interested employees, makes all the necessary arrangements for an external provider to provide the course. It is a 5 day course for which some pre-reading is recommended. The MSP qualification awarded at the end of the course was one which Manager TWO had obtained during his employment with the Respondent, and in practice the Respondent had not insisted on the pre-requisite that an JOB TWO they have this qualification *before* starting in the role. The other JOB TWO on the team at the relevant times was Fotis Nikolaidis. He joined the team before Manager TWO did (Manager TWO joined it in March 2015) and did not have the MSP qualification when he joined, but was expected to (and did, in fact) obtain the qualification sooner rather than later after joining the team. No specific deadline for either the Claimant or Mr Nikolaidis to obtain the qualification was set (and no specific consequence of failing to obtain the qualification within a reasonable period of time was set out).

60. The job description (originally drawn up in 2014) at pages 391 to 392 is the role to which each of Mr Nikolaidis and the Claimant were appointed. It does not specify that MSP qualification is essential.

61. Manager TWO and the Claimant were both aware that the Respondent’s training team usually arranged MSP courses. At their one to one on 29 September 2015, Manager TWO agreed to the Claimant’s suggestion that if she could gather the names of a sufficient number of colleagues (9 was the number which they agreed) whose managers were willing to approve, and pay for, their attendance, then there could be an approach to the training team to request that the course be run for that group. The Claimant worked hard on trying to co-ordinate various parties (the training team, venue provider, course provider, possible attendees). The Respondent’s training team believed (around 13 November 2015) that a course provider and venue had been identified for a provisional start date of 7 December 2015. On 17 November 2015, the Claimant copied in Managers TWO & THREE on an email trail explaining that there were some problems with that; she could do

the dates, but many of the other possible attendees could not. On 18 November 2015, the training team confirmed to the Claimant (cc'ed to Manager TWO and THREE) that the 7 December date was cancelled and there were no cancellation fees. The Claimant was aware from previous correspondence that this cancellation meant that the course could not be organised – by her own efforts - before Xmas; the training team now instructed that the efforts to organise the course outside of the normal processes should cease. In other words, the Respondent's position was that the Claimant would have to wait to take part in the MSP course on the next occasion that it was organised by the training team.

62. On 18 November 2015, the claimant sought and obtained Manager THREE's permission to try to arrange the course herself. He was content to pay for her to go on an external course if necessary. On 24 November 2015 (11:54), the Claimant forwarded to Manager TWO a copy of Manager THREE's approval. This followed her email about 20 minutes earlier to the potential attendees to inform them that a course on 7 December 2015 was definitely not going to happen, and that the training team had Monday 25 January 2016 in mind as a possible alternative.

63. Our finding of fact is that Manager TWO did not cancel the Claimant's attendance on a course that was due to start on 7 December 2015. The entire course, which had been provisionally booked, did not go ahead because of a decision made by the training team, which followed discussions between the Claimant and that team. It was the Claimant who notified Manager TWO (and THREE) of the cancellation, rather than the other way round, and the decision was made on 18 November 2015, notwithstanding the fact that the Claimant did not acknowledge that she accepted the decision until 24 November 2015.

64. At 22:20 on 18 November 2015, the Claimant emailed Manager THREE to say that she was likely to be off sick the following day, Thursday 19 November. On the evening of the 19th, she emailed him to say that she was unlikely to be back on the Monday, and she had "been struggling for a while as result of something that happened at work" (p1008). He replied on Friday 20th to suggest that she see how she felt by Sunday, and that she could consider a discussion with Manager TWO if her absence related to work. (The Claimant's email had said that she was reluctant to contact Manager TWO because he was on leave at the time.)

65. On Monday 23 November 2015, the Claimant obtained a fit note from her GP, which she forwarded to the Respondent, which said that she would not be fit to attend work in the period 23 to 30 November inclusive. It stated no reason for the absence, and did not state that the Claimant would be able to attend work if adjustments were made.

66. On 24 November 2015, at 11.14am, the Claimant contacted Manager TWO to say that she was going to send an email to all those who had been potential attendees for 7 December 2015. She told him that she was informing of this because she had been told by the training team to cease her involvement. Manager TWO replied at 11:49am to say (a) she should comply with the training team's instructions and (b) he would contact them about the arrangements that they, the training team, were going to make to arrange the course and (c) that she, the Claimant should turn off her phone and do no work related activity until she was

back from her sickness absence. The Claimant's reply a few minutes later did not copy him in on the email which she had already sent, informing the colleagues that the course was cancelled, but she did indicate that she did not feel able to comply with the training team's instructions because she believed she owed a commitment to the attendees to update them personally.

67. After 11pm on 24 November 2015, the Claimant emailed Manager TWO to say that her absence was not due to anything to do with her new role, but was because of her "previous boss" (meaning Manager ONE). She:

    67.1 alluded to a grievance and a data protection act request (both relating to her dealings with Manager ONE)

    67.2 referred to "panic attacks, 'rabbit in headlights' scenarios and nightmares, etc. all of which sum to pain and exhaustion from not being able to relax to panic attacks"

    67.3 stated: "Anyway, I have new drugs which seem (so far) to be helping bring things back to a manageable level at least for home-working (which is essentially not have to see anyone face-to-face and the freedom to go for runs in daylight) have therefore planned what I should do this week - it would be good if you could hold me to this, so I don't have any excuses."

    67.4 Set out a plan of activities for the next few days. She said she had done the first step which was contacted colleagues re the MSP, and asked if Manager TWO could help with the other steps, which were connected to her prospective grievance about what happened on Manager ONE's team.

68. Manager TWO contacted the Claimant the following date by email at 11:44am. The Claimant was still absent from work. Manager TWO stated that the Claimant should not work at home while signed off and confirmed he would try to be supportive to her during the grievance process. He stated that she should not do the MSP course before Xmas and that he was making a referral to Occupational Health. He was not cancelling the course (which had already been cancelled for 7 December), but was stating that the Claimant should cease continuing to push for the course on 7 December to go ahead; as mentioned above, the Claimant had actually already accepted this and emailed the other attendees (11:35am on 24 November) to confirm, but he had not been copied in on that particular email and had misunderstood what the Claimant had said about ignoring the training team's instructions.

69. Manager TWO's 25 November 2015 email was not intended to, and did not, inform the Claimant that her attendance at the MSP course was being indefinitely suspended. It merely told her that she should definitely not attend on 7 December 2015 (something which she already knew), and that she should not try to attend before Xmas 2015 (and she already knew that 25 January 2016 was a potential new date). The Claimant did not interpret the email at the time as stating or implying that she would not be able to do the MSP course in the New Year.

70. Manager TWO made a detailed referral (pp1020-1022) to the external provider, OH Assist. The referral mentioned that the Claimant had had recurrent absence,

mentioned she was signed off until 30 November 2015, and said that his understanding was the reasons included "Stress, Anxiety, Depression, Panic attacks", and the prospective grievance against previous manager.

71. Subsequently the Claimant sent a copy of the draft grievance to Manager TWO and said it was up to him if he read it. He did not do so, and told her of this.

72. On 1 December 2015, there was a back to work meeting and the minutes are in the bundle (1037-1038). The Claimant's absences from 14 Aug 2015 to 4 Sep 2015 and 19 November to 30 November 2015 are both noted and "work-related sickness" is mentioned; this reflected the information given to Manager TWO by the Claimant and not a formal acceptance by Manager TWO or the Respondent that the Respondent had caused her absence. (Manager TWO subsequently sought HR advice and was informed that it would only be classified as such if that was the grievance outcome.) The Claimant's medication was discussed, as was Manager TWO's intention to rely on the advice from OH Assist when received. The Claimant did not inform Manager TWO of health issues pre-dating the 14 August 2015 absence which was, according to what the Claimant told Manager TWO, a reaction to Manager ONE's treatment of her.

73. The OH Assist report dated 14 December 2015 (1055-1057) was seen by both the Claimant and Manager TWO. It was from Sally Phillips, Occupational Health Adviser. The report stated, based on information given by the Claimant to Ms Phillps that:

    73.1 "Miss XYZ started to suffer with stress, anxiety, depression and panic attacks in August 2015 and she attributes this to purely work related issues. Prior to this Miss XYZ had been under undue pressure at work for about a year however she reports that she was able to cope until the alleged work issues got too difficult to handle."

    73.2 It referred to the Claimant's anti-depressant medication and that the Claimant would potentially be vulnerable for so long as the grievance continued, but she should be kept busy with work rather than put on reduced duties. It suggested that the Claimant was fit also fit to undertake training for the job, but would potentially need extra time to complete it.

    73.3 There was a discussion about the possibility of counselling and that the Claimant had not been keen to do this via the work provider, Validium, (because only 6 sessions would be offered), but that Ms Phillips had encouraged her to consider it. Ms Phillips recommended that the Claimant be allowed paid time off for counselling if she decided to have it.

    73.4 The report correctly pointed out that the issue of whether the Claimant was disabled was a matter for a tribunal rather than Ms Phillips to decide, but offered the advice that it seemed that the impairment had lasted less than a year (since August 2015) and that it was specifically related to her relationship with Manager ONE and was therefore not likely to recur.

74. The Claimant and Manager TWO met to discuss the report and to discuss what options there were for the Respondent to provide further support to the Claimant.

He emailed a list of the option to the Claimant on 17 December 2015 (1073) and these included going back to OH for further support, the Claimant contacting Validium, or the Claimant making use of the BUPA membership that was provided as part of her contractual entitlement.

75. In January 2016, Manager TWO did not cancel the Claimant's attendance on the MSP course. On Friday 8 January 2016, he became aware that there were vacancies on an MSP course starting the following Monday and offered the Claimant the opportunity to join it. The Claimant took the decision (which was a reasonable one in all the circumstances) that she would not attend, as she did not believe that she had received sufficient notification of the start date so as to enable her to do the pre-reading and because she already had things in her diary for that week.

76. Neither Manager TWO nor the Claimant regarded her decision to decline attendance on that particular occasion as meaning that she would not do the course at some stage in the future. Manager TWO did not regard it as essential that the Claimant obtain the qualification in the immediate future and made clear to the Claimant that there was no pressure on the Claimant to do so. (Manager THREE, in fact, was keen for the Claimant to obtain the MSP qualification, but placed no undue pressure on either the Claimant or Manager TWO.)

77. Neither Manager THREE nor Manager TWO contacted any external provider in order to cancel any MSP course which the Claimant had booked herself onto and neither of them is aware of whether she did, in fact, book herself onto an external course.

<u>F6 December 15: Mr Managers TWO refused to help the Claimant to find a suitable mentor;</u>

78. Because of Manager ONE's perception of the Claimant's conduct on 10 August 2015, a disciplinary investigation was commenced and the person who conducted it was Ms Sarah Downing. (See below). Ms Downing was aware that the Claimant was moving to a new role (that is the one on Manager TWO's team) and it was Ms Downing's opinion that the Claimant would potentially benefit from a mentor. She did not make that a formal recommendation because that was not in the scope of her role as investigator of a disciplinary matter, and because, as far as she was aware, Manager TWO was unaware of the disciplinary investigation. It was also her view, based on her experience, that the onus would be on the Claimant to locate a potential mentor and then seek Manager TWO's approval for the arrangement.

79. Commencing in October 2015, the Claimant and Manager TWO had discussions about setting her objectives for the remainder of the April 2015 to March 2016 review period. In accordance with the Respondent's procedures, and in accordance with what Manager TWO thought was appropriate for an employee in the Claimant's role, the Claimant was involved in the drafting process. She made suggestions and Manager TWO made his comments. The Claimant asked to be "assigned" a senior leader as mentor in order to help her understand what skill gap she had and to help fix it. Manager TWO commented (in writing, see his comments at 991-996) that it would be the Claimant's responsibility to make such

arrangements with a mentor, and he would assist her with that if she wished. It was not Manager TWO's opinion that the Claimant necessarily needed a mentor, but he was not opposed to the idea. He told her that if she could identify what specific type of mentoring she wanted, and for what reasons then he might be able to make some suggestions about who she could approach. His opinion (based on what the Claimant told him, and on what she wrote) was that she was seeking a mentor for work issues, not emotional support. He had some discussions with 2 colleagues, but neither of them were willing to volunteer.

80. The Claimant did not supply him with details of anybody that she had found that was willing to be a mentor, and she did not tell him that she wanted a mentor for reasons of emotional support, as opposed to assisting with career advancement/professional development. The context of the Claimant's request was that her proposed objectives included being promoted to Band 2.

81. The Claimant's colleague, Mr Nikolaidis did not have a mentor.

F7 19.01.16: Manager TWO had no further one-to-one meetings with the Claimant after this date;

82. From January 2016, while remaining in his [Substantive Role], Manager TWO began involvement in a particular project, the Planning and Delivering Safe Work ("PDSW") programme. This required his normal workplace to be at the Respondent's London premises, rather than in Milton Keynes where he, and the Claimant and Mr Nikolaidis habitually worked. It was a very important and sensitive project for the Respondent and, as was made clear to Manager TWO, was one in which the chief executive was taking a close and direct interest.

83. Manager TWO was obliged to devote his working time almost exclusively to the PDSW programme. Manager THREE and Manager TWO agreed that Manager TWO would continue to supervise the Claimant and Mr Nikolaidis as their Band 3 roles did not require Manager TWO's day to day involvement.

84. After 19 January 2016, there were no formal meetings described as "one to one meetings" between the Claimant and Manager TWO. They were still in contact after this date and Manager TWO was able to give guidance and support to the Claimant in relation to her work.

F8 11.05.16: The Respondent gave Fotis Nikolaidis the opportunity to act into a role of line manager but did not afford that opportunity to the Claimant;

85. On joining the team, the Claimant had not been given a full assurance review or end to end review to complete as she did not yet have the experience to do so. Manager TWO gave her internal facing tasks such as working on internal assurance checklists and working with colleagues to deliver workshops.

86. We accept Manager TWO's assessment (paragraph 320 of his witness statement) as to which parts of the role profile the Claimant was doing in practice during her time on the team.

87. From around January 2016 onwards, there were certain meetings that Manager TWO would have otherwise attended (but for the fact that he was devoting his time

to the PDSW programme), and Mr Nikolaidis was tasked with attending those. This was an opportunity for him to gain additional experience and would have been an opportunity for the Claimant to gain additional experience had she been tasked with doing it. Manager TWO believed that Mr Nikolaidis was the appropriate choice because he had been in the role of JOB TWO from 2015. He also had his MSP qualification. He did not think that it was appropriate task for the Claimant because she had started the previous September

88. Gradually more and more of Manager TWO's work was given to Mr Nikolaidis to do in Manager TWO's absence. There was no formal selection process and the Claimant was not offered the opportunity to take over parts of Manager TWO's role. On 11 May 2016, the team were informed that Mr Nikolaidis would assume to role of day to day lead for the assurance team and their activities until the end of June.

89. The Claimant asked for information about what processes had been followed, and what she needed to do to be considered for future opportunities "for example, come the end of June where the question of resource allocation may again arise".

90. Manager TWO replied on 12 May 2016 (1476), giving his genuine opinion about the situation. Amongst other things he stated:

> You haven't yet completed the MSP course
>
> You haven't yet completed a full end to end assurance review
>
> Fotis has more experience and is MSP qualified
>
> Fotis has conducted end to end and other assurance reviews alone
>
> This is not a formal secondment into a role
>
> It is a development opportunity that I have discussed and agreed with Fotis
>
> There is every chance this kind of opportunity will arise again and we will be able to review who would be best placed to fill the role at this point

<u>F9 07.09.16: the Claimant resigned her role and moved internally in order to avoid further contact with Mr. Manager THREE; the Respondent failed to make any enquiry into her reasons for that decision or her wellbeing;</u>

91. The Claimant had mentioned her aim of moving to a Band 2 role in her draft objectives sent to Manager TWO in October 2015. In January 2016, she informed him that she was considering whether she should leave the team.

92. In due course, she had the opportunity to move to another Band 3 role, as JOB THREE. She did not seek out this opportunity specifically because she wished to avoid Manager THREE. She had moved teams regularly since joining the Respondent.

93. The Claimant notified Manager THREE by email sent 15:13 on 7 September 2016 that her reason for leaving was to seek other opportunities.The Claimant's email at 15:13 did not say she is leaving for health reasons or get away from Manager THREE. It simply said that she had accepted a new role, and asked to know her release date and referred to a notice period of 8 weeks.

94. Manager THREE queried (page 2185 of bundle) whether the Claimant was leaving her employment with the Respondent or moving to another role within the organisation. The Claimant replied at 16:24 declining to say if the move was internal, or if she was resigning from her employment with the Respondent, citing previous difficulties between her and Manager THREE as a reason for refusing to answer. She asked Manager THREE "to simply nominate a release date". His response was "Whether the role is external or internal influences release dates — is it a role in NR or external?". The Claimant's reply was:

> The maximum notice period you may hold onto me for either way is eight weeks. You are entitled to no more than notification of my intention, which I have given today.
>
> If you will not consider a compromise of an earlier release date given the clearly untenable situation we are presently in, the notice will simply expire after eight weeks. I would ask you to reconsider this course of action though, as another eight weeks of misery for all of us doesn't seem very sensible, nor humane.
>
> Please kindly cease and desist investigating my personal decision - it is my choice to leave and having tried as hard as I could to amicably resolve the situation around your unacceptable behaviours, it is obvious I have failed. Now, for my sanity, I need to just get away and don't need any baggage following me.
>
> For this reason, I am not disclosing details to any colleagues pastor present; if you continue to disrespect my right to privacy in this matter I will have to escalate my concern, as such action by you could easily prejudice both my wellbeing over the coming weeks and, by extension, my chances of getting myself to a healthy working environment in which I can start to come to terms with the failures of the last year and hopefully heal.
>
> If I do not hear back from you, I will assume my last day to be eight weeks from today.
>
> Please copy Richard into all future correspondence.

95. "Richard" was a reference to Richard Heslop, the Claimant's union representative.

96. This email did not ask the Respondent to investigate her reasons for wishing to change teams. On the contrary, it made clear that the Claimant did not want that to happen.

<u>F10 09.09.16: Manager TWO unfairly and inaccurately characterised the Claimant as threatening, needy and as exhibiting poor behaviour and lied about: a) not having been in contact with the Claimant when he had; (b) being motivated out of genuine care for the Claimant when he had not been; (c) being so affected that he turned his phone off; (d) the way in which the agreements of "more [contact] time" / seating arrangements were arrived at;</u>

97. This allegation relates to the comments which Manager TWO is recorded as having made when he met Ms Armstrong on 9 September 2016.

98. In that interview, Manager TWO gave answers which were truthful based on his perception of the situation. He did not lie. He and Ms Armstrong each signed the notes (2203-2206) of the interview.

99. He did say that he turned off his work phone overnight and that part of his motivation for doing so was to avoid being disturbed by emails from the Claimant. He did say that part of his motivation for forwarding the May 2016 draft grievance and the email which he read on 27 August 2016 to Human Resources and others was that he was concerned for the Claimant's welfare. He did say that he had not contacted the Claimant, other than as described in the interview. He did say that he believed that the Claimant had wanted to spend a significant part of the working week seated next to him and that he had not committed to doing this.

F11 05.10.16 The Respondent, by Mr. Manager FOUR (possibly on advice from Lisa Belsham) subjected the Claimant to a time limited test in response to her training request and the Claimant was informed by Mr Manager FOUR that she would not have been offered her job on the basis of the result obtained, and that she had taken the opportunity from another candidate. The Claimant replied to the answers of the test with "yes", or "no" answers and received a deduction in her marking as a result;

100. The Claimant started on 26 September 2016, as JOB THREE, reporting to Manager FOUR. She had not been given tests during the selection process, but she had answered questions during interview. On starting in the team, the Claimant asked for training in Excel and Manager FOUR formed the view that her skills in Excel and data analysis might not have been quite what he expected. He therefore gave her a test on around 5 October 2016. This was his own decision, not on advice or suggestion from Ms Belsham.

101. Manager FOUR's opinion was that the test required more detailed answers than simple "yes" or "no" and required some detailed written analysis. That was his genuine opinion about what the test required from any person who took it, and not a difference in treatment for the Claimant. The test was usually given to applicants for Band 4, that is the band lower than the Band 3 job to which the Claimant had been appointed on his team.

102. Manager FOUR does not recall telling the Claimant that he would not have offered her the job based on the way that she performed on the test. The Claimant is sure that he did so. On Manager FOUR's own evidence, based on the test outcome, he did not believe that the Claimant would be able to perform the specific task which he had had in mind for her, and so – instead – he kept the data analysis part of the task with the worker who had been doing it up to that point, and allocated that worker to the Claimant to assist her. So, on the balance of probabilities, our finding is that he did communicate something to the Claimant along the lines of "*I would not have given you this task if I had known that you could not do the data analysis part of it*" and that he had intended to appoint someone to the role who could do the full task themselves, without needing the extra assistance. We do not accept that he said that she had taken the opportunity from someone else. She is not recorded as mentioning this allegation to OH when she spoke to them on 12 October 2016 (see page 2540).

F12 12.10.16: Ms Tracy Pugh blocked the Claimant's World Mental Health Day feature from being published on Safety Central;

103. Safety Central was not a purely internal website. It was an externally hosted site for the railway industry including contractors etc to deal with safety matters. As

per page 2531 of the bundle, Kieran Young, Senior Communications Manager gave instructions that the full and unedited version could not be published on that website, and the reasons included that it referred to a live grievance and that the manager was still in the business. The same day, 12 October 2016, Ms Pugh communicated the decision to the Claimant.

104. A version of the article was published on the Respondent's internal intranet, accessible to employees only.

F13 13.01.17: The Respondent paid the Claimant's arrears for bonus pay but did not reimburse her for deductions because of her disability-related absences, despite a grievance recommendation that the sum be paid.

105. It is correct that the Claimant's bonus was affected because of her absences and that the Respondent did not disregard absences due to disability.

106. Hayley Clark investigated the Claimant's grievance, and the part of her investigation outcome report dated 18 August 2016 (2047 to 2073) which deals with the Claimant's complaints about pay is Part 2, item 1 (2065) and item 2a (2066). Ms Clarke stated/recommended that the Claimant be awarded the appropriate performance-related pay for review year 2015/16, and that, taking into account all the circumstances, including her absences, she be awarded "Developing in Role" as her rating for 15/16.

107. In other words, the recommendation was that her rating be that which would be given to someone with less than 6 months in post. The grievance outcome did not say that the Respondent should make an adjustment to its normal policy in relation to reducing bonuses to take account of absence and, in fact, the Respondent did not make an adjustment to the policy.

108. The rule which was that if an employee had more than 20 days absence in the relevant financial year, then they were still entitled to a bonus, but it would be reduced to take account of the proportion of days they had been absent during the year. Certain types of absence (eg jury service) were automatically exempt. Absence due to disability was not automatically exempt, but the policy required managers to consider the Respondent's obligations under the Equality Act.

109. The Claimant's bonus was paid with a reduction.

F14 01.02.17: provision of a replacement mobile phone to the Claimant was delayed (Mr Walter Brady, Ms Lisa Belsham, Ms Tracy Pugh, Ms Paula Armstrong, Mr. Manager FOUR);

110. There was no "delay". Manager FOUR arranged for a replacement promptly. On 31 January 2017, there was a notification that Blackberrys were going to be disabled, and the Claimant asked, via her union rep, for a replacement. On 2 February 2017, Manager FOUR asked the union rep to confirm the Claimant was content for the replacement to be delivered to her home address and that the Blackberry would not be cut off until the new one was delivered.

F15 From September 2014 onwards, approximately every two months or so the Claimant completed telephone "psychological services" assessments, but the Respondent did not collate this information about the Claimant;

111. The Respondent used an organisation called Validium. This was an external organisation and was independent of the Respondent's Occupational Health providers. Employees were able to access Validium's services directly and confidentially. Any information gathered by Validium as a result of telephone contact from the Claimant was not forwarded to the Respondent and the Respondent could not, therefore, collate it.

F16 26.8.15: BUPA provided a report to the Respondent on the basis of a referral that had been made without referring to any previous medical referrals or the seriousness or duration of the Claimant's symptoms;

112. OH Assist became the Respondent's external OH provider in around November 2015 (which is why Manager TWO used them for his November 2015 referral). Previously, the external OH provider was BUPA. In around July 2015, Manager ONE made a referral to BUPA while the Claimant was on her team. The referral is pages 818 to 821. It was made by Manager ONE and she mentioned that she wanted advice about possible reasonable adjustments and that she was aware that the Claimant had referred to stress and anxiety. Manager ONE believed that OH would decide what further info they needed by asking questions to the Claimant and or by seeking GP or other medical records from the Claimant. Manager ONE was not aware of any previous advice from OH in relation to the Claimant. She did not intentionally withhold information which she thought was relevant. In relation to the question about "personal issues", Manager ONE made clear that there might be matters which the OH provider would need to ask the Claimant about. Manager ONE stated that she was concerned that there may be some deep-seated issues about anxiety and mental health.

113. The referral was made 15 July, and the originally proposed appointment date was 4 August. She attended on 20 August 2015. On 13 August, Manager ONE supplied additional information, including stating that Manager ONE had had concerns about the Claimant's behaviour to the extent that the Respondent had suspended the Claimant and commenced disciplinary action, and Manager ONE thought that the OH provider should comment on whether there could be a medical reason for the way in which (according to Manager ONE's perception) the Claimant had been acting. The email also made clear that the OH provider would need to liaise with the Claimant to obtain relevant further information because the relationship between the Claimant and Manager ONE had broken down.

114. On 26 August 2015, the Claimant gave consent to the report being released to the Respondent. Amongst other things, it stated:

    114.1 That by now the Claimant had been suspended

    114.2 That she was temporarily unfit and signed off by GP

    114.3 She had been prescribed medication by her GP (it does not specify a date, but implies that the author thought it was recent)

114.4 She was not believed to have an underlying condition

F17 14.12.15: An OH Assessment from Ms Sally Phillips failed to build on previous assessments so as to appreciate that the Claimant's medical conditions had lasted over a year;

115. The report released to the Respondent is at pages 1055 to 1057 of bundle. It had previously been seen and approved by the Claimant. the Claimant had the opportunity to inform the Occupational Health Adviser about any relevant information. As discussed above, the report included a passage which stated that the decision on whether the definition of disability applies is one for an employment tribunal, but gave reasons for author's belief that the Claimant's "psychological health condition" had not lasted for 12 months and was not likely to.

116. The Claimant had the opportunity to disagree with that opinion or to give further factual information about her current condition, or any past episodes, if she wished to do so. She did not.

117. Our finding is that the summary of the current symptoms which the Claimant was experiencing was based on what the Claimant said to OH at the time. It is consistent with Manager TWO's claim that the Claimant told him that her condition had been brought on recently and was entirely attributable to Manager ONE's actions (in particular the suspension) and is consistent with what the Claimant says in the first ET1 in which she alleges that she would not be disabled but for the Respondent's actions during 2015.

118. It is also consistent with a response to a specific question about stress going forward in a high stress tole

> Answer: It is my understanding from Miss XYZ that it was not her actual previous job role that attributed to her stress, anxiety and panic attacks and that it was alleged issues at work outside the job role itself (a difficult relationship with her previous line manager). In view of this I'm not expecting another stressful role to impact on her health in the future.

119. It appears to us that Ms Phillips did not have sight of the 26 August 2015 OH report (since she did not refer to it), but the Claimant could have asked for that to be taken into account, or mentioned, and did not do so. She did not give Ms Phillips any reason to believe that it was necessary or appropriate to ask for more detailed historical information.

120. The report was sent in draft form to the Claimant on 13 December 2015, and the letter made clear that the Claimant could request amendments of inaccuracies by post or email. The Claimant commented on the report by email to Manager TWO on 14 December, after she had seen it and says that she had noted things to tell OH, and that they had not asked her. However, even if there were things that she had not said during the appointment, she did not mention either to Ms Phillips or Manager TWO afterwards that she believed that there was a longterm medical condition or impairment that required further discussion or an amended OH report.

F18 15.12.15: Manager TWO refused to engage in a constructive dialogue about reasonable adjustments after an OH report was received on the basis that discussion of adjustments would be pushed back until a later, more detailed report;

121. On 14 December 2015, after the Claimant had had her appointment but before Manager TWO had seen the report, the Claimant commented on the OH Assist appointment and told him that she did not expect the report to provide useful information.

122. As she mentioned in her email, some adjustments were already in place, including Wednesdays off and early starts. The Claimant made clear she wished to be busy with work.

123. As mentioned above, on 17 December 2015, he sent the Claimant a list of options after they had both seen the OH report. He was willing to discuss potential adjustments with the Claimant, and to make suggestions to her about sources of assistance. He was willing in principle to implement adjustments.

F19 12.02.16: A further Occupational Health Assist report was produced by Sally Newman with no reference to prior reports or to the question of whether the Claimant was disabled;

124. This report was produced after a further referral to OH Assist was made by Manager TWO. Manager TWO specifically informed OH Assist that he did not want the Claimant to have to start the process all over again (ie he did not want this referral to be treated as if it was the first) and he wanted OH Assist to be aware that he and the Claimant had already received one report and wanted a more detailed response this time so that he and the Claimant could can properly consider all of the potential options available. He liaised with the Claimant and OH assist by telephone and email to try to ensure that the appointment (originally intended for 5 February 2016, then rearranged for 12 February) was as effective as possible and took account of the information which OH Assist already possessed.

125. He also forwarded to OH Assist a copy of the Claimant's email to him which said that she also wanted the new report to be aware of, and build on, the earlier one.

126. The 12 February report stated that OH Assist had progressed the Claimant to psychological services for them to assess her and decide on the best form of talking therapy treatment for her symptoms. It stated that the same OH Assist adviser would review the case in about 6 weeks to check progress and that in the meantime the Claimant was unfit for work. She was off work with anxiety, as certified by GP the reference to "psychological services" means Validium).

127. OH Assist and Validium are each external organisations to the Respondent. No further specific adjustments were suggested by either organisation at this stage. Likewise no further specific adjustments were suggested to the Respondent by the Claimant's GP

128. Manager TWO, before the appointment, had already confirmed to the Claimant that she could potentially have more than 6 sessions of counselling if the OH providers recommended that.

F20 April 2016: Manager TWO refused to engage in a constructive dialogue about reasonable adjustments which could be made to the Claimant's working conditions even on receipt of the more detailed Occupational Health reports then available;

129. During March 2016, Manager TWO sought to liaise with the Claimant and Validium. This included a meeting between him, the Claimant, and Manager THREE around 23 March 2016, and discussions about the type of information that the Claimant was willing to have included in the referral.

130. The Claimant returned to work. The Claimant's preference was to work in the library, away from the team's location in the office and the Respondent agreed to her doing so.

131. On 15 April 2016, the Claimant informed Manager TWO that she was not yet content for the clinician's report to be released to him, but she sought his agreement to some of the recommendations being implemented, and copied and pasted the relevant section. He replied the same day to agree that she could have 10 to 12 CBT sessions and that she agreed it was a good idea for her to have access to "a trusted individual with whom [she] can talk with about issues or emotions that arise at work and that this identified person could check in with how [she] is coping emotionally on a regular basis". He asked the Claimant if she wanted him to liaise with HR about arranging this, or if she preferred a different approach. She replied to say that she was happy for him to take the lead. He contacted HR on 20 April 2016 to ask them to make the arrangements (1355).

132. On 19 April 2016, on receipt of an email from Manager THREE asking where she was, the Claimant informed him that she was unwell and had not attended work that day. She was also absent on 20 April and returned on 21 April.

133. The draft report had been prepared for Validium and the Claimant insisted to Validium that the report not be released to the Respondent until there were changes. She wanted some information removed from it. On 21 April 2016, she sent her proposed amended version of the report to Validium. On 22 April 2016, the author, Dr Brennan, agreed to the Claimant's amendments. The changes that the Claimant required to be made took out information about previous mental health episodes. For example, in the original 1324-1327, in the box for "previous emotional disorder/referral for psychological treatment" it was stated that the Claimant had had "low mood/depression during school and university"; in the version released to the Respondent, at the Claimant's request, that had been changed to "none".

134. On 25 April 2016, Manager TWO received the report and confirmed to the Claimant that he accepted the recommendation for CBT (in principle, subject to confirmation about cost) and that he had replied to Validium to say so.

135. The following day, he confirmed that the Respondent had approved the sessions. There was to be an interim report after session 5 (1404).

136. On 26 April, he also informed the Claimant that he had been advised by HR that the Respondent did not employ someone who could fulfil the role of being the point of contact for emotional support. The Claimant expressed disappointment that no-

one specific was being arranged. Manager TWO replied to say that the Respondent was willing to provide time off for her to have access to such support and/or that the Claimant could use the services provided by the Respondent generally for its staff, including the Validium helpline.

137. The Claimant had also requested that there be "mediation" between Manager TWO and her. On 26 April 2016, he stated that he did not think that this was necessary in all the circumstances, including the cost to the business, but was willing to keep the request under review. The Claimant stated that the purpose of mediation from her point of view was as an alternative to raising a formal grievance. He informed her that while he believed that their working relationship did not require mediation, she did have the right to raise a formal grievance if she wished to do so. Manager TWO's opinion was that he thought he was already spending as much time with the Claimant as his PSDW duties allowed, and that agreeing to mediation would not change that.

138. In response to these exchanges, the Claimant emailed him attaching excerpts from the Respondent's in relation to disability. This prompted Manager TWO to ask if the Claimant was suggesting that she had a disability, because his understanding up to that point was that the Claimant had been seeking assistance due to workplace stress caused by (based on what she told him) the alleged actions of the Respondent. He had believed, relying on the December 2015 report, that the Claimant did not have a disability and, until now, the Claimant had not suggested otherwise. It was agreed that the Claimant would complete a reasonable adjustments request form and that Manager TWO would seek further information from Validium, which he did. On 28 April 2016, Validium replied to say that there was no need to delay starting the counselling while the disability issue was considered, and recommended a further referral to the OH provider to ask the question.

139. On receipt of the reasonable adjustments request form, Manager TWO responded to ask the Claimant for clarification both of the request and of her reasons for believing they were adjustments that were necessary because of a disability. On 29 April, the Claimant supplied the updated adjustment request form (1417 to 1420).

140. Manager TWO made the OH referral, including all the information in his possession that he thought was potentially relevant, including that the CBT sessions were booked and due to start on 10 May (with an interim report after 5th) and that the Respondent did not believe that it employed someone who could fulfil the role of being the point of contact for emotional support. He asked directly for advice about whether the Claimant was disabled as well as for more general advice.

141. In making this referral, Manager TWO took account of the "to whom it may concern" letter dated 5 March 2016 from AW (1216), which Ms XYZ had provided to him to assist him with the OH referral. This 1 page letter mentioned that AW had met the Claimant on 15 and 25 February 2016 and also stated that the Claimant had benefited from Cognitive Behavioural Therapy and might benefit from Cognitive Analytical Therapy. It stated that:

> XYZ has recently experienced an episode of depression and anxiety triggered initially by bullying and harassment in the work place followed by an unfair suspension. Although this cause has been dealt with by her employers and XYZ has started in a new role her depression and anxiety have impacted on her ability to work and she has needed to take sick leave. XYZ has an impressive work ethic and is very motivated to make a full recovery.
>
> Fortunately the episode of low mood and anxiety she has been experiencing is resolving and there are therapies available which would help her emotionally in the longer term

142. A much longer and more detailed letter also dated 5 March 2016 had been produced. (1218 to 1222). The Claimant asked AW to leave out a lot of information from that letter for the "to whom it may concern" letter which the Claimant supplied to Manager TWO. The sections in the longer letter omitted from the version given to Manager TWO include sections about mental health issues the Claimant had previously experienced. For example:

> XYZ said that she has experienced bouts of low mood since her teenage years. …. XYZ said that she started self-harming by scratching her arms in upper school ….
>
> Over the years she had seen her GP and on one occasion a community mental heath team in Bedford for help. She had been prescribed many medications in the past; a number of different antidepressants in therapeutic doses, and other psychotropic medications. These included [list of 9 named medications]. XYZ said that none of these medications had proved beneficial and the most helpful intervention had been CBT. …
>
> … in the past XYZ has tried many medications which she has not found particularly beneficial and therefore I think these are to be avoided at the moment.

<u>F21 07.05.16: Ms Nicola Carver produced an OH report which did not address adequately, or at all what the Claimant's mental health condition was, and did not have the benefit of the previous reports; it did however confirm a likelihood of meeting the Equality Act definition of 'disabled', and made a recommendation of a buddy system;</u>

143. Ms Carver's report is p1442 in the bundle. Amongst other things, it states:

> Based on her assessment today, Mrs XYZ has experienced deterioration in her mental health. In my professional opinion, her mood is significantly low at times and her anxiety levels heightened. Miss XYZ is receiving appropriate treatment via her GP and has commenced psychological support with Validium services.
>
> Based on her assessment today, it is my professional opinion that Miss XYZ is fit for work. She prefers to work longer hours to avoid isolation at home. In my professional opinion, productivity levels may be lowered until her mental health improves.
>
> Following on from Validium recommendations, Miss XYZ requires a buddy system in the workplace. A person she can talk to if she has difficulties. Management would be advised to refer to relevant welfare policies to assess what

support is available to Miss XYZ. If necessary, management would be advised to accessibility with HR.

Based on her assessment today, it is my professional opinion that Miss XYZ's symptoms are having a substantial effect on her day to day activities. In my opinion, symptoms and treatment may be ongoing for 12 months or longer.

An occupational health review has been agreed for 4 weeks time, prior to case closure, to reassess Miss XYZ's fitness for work.

In my opinion, disregarding the effect of treatment, Miss XYZ is likely be considered as disabled under the Equality Act. The condition this relates to is depression and anxiety.

F22 10.05.16 – 04.06.16: The Claimant attended 5 counselling sessions at the end of which, on 09.08.16 Dr. Leah Brennan produced a report detailing stress and anxiety but again failing to build on or take account of previous reports. The Respondent further omitted to take proper note of or action in respect of the ongoing and recurring symptoms of the Claimant's disabilities;

144. It is correct that the Claimant attended 5 appointments. These were 10/05/16, 17/05/16, 21/05/16, 31/05/16, 04/06/16

145. It is correct that Dr Brennan produced an interim report after these 5 sessions, as had been decided by the Respondent and Validium at the outset.

146. The Claimant did not consent to Manager THREE seeing the report and so it was not seen by the Respondent in August. The first time that it was seen by the Respondent was approximately 11 October 2016 when released to Manager FOUR by the Claimant.

147. Dr Brennan, who is not an employee of the Respondent, and who is an independent clinician engaged via the Respondent, had been provided – as far as the Respondent is aware - with all the background material that the Respondent had. She and the Claimant also had the opportunity during their sessions to exchange further information with each other.

148. The report is dated 9 August 2016 on the front page, and 25 August 2016 on the electronic signature page. It said that the Claimant was still experiencing (as of the end of the sessions) significant anxiety, which was a concern to Dr Brennan. It noted that the Claimant had stated that she had not found the sessions to be helpful to effect change.

149. Once he received the report, Manager FOUR had discussions with the Claimant about potential adjustments, and he took into account advice from HR, the contents of the report, and information from the Claimant.

150. One comment made in the report was: "It was also identified that the client would feel supported by the availability of a support person in the workplace, however to my knowledge this was not provided." This is true. That was not provided.

151. More generally the report comments on 2 relationships at work (we infer it probably means with Manager TWO and ONE, though it might mean Manager TWO and Manager THREE) and stated: “The client reported that she does not find this type of therapeutic intervention helpful to effect change. I remain concerned about the client's psychological wellbeing.”

152. Based on conversations between him and the Claimant, Manager FOUR agreed weekly 121s with the Claimant (rather than 4 weekly as he did with others). His intention was so she could let him know if there were any issues causing her stress/concern at work. Additionally, he made sure she knew could speak to him at any time if she needed more support. He confirmed that formalised our previous if she was feeling high levels of anxiety she could look to work somewhere quiet in the building such as the library. The Claimant told him it was what had been allowed in her previous role and he was happy to continue it.

153. Manager FOUR was aware that the Claimant was longer reporting to any of Manager ONE, Manager TWO or Manager THREE. Based on what the Claimant said to him, and what he observed himself, he believed that the line management relationship was working well, and that he did not need to make adjustments, or arrange mediation, for that relationship, and he did not do so.

<u>F23 24.06.16: The Claimant undertook a further Occupational Health telephone assessment but no report was ever produced and the Respondent failed to follow it up in spite of the Claimant repeatedly raising it;</u>

154. A follow-up appointment with OH Assist was scheduled for 24 June 2016. Ms Phillips, OH Adviser, contacted the Claimant by phone. The Claimant refused consent to a report being released to the Respondent and refused to meet OH Assist for a face to face appointment. As a result, OH Assist wrote to the Respondent to say that the referral was closed (citing the Claimant’s lack of consent as the reason). During the discussion, Ms Phillips also formed the view that the Claimant was not consenting to interim report from Validium being released to the Respondent (1732).

<u>F24 22.09.16: Mr Manager THREE failed to take account of OH report produced by Dr Mohammad Baig;</u>

155. On 22 September 2016, Dr Baig produced a report following a 26 August 2016 referral by Manager THREE.

156. Amongst other things, it stated that Dr Baig had sought information from the Claimant’s GP to enable him to provide his full report (and gave reasons for that being necessary) and said: “In the mean time I will advise she should have flexible working hours and if possible can work from home on management discretion and prior notice to attend a disciplinary meeting accompanied with union rep.”

157. On 25 September, the Claimant became aware that this report had been sent to the Respondent and wrote to object. In her objection (which she forwarded to her new manager, Manager FOUR) she said, amongst other things:

> Please also ensure that the report is struck from my employee record on all relevant Network Rail and/or occ. health systems -the Company has no right to this data because no consent was given.

158. There was no failure, after 22 September 2016, by Manager THREE to implement any specific recommendation in the report as it related to him or his team. The Claimant already had flexible working, some opportunities to work from home, and the right to be accompanied by TU rep.

159. In any event, the Claimant made clear to the Respondent that she did not want it to act based on the report.

F25 09.11.16: The Claimant was informed of a 22 November 2016 date for her disciplinary hearing without reference to Occupational Health or to the possibility of making any reasonable adjustments to the process (Mr Ian Turner, Ms Tracy Pugh, Mr Manager THREE, Mr Walter Brady);

160. On 24 October 2016, OH Assist wrote to the Claimant's GP seeking a report about the Claimant's health generally, as relevant to work-related issues, but received no response

161. On 28 October 2016, Mr Turner wrote to the Claimant to introduce himself as "disciplinary manager" for the case, say that he would send an invitation to a hearing in due course, and to seek dates to avoid. The Claimant replied on 1 November 2016. (2692)

162. The Claimant's reply stated, amongst other things

> … Recommendations from occupational health for Reasonable Adjustments are pending my doctor's report. From my perspective it would be good to make as much progress with these items before you and I meet however, I recognise that you will probably want to close matters out without undue delay; if we can strike a balance between these needs it would be much appreciated.

163. The Claimant did not chase her doctor to provide the report and no report was provided to the Respondent.

164. The letter 9 November 2016 (2743-2746) gave the Claimant 2 weeks' notice of the hearing. There was no further specific referral to OH about the disciplinary hearing before this letter was sent out. The letter concluded:

> If you have any specific needs at the hearing for example as a result of a disability, or if you have any other questions, please also contact me as soon as possible.
>
> I would like to take this opportunity to remind you of Network Rail's confidential counselling service through Validium. They can be contacted 24 hours a day on [phone numbers].

F26 The Respondent conducted no risk assessments in response to the medical information made available to It in relation to management of the Claimant or appropriate procedures during grievance and disciplinary processes.

165. To the extent that this allegation is that the Respondent did not complete the formal assessment forms, then it is true. The Respondent did not complete such forms.

166. On 24 October 2016, the Respondent wrote to the Claimant's GP seeking a report. On the same day, it wrote to the Claimant (2591) to inform her that it had done so and stating that, while she had consented to the Respondent doing so, she would have the right to see the GP's report before it was sent to the Respondent and the right to object to its disclosure. She was told she should contact her GP if she wished to arrange this. The Respondent never received a reply from the Claimant's GP.

167. As per the 9 November 2016 letter, she was invited to comment on proposed reasonable adjustments (as well as having the standard information about the right to be accompanied, and that the hearing would be conducted in accordance with the Respondent's procedures.

F27 From September 2014, the Claimant raised concerns relating to the working environment and unrealistic demands made of her and other team members, orally and in meetings throughout from that time, by text message and by email. In particular (in addition to regular oral reports):

(1) by text on 9th October 2014 [711];

(2) by email/meeting on 13th November 2014 [722];

(3) by email on 10th April 2015 [748];

(4) by meetings on 7th, 8th, 15th and 29th May 2015 [755, 772, 792];

(5) at a meeting on 12th June 2015 [796];

(6) by email on 17th June and 11th July 2015 [800, 823];

168. In relation to (1) text on 9th October 2014

168.1 At row FS146 of XYZ 1, the Claimant refers in general terms to disclosures which she says she made between October 2014 and January 2015.

168.2 The earliest email relevant to this issue in the bundle is at page 710, where Manager ONE thanks the Claimant for a text sent "last night". In it, Manager ONE says that she does not want anyone to jeopardise their health and well being and wants people to work to a pattern that is sustainable. Her email envisaged that the team might need to work 9am to 6pm (rather than the contracted 9am to 5pm), on the basis of planning to finish by 5pm, but being aware that some tasks might take longer than planned.

168.3 We do not have a copy of a text sent either 8 October or 9 October 2014 and we cannot infer specifically what it said. Manager ONE's reply is consistent with either the Claimant raising her own workload only, or that of others including herself. It can be inferred that the Claimant had said something about health and wellbeing, but it cannot be deduced that the text necessarily contained a suggestion that the Respondent was endangering health and

safety or breaching a legal obligation (or information which the Claimant reasonably believed to disclose a potential breach of either).

169. Generally in relation to October, the team had to go back and redo some parts of a piece of work that had taken several months up to September 2014. They were not required to go into the same level of detail as they had gone into when doing the work previously. In other words, they were not required to squeeze 5 months of work into a single month, and Manager ONE made that clear to the Claimant. It was, however, an onerous task and an unexpected one.

170. In relation to (2) email/meeting on 13th November 2014

    170.1 The Claimant sent an invitation to Manager ONE for a meeting on 13 November 2014. The text of the invitation is at pages 722 and 723 and it included a copy of an earlier thread. The communication focuses on the workload from the Claimant's point of view. There is no information in the email alleging a breach of legal obligation or endangering health and safety, although it does refer to the expectation of work volume for October being "not realistic". The Claimant asserts that for October that they had been expected to do 5 months worth of work in one month; that is not a reasonable belief for her to hold, as she had been told by Manager ONE that that was not the case. She also uses the word "punishment" in reference to the workload for October, but, in context, was not suggesting that somebody (Manager ONE or anyone else) was specifically imposing a "punishment" in the ordinary sense of the word; a better translation of her intended meaning was along the lines of "the October workload was unnecessarily high, which could have been avoided with better planning and clarity earlier in the project".

    170.2 The main thrust of the communication is that the Claimant believed that the work could be better organised, and – by implication – that the Respondent as a whole, and Manager ONE and the Claimant in particular would benefit from that. She did not state or imply that there was be a breach of a legal obligation (or danger to health and safety, etc).

171. In relation to by email on 10th April 2015

    171.1 There is a trail of emails in the bundle on 748 to 750, with at 5:59pm, the Claimant forwarding to Manager ONE an exchange between her and Deloitte; the emails sent by the Claimant to Deloitte and others being details of what she intended a meeting the following week to focus on; the reply from Deloitte being their opinion about what the meeting should address, and the email from the Claimant to Manager ONE implying that she thought that her suggestion had been the appropriate one and Deloitte should not have tried to set the agenda. (We also note the content of 4613 to 4637).

    171.2 In these emails, the Claimant comments on the work that is being done at the time. She does not refer to workload being too high, though she does express frustration at what she sees as unhelpful interventions from a third party. Nothing in these communications could be interpreted by the Claimant or anyone else as tending to disclose breach of a legal obligation or as relating to health and safety issues.

172. In relation to meetings on 7th, 8th, 15th and 29th May 2015

172.1 At FS155 of XYZ 1, the Claimant says that she attended a meeting with Manager ONE on 8 May 2015 in which she reported her symptoms of anxiety and said that the requirement to work excessive hours in order to perform instructions was causing that.

172.2 The contemporaneous documents include Manager ONE's email to the Claimant (copied to Sarah Gatland of HR) on 11 May 2015, with her notes of the meeting on 8 May as well as one on 7 May (with Greg Sugden). The Claimant's response about the meeting (and notes) was sent at 17:20 on 12 May 2015 (759 of bundle, though we only had black and white copy). It followed emails which she had sent to herself about things she intended to say. In other words, the Claimant put a lot of thought into her response.

172.3 As acknowledged in Manager ONE's notes, the Claimant was raising that there were work issues which were causing anxiety and stress and potentially making her ill. Manager ONE described these as "your concern regarding workload" and mentioned some suggestions to help the Claimant with her workload, and that the Claimant had not wished to pass ownership of activities to others. The Claimant's own comments did not dispute that Manager ONE had made these suggestions, or that the Claimant had rejected them, but commented that she thought that the Respondent should be finding ways of deciding that certain activities need not be done at all (by anyone, not just her). The Claimant commented:

> I would like to point out that whilst moving my workload is not something I was keen on (reasons given) I had tried your previous suggestions eg. to research and try coping skills from the health and wellbeing portal and phone Validium. The issue I encountered was that counselling would only really be valuable/appropriate if it were 'me' or an issue in my personal life that is the problem, which on discussing the situation with various advisors was not the indication. (*See below)

172.4 Her comments stated that she wanted more objective information about what was required in relation to her activities in particular projects, and she was to believe that she was adding value.

172.5 However, there is nothing in these documents to suggest that the Claimant had given information that any legal obligation was being breached (other than the duty of care and other obligations to the Claimant personally) or that the Claimant reasonably believed that she had disclosed such information. "Team morale" is mentioned, but from the context, the Claimant was not making a disclosure that others were badly affected by workload, but rather the Claimant commenting that she, the Claimant, should not be expected to try to improve team morale, and the Respondent should make that clear to the team.

172.6 At the end of her 12 May email, the Claimant mentioned some points that she wanted to discuss at a meeting which had been scheduled for that Friday, 15 May 2015. In that section of text, there is no information that anyone (including

the Claimant) could reasonably interpret as disclosing a breach of a legal obligation or that health and safety was being endangered.

172.7 On 769 is an email of Manager ONE's notes of the meeting of 15 May, and the Claimant's confirmation that the notes are accurate. Amongst other things, the Claimant had said that she had decided that the role was not right for her and she was looking for another role in the business, and Manager ONE said that she was disappointed but willing to support the Claimant in exploring such options. Based on these notes, the Claimant did not disclose any information which she or anyone else would have reasonably considered to tend to show breach of a legal obligation or that there was a danger to health and safety.

172.8 772 of bundle is Manager ONE's file note of a meeting on 28 May 2015. There is a discussion about the Claimant's work including an agreed transfer of some of it to a colleague. There was discussion of annual leave, and we do not agree that Manager ONE said or did anything to discourage the Claimant from booking leave in July (she simply made the normal comment that leave on days of the Claimant's choosing would not be a problem, subject to consideration of there being enough cover.) Nothing in Manager ONE's notes indicate that the Claimant disclosed any information about a breach of a legal obligation or of risj to health and safety, etc. The Claimant's statements do not specifically allude to this date as being one on which she made alleged protected disclosures.

172.9 On 29 May 2015:

172.9.1 At 774 there is a copy of an email of 29 May sent to Manager ONE at 1:17pm by the Claimant. It does not contain disclosures of any breaches of legal obligations or risks to health and safety, etc.

172.9.2 At 792 is Manager ONE's email of 29 May 2015, which copies in the Claimant. It follows a meeting between Manager ONE and the Claimant earlier that day. It discusses plan for the work to be done, including what will be the Claimant's responsibilities. Nothing in Manager ONE's notes indicate that the Claimant disclosed any information about a breach of a legal obligation etc.

172.9.3 We are not satisfied that there was any disclosure of information that day which the Claimant believed related to breaches of legal obligations or risks to health and safety, etc.

173. In relation to meeting on 12th June 2015

173.1 Around 12 June 2015, the Claimant and Manager ONE had a 121 meeting which discussed, amongst other things, the continuing attempts to finalise the objectives. The Claimant sent a revised draft around 4pm on 12 June.

173.2 We have Manager ONE's notes of the meeting and comments on the draft in her email of 12:52 on 13 June (796-798). The Claimant's response starts on page 800. The correspondence does not indicate that the Claimant had sought to raise issues about other people's workload being unhealthy, or any other health and safety or legal obligations affecting anyone else. The main

topic of discussion was the Claimant's objectives, and the Claimant's preference not to attend meetings between 4pm and 5pm, on the basis that she was – for her own reasons, not because Manager ONE wanted to – arriving at work at 8am was also discussed. The discussion is specific to the Claimant's working arrangements and the work to be done on the current project. Manager ONE mentions that she had sought to implement measures for the Claimant not to work late in the evenings, but would expect the Claimant to be available to attend meetings between 4 and 5pm. The Claimant suggested that it was important to be flexible and noted that others had also asked for the meetings to finish by 4pm.

174. In relation to email on 17th June and 11th July 2015

174.1 The email of 17 June is the one we have just mentioned (page 800).

174.2 The email sent by the Claimant to Manager ONE on 11 July 2015 at 19:55 (page 823) refers to various issues. It contains a statement that the workload of the Claimant and another person (name redacted) has been unsustainable. It seeks support options and gives reasons that support is required, including that one member of staff is leaving and that someone to whom a job offer had been made was not joining. The further exchanges between 13 and 18 July indicate that at the time both the Claimant and Manager ONE regarded this as a resource issue to help the Claimant provide a good service to the Respondent and not a health and safety or breach of a legal obligation issue.

<u>F28 12.08.15: Manager ONE suspended the Claimant, thereby commencing a disciplinary process against her;</u>

175. It is correct that Manager ONE (who was known as Manager ONE at work at the time) did suspend the Claimant and also initiated disciplinary process.

176. This followed the events of 10 August 2015, which was the date on which Manager ONE told the Claimant that Manager ONE and Manager TWO had agreed a date of Monday 2 October 2015 for the Claimant to start work in Manager TWO's team.

177. Manager ONE's opinion was that the Claimant had reacted angrily and disrespectfully when being given the news; had then been significantly late for a team meeting due to start at 12.30pm (Manager ONE was aware that the Claimant and gone to the gym and back before the start of the meeting and that the departure for the gym had been delayed slightly by the discussion about the 2 October date); had sent an email to Manager ONE at 22:18, which said its contents could not be shared with anyone else and asked Manager ONE to do various things by close of business on 11 August 2015. These included, in relation to the Claimant's potential team move, preparing: "Written summaries of all communication you have engaged in (any and all parties via any and aft channels, including but not limited to phone calls and face-to-face meetings) …For all of the above items, please ensure that details of the date, time and format are stated /indicated, as well as a brief description of who initiated the item and for what purpose. Please also keep me fully abreast of any further communications and /or

correspondence you engage in so that I may keep the fog up to date once you have supplied it."

178. Having taken HR advice, Manager ONE decided that disciplinary action was justified and appropriate and that the Claimant should be suspended. She believed that suspension was appropriate in all the circumstances and was in accordance with the Respondent's policies.

179. The suspension was conducted face to face on 12 August 2015, and the follow up letter (894-895) was dated 13 August 2015.

180. On 13 August 2015, the Claimant wrote to the Respondent, in connection with the offer of the post on Manager TWO's team, stating: "Just to confirm (for the formal record and just in case the "refer to resourcer" voting button may not constitute acceptance of the offer) I am really pleased to accept the offer of the post of JOB TWO **subject to the condition** that we are able to reach agreement on salary within the next 8 weeks." (Emphasis added). The Claimant was aware at the time that there had been no formal agreement previously reached with the Respondent or Manager TWO that she would definitely join his team at all, let alone on a specific start date.

F29 16.09.15: The Respondent's disciplinary investigation manager dismissed the disciplinary complaint against the Claimant but failed to consider disciplining Manager ONE for inappropriate use of suspension;

181. The person appointed by the Respondent to investigate was Ms Sarah Bond, known at the time as Ms Sarah Downing. She had had no previous involvement in the matter, and conducted the investigation in accordance with HR advice and with the Respondent's policies.

182. The allegations to be investigated where:

182.1 Insubordination, rude and confrontational behaviour by KB towards her Line Manager in person and by email, and

182.2 continued unreasonable behaviour whilst her Line Manager was managing KB's performance since April 2015.

183. Ms Downing was appointed on 18 August 2015 and contacted the Claimant on 19 August 2015. A referral to OH had been made. (See above. The referral had been made in July 2015, but the appointment had not taken place by 10 August, and Manager ONE supplied additional information after that date). Ms Downing decided it was appropriate to wait on the OH report before conducting the investigation meeting with the Claimant. She kept the Claimant updated as to progress.

184. On around 26 August 2015, the Respondent received the OH report from BUPA Assist. Ms Downing read it and noted that it said that there was no underlying medical condition, other than work place stress, and that it referred to the Claimant's suspension. Ms Downing was advised by HR to check whether the Claimant was fit to meet her; she did so, and the reply was that the Claimant would be fit to attend the meeting once she was fit to return to work, but not before then.

185. Ms Downing interviewed Manager ONE around 10 September 2015, and the Claimant around 16 September 2015. She interviewed two of their colleagues on 17 September 2015.

186. Ms Downing's investigation focused primarily on the events of 10 August 2015 (including the reasons for what happened from the Claimant's perspective) and gave little consideration to the allegation that the Claimant's behaviour towards her manager from April 2015 onwards had been unreasonable.

187. Ms Downing came to the view that there should be no further action in relation to the disciplinary allegations. She informed HR. She communicated the outcome to the Claimant by phone on around Thursday 17 September 2015 (which was immediately before going on leave). The confirmation letter was prepared after her return from leave and dated 30 September 2015 (965). The formal report was completed 5 October 2015.

188. Following the lifting of the suspension, in mid-September, neither Manager ONE nor the Claimant thought it appropriate for the Claimant to recommence work on Manager ONE's team. The Claimant therefore, with the agreement of Manager ONE and Manager TWO, became a member of Manager TWO's team from 23 September 2015.

189. Ms Downing's opinion was that suspension might not have been appropriate on 12 August 2015, because other options might have been available. She did not take into account Manager ONE's opinion about the nature of the communications between April and August 2015, and believed that on 10 August 2015, what seemed to have happened was a disagreement between two colleagues that was potentially affected by the fact that both of them had been working hard.

190. Ms Downing informed HR that she did not necessarily think suspension had been needed around 17 September 2015. She did not believe that Manager ONE should be disciplined and did not believe that Manager ONE had had an improper motive for the suspension.

191. It is correct that the Respondent did not seek to commence any disciplinary action (to be investigated by Ms Downing or anybody else) in relation to Manager ONE. The reason for this is that neither Ms Downing, nor HR, nor any of the Respondent's other relevant employees believed that Manager ONE had done anything that might merit a disciplinary sanction.

<u>F30 01.12.15: The Claimant lodged a grievance in respect of her treatment by Manager ONE ('AGREED');</u>

192. On 1 December 2015, the Claimant sent a letter (by email) to Manager ONE's line manager, Mr Sugden. She informed Manager TWO that she was doing so.

193. In the letter she referred to various pieces of legislation including: Health and Safety at Work Act 1974; the Employment Rights Act 1996; the Protection from Harassment Act 1997; the Data Protection Act 1998; the Management of Health and Safety at Work Regulations 1999; the Equality Act 2010. She also referred to various other legal expressions and concepts. She stated that she was instigating

the grievance procedures due to "a reasonable belief that [Manager ONE] has breached her duties towards me as my line manager."

194. The letter referred to disability discrimination; it referred to the duty to make reasonable adjustments and alleged it had been breached between March and August 2015. She alleged harassment by Manager ONE and referred to her new team as being "a position of relative safety". She alleged that there had been misconduct, bullying and discrimination by Manager ONE, and referred to her understanding of these terms, including by reference to definitions in the Respondent's policies.

195. On 26 January 2016, she wrote to Mr Sugden to say that she wished to "pause" the grievance. Amongst other things, the email said:

> … This is to enable you to 'clear the decks' as it were, of grievances considered open i.e. those which, I appreciate, you are obliged to try to resolve expediently: it is regrettable that we have been unable to do this in spite of best intentions. I do appreciate the approach you have tried to take thus far. …
>
> … please do not interpret my decision to mean that I consider the matter closed. 'Withdrawal' is probably therefore an unhelpful term, though I understand that you may need to use it for internal process.
>
> I (or a union rep) will let you know once we have clarity over which course of action is most likely to yield the outcomes I need.

<u>F31 26.07.16: The Claimant lodged a further grievance.</u>

196. On 16 May 2016, the Claimant sent an email with attached letter to Manager TWO. The introduction to the email stated:

> Please find attached a draft letter for your consideration. This is sent without prejudice and as an information exercise at this stage, with formal grievance to follow (assuming we continue not to be able to reach informal resolution). If things need to go a step further —and I'm very open to hearing your thoughts on this — then my initial view is that this letter needs to go to [Manager THREE's line manager] Suzanne.

197. Manager TWO took HR advice and consulted his own line manager, Manager THREE. The Respondent decided that, notwithstanding the Claimant's comments that the document was "without prejudice", the contents should be formally considered. The Respondent decided that Manager TWO should not be the Claimant's immediate line manager while the investigation continued, and notified the Claimant of this by email dated 27 May 2016 from Tracy Pugh, HR. In that email (1618-1619):

197.1 The Claimant was told she would report to Manager THREE in relation to health and well-being in the work place and to Mr Nikolaidis for day to day tasks and monthly 121s.

197.2 The Claimant was instructed not to engage with Manager TWO in any way until the grievance process was concluded.

197.3 The Claimant was informed to seek flexible working formally through the Respondent's procedures.

197.4 She was told that in principle, she could continue to work on the Respondent's premises away from the team area, but should discuss the specific details with Manager THREE.

197.5 In relation to workplace buddy, she was given details of mental health first aiders and, in particular, the name of a particular individual. (She had previously been given these details by Mr Bowsher around 13 May 2016 and had made contact with the individual: see 1485-1485C).

197.6 She was advised to engage with Validium

198. Around 31 May 2016, Ms Hayley Clarke was appointed as the manager to investigate the grievance, and on 1 June 2016, Ms Clarke contacted the Claimant to say to.

199. The Claimant consented to Ms Clarke having access to the Claimant's health records, and Ms Clarke consented to the Claimant's request to be allowed to send an amended version of the grievance. For these reasons, the tentative meeting date of 15 June 2016 was postponed to 23 June. Ms Clarke agreed that the Claimant could be accompanied by 2 people. Ms Clarke also made clear that the purpose of the meeting was so that Ms Clarke could obtain further information from the Claimant and that there was no need for the Claimant to bring witnesses or provide witness statements from third parties for the meeting. She agreed, in principle, to the Claimant providing witness statements/details in due course if relevant to the Claimant's own grievance, while pointing out that this was not being treated as a collective grievance and that other individuals should lodge their own individual grievances if they had concerns about their own treatment by the Respondent.

200. Ms Clarke met Manager TWO on 7 June.

201. She met the Claimant on 23 June and discussed the contents of the grievance, the proposed timetable for resolving and they agreed to meet again in early July. The notes are 1725 to 1730. It was confirmed that this was an individual, not a collective, grievance and 5 subject matters were agreed:

    1. Parity of pay

    2. Performance review

    3. Isolation from team

    4. Treated differently to other members of the team

    5. Grievance process and impact on KB

202. One of the reasons for a second meeting was that the discussion of items 4 and 5 was not completed on 23 June. Ms Clarke sent the Claimant the notes from the 23 June meeting, and the Claimant sent Ms Clarke some updated drafts of the

grievance. They reconvened on 8 July 2016. During that meeting, Ms Clarke became aware that the Claimant was signed off sick. She suggested that it might not be appropriate for the hearing to be taking place while the Claimant was off sick. The Claimant and her union representative left the room to discuss and the union rep returned alone to state that the Claimant had gone home.

203. The Claimant was signed off until 18 July. She and Ms Clarke continued to exchange emails. On 20 July 2016, the Claimant submitted a further revised version of the grievance.

204. On 26 July, Ms Clark met Manager TWO to discuss the points made by the Claimant.

    204.1 He said that there had been an external MSP course cancelled by him before 7 December 2015 start date. (As discussed above, we have seen evidence that the provisional course arranged via training team for 7 December was cancelled, but no contemporaneous documents to show a different, external course, was later arranged for the same date).

    204.2 The Claimant had not shadowed on an end to end review because no suitable end to end reviews had taken place since the Claimant joined the team

    204.3 Said that the Claimant's end of year performance review (for 15/16) was on hold. He believed that this was with the Claimant's agreement.

    204.4 Commented generally on the other matters, such as alleged lack of HR and OH support.

205. On the same day, 26 July 2016, Ms Clarke also met Manager THREE. He gave very brief comments in relation to each of the 5 subject headings for the grievance. He sent an email and attachments dated 29 July which he thought were further relevant information about the feedback he had given to the Claimant in relation to her work.

206. On 26 July 2016, the Claimant sent the proposed final version of her grievance, with supporting documents.

207. By letter dated 19 August 2016, Ms Clarke wrote to the Claimant with the outcome. None of the 5 elements of the grievance were upheld. As stated in the letter, and detailed in the attached 27page report, Ms Clarke did make some recommendations.

    207.1 That the Claimant complete the MSP course by elearning and in a week with no other scheduled work activity.

    207.2 That the Claimant receive a pay increase (and £2000 per year was Ms Clarke's recommendation) provided she passed the MSP course

    207.3 To give a date for the Claimant to shadow and end to end review

    207.4 That the annual review for 15/16 and the setting of objectives for 16/17 be completed promptly following the grievance outcome

207.5 That she be rated "developing in role" for 15/16 in relation to the post on Manager TWO's team given the amount of absence between September 2015 and March 2016. This had the same effect for bonus purposes as an outcome of "good" (see page 1826)

207.6 That there be regular 121s and other management feedback meetings, and that these be properly diarised and documented, and only postponed when absolutely necessary

207.7 That a mediation meeting between the Claimant, Mr Nikolaidis and Manager THREE be arranged and that the Claimant be managed by Manager THREE pending the appointment of Manager TWO's replacement (Manager TWO having submitted his notice).

208. Ms Clarke rejected the allegations that Manager ONE had somehow turned Manager TWO or Manager THREE or anyone else against the Claimant and rejected the allegation that it had been wrong for Manager TWO to step away from being line manager pending the grievance investigation. She addressed the comments which the Claimant made which claimed that other people, not just the Claimant, were dissatisfied with Manager THREE, while reiterating again the focus of her report was on the Claimant's grievance.

<u>F32 June 2016: The Claimant's annual review is delayed pending the outcome of her grievance ('AGREED');</u>

209. By May 2016, Manager TWO had received some feedback from Manager ONE re the period April to August 2015 and he informed the Claimant of this and that he believed he was in a position to conclude the Claimant's April 2015 to March 2016 performance review. On 31 May 2016, at a meeting and in an email the same day, the Claimant informed Mr Bowsher of this and said that she was concerned about the review process and about being able to refute any negative comments made by Manager ONE. She also sought his help about how the review would be impacted by the grievance process. Mr Bowsher suggested that perhaps the review could be deferred until after the grievance and offered to approach Manager TWO to suggest this. The Claimant agreed.

210. Mr Bowsher liaised with Manager TWO. Manager TWO agreed (with the consent of HR and Manager THREE) to defer the performance review on a short term basis pending the outcome of the grievance. Mr Bowsher confirmed to the Claimant that this was agreed.

211. Agreeing to defer performance reviews until after a grievance outcome was an approach the Respondent had taken previously and its reasons for agreeing to do so on this occasion is that Manager TWO, Manager THREE and HR believed that this was what the Claimant wanted them to agree to.

<u>F33 11.08.16: The Respondent initiated disciplinary proceedings against the Claimant;</u>

212. At 12:32 on 11 August 2016, Manager THREE sent an email to the Claimant attaching a letter stating that disciplinary proceedings had been commenced.

213. The Claimant asked Ms Clarke to treat this as part of her grievance, and Ms Clarke replied to say that was not possible.

214. The matters to be investigated were stated to be:

    214.1 Inappropriate Communication (some alleged examples were given)

    214.2 Contacting Manager TWO on 31 July 2016

    214.3 Failing to inform Manager THREE of whereabouts in the building she was working when on the Respondent's premises and failing to grant appropriate access to her Outlook calendar to Manager THREE and the team

    214.4 Not following absence reporting procedures (some alleged examples were given)

215. 11 August 2016 was the Claimant's first day back after a period of absence.

216. Manager THREE's reasons for commencing formal proceedings was that he believed that he had previously given information to the Claimant about the need to comply with these requirements and that she had breached them after she had been given instructions. He believed it was therefore appropriate to take a more formal approach. On behalf of HR, Ms Pugh approved this approach and helped draft the letter.

<u>F34 06.09.16: Tracy Pugh informed the Claimant that the Respondent had appointed an appeal hearing manager, and rescinded the arrangement later on the same day;</u>

217. On 6 September 2016, Ms Pugh informed the Claimant that Mark Farrow would deal with the appeal. Later that day Ms Pugh learned (from Mr Farrow) that he had not been asked to do it and that he did not have capacity to do it. She therefore emailed the Claimant the same day that the appeal manager would not be Mr Farrow.

218. The Claimant replied to Ms Pugh the same day that she had been unsure as to whether Mr Farrow was sufficiently senior in any event.

<u>F35 27.09.16: The Claimant attended a disciplinary interview, for or at which no reasonable adjustments were made;</u>

219. The appointed investigator was Paul Armstrong. Ms Armstong was appointed in August 2016 and contacted the Claimant to introduced herself.

    219.1 On 1 September 2016, a letter dated 31 August 2016 was sent to the Claimant inviting her to a meeting on 9 September 2016.

    219.2 A letter dated 23 September 2016 was sent to the Claimant inviting her to a meeting on 27 September 2016.

    219.3 Each of those letters stated: "If you have any specific needs at the meeting for example as a result of a disability, or if you have any other questions, please

also contact me as soon as possible." Each letter also reminded the Claimant of the counselling service available by phone.

220. In response to the 1 September email, the Claimant replied to state that she would send relevant documents asap (when she felt well enough). She also said that when she had written to Manager TWO around 31 July, she had expected to die. She stated that she was self-harming and was seeking NHS assistance. Having sent that email to Ms Armstrong (copied to Walter Brady of HR), the Claimant then forwarded it about half an hour later to Manager THREE, Manager TWO and Ms Pugh (as well as to Manager THREE's line manager).

221. The meeting for 9 September 2016 was postponed to 16 September 2016, which was to be after the Claimant had visited her GP to discuss whether she was well enough to attend. The Claimant declined the 16 September date, stating that her GP had only signed her off as fit for work provided adjustments were made, and the adjustment required for the period 9 September to 23 September was to work from home. (The fit note is page 7371; the Claimant's email to Ms Armstrong is 2207). The Claimant was willing in principle to meet provided the Respondent did not object to the fact that she was supposed to be off sick (if not permitted to work from home).

222. After further correspondence, and after the expiry of the fit note just mentioned, the meeting went ahead on 27 September. A further OH report was in existence, but, as discussed above, this was not seen by the Respondent until the Claimant supplied a copy to Manager FOUR. Manager THREE and Ms Armstrong had not seen it by 27 September 2016. Ms Armstrong reiterated to the Claimant that she, Ms Armstrong did not have the report and that she had been advised by HR that the Claimant had not consented to its release (a point which the Claimant did not accept).

F36 11.10.16: The Appeal Manager told the Claimant that "she didn't make things easy" (Ms Caroline Carruthers);

223. Around 8 September 2016, the Claimant was told that Ms Carruthers would be the manager who was going to deal with the Claimant's appeal against Ms Clarke's grievance decision.

224. Ms Carruthers is unable to locate her handwritten notes of their first meeting. The Claimant is sure that Ms Carruthers made a comment that the Claimant "didn't make things easy". Ms Carruthers does not specifically recall that.

225. On the balance of probabilities, the Claimant's recollection is accurate and Ms Carruthers made a comment along those lines to the Claimant while asking the Claimant to explain the basis of her appeal and of the outcomes she was seeking.

226. In the absence of evidence from Ms Carruthers about why she made the remark, it is difficult for us to know her reasons. The absence of notes of the meeting make it difficult for us to see the precise context.

F37 21.10.16: The Respondent decided that the disciplinary case against the Claimant would progress to a hearing and informed her of that decision;

227. On 24 October 2016, Ms Armstrong notified the Claimant that there would be a disciplinary hearing, and that the hearing officer would contact her with further details. (2598)

228. Ms Armstrong genuinely believed that a disciplinary hearing was justified based on the evidence she had seen, including interviews with the Claimant and with Manager THREE and Manager TWO. She believed that there was a case to answer for each allegation.

F38 03.11.16: The Respondent's Appeal Hearing Manager recommended a stress risk assessment and agreement of reasonable adjustments but the Respondent failed to act on those recommendations;

229. In Manager FOUR's team, Manager FOUR oversaw the request to the Claimant's GP around 27 October 2016 seeking advice about adjustments that might be required, including during the disciplinary process.

230. He was informed that Ms Carruthers, the appeal hearing manager recommended a stress risk assessment and on 4 November 2016, he took advice from HR about the process and was told that he, as line manager would normally sit with the employee and go through the document and record the answers.

231. On 8 November 2016, he sought further advice from HR and asked if OH input would be required for the form. He was advised that he, as line manager, could do it in the first instance, and was supplied with a template of a letter to call a welfare meeting with the Claimant for the purpose.

232. On 9 November 2016, he informed the Claimant of the intention to hold a welfare meeting with HR support on 11 November 2016. On 10 November 2016, the Claimant was off sick and Manager FOUR decided to hold the welfare meeting when she returned. (3332)

233. The Claimant did not return from this sickness absence prior to being suspended pending a disciplinary investigation.

F39 09.11.16: The Claimant was informed of a 22 November 2016 date for her disciplinary hearing without reference to Occupational Health or to the possibility of making any reasonable adjustments to the process (Mr Ian Turner, Ms Tracy Pugh, Mr Manager THREE, Mr Walter Brady);

234. This is a duplicate. See F25 above.

F40 14.11.16: The Claimant was suspended from work and suspended from IT access (Mr Walter Brady, Ms Lisa Belsham, Ms Tracy Pugh, Ms Paula Armstrong);

235. On 14 November 2016, the Claimant was suspended during a conference call attended by the Claimant, her union representative, her line manager (Manager FOUR) and the Lead HR Business Partner for Manager FOUR's area, Lisa Belsham.

236. A letter in the name of the Claimant's line manager (Manager FOUR) and dated 14 November 2016 (2764) confirmed the decision.

237. The effective decision-maker was Ms Belsham. She advised Manager FOUR to implement the decision on behalf of the Respondent and he accepted her advice.

238. The reason for the suspension was the disciplinary proceedings which had been initiated around 11 August 2016 (Manager THREE's notification letter) and had been investigated by Ms Armstrong and for which Mr Turner was the hearing officer. As mentioned above, Mr Turner had written to the Claimant on 9 November 2016. She was on sickness absence immediately after that and informed Manager FOUR that she was concerned about the prospect of losing her job.

239. Manager FOUR discussed the matter with Ms Belsham, which caused her to review the case. Ms Belsham formed the opinion that it was surprising that the Claimant had not been suspended previously. She regarded the Claimant's emails to Manager TWO and Manager THREE as potentially having been upsetting to read. She also had the view that the email to Manager TWO of 31 July implied a threat. Ms Belsham also formed the view that the Claimant was potentially seeking to involve Manager FOUR in the processes in a way that went beyond what could reasonably be expected of him as manager, and that potentially – in Ms Belsham's opinion – there was the possibility might behave towards Manager FOUR in the same way that – in Ms Belsham's opinion, the Claimant had behaved towards Manager TWO or Manager THREE and that the Claimant was taking up an increasing amount of Manager FOUR's time.

240. The main reason that Ms Belsham took the decision to recommend suspension was that she was concerned about the contents of the emails sent to Manager TWO and Manager THREE, coupled with what the Claimant said to Manager FOUR about the 9 November 2016 invitation to disciplinary hearing.

241. Manager FOUR accepted the advice, believing, based on what Ms Belsham told him, that this was the appropriate course of action in all the circumstances, and was in accordance with the Respondent's policies.

242. The terms of the suspension were that the Claimant was not able to directly contact any of the Respondent's employees at all (including Manager FOUR, Ms Belsham, Ms Armstrong and Mr Turner) other than a person we will call "HS", who was a Senior Human Resources Business Partner, who was to be the only point of contact and was to act as welfare manager.

243. The Claimant and her representative did not raise specific objections at the time to the suspension or the conditions placed upon it.

244. In Ms Belsham's written statement, there is no reference to seeking specific medical advice about the best way to approach the suspension, or the effects that the suspension or the conditions might have on the Claimant. In the written statement, Ms Belsham expressly mentions people that she spoke to, and does not mention a discussion with a medical adviser. We are satisfied, in particular, that – contrary to her oral evidence in cross-examination – she did not speak to Dr Peters (a fact confirmed by her supplementary witness statement). We are also satisfied that she did not speak to Jane Manders either and that, had she done so, she would have included that in her written statement (and/or that it would have been recorded in the Respondent's HR case notes). Ms Belsham was giving her

oral evidence about four and a half years after the events in question. We are satisfied that she was not deliberately seeking to deceive us, but rather she was mistakenly recalling a conversation with Dr Peters in which the Claimant was discussed (informally, and without being documented) and has incorrectly attributed that to being before suspension, as opposed to around December 2016 or January 2017 (that is, several weeks after the 14 November 2016 suspension).

245. For completeness, we do think that Ms Belsham should have been more willing to accept her error outright in her supplementary statement. However, we reject the Claimant's counsel's suggestion that, in her oral evidence, she expressly claimed that she knew she had spoken to Dr Peters while he was doing consultancy work prior to becoming an employee of the Respondent's; she merely said that that was one possibility.

F41 25.11.16: The Claimant remained suspended after lodging a further formal grievance about her suspension;

246. On 25 November 2016, a letter from the Claimant was forwarded to Manager FOUR by the Claimant's union representative. The Claimant did not send it directly because of the terms of her suspension. Manager FOUR asked the union rep to contact the Claimant to acknowledge receipt and that the letter would be treated as a grievance.

247. The letter did not, in specific terms, object to the suspension or to the terms of the suspension. The grievance was that the Claimant had had a job interview with the Respondent the previous day and, because of the terms of the suspension, she had asked HS to contact the interviewer and say that the Claimant was not available; the grievance alleged that this had not been done.

248. The suspension did continue after the grievance, and on the same terms.

F42 In respect of that grievance and each grievance that the Claimant had previously lodged, the Claimant remained subject to decisions made by or contributed to by the persons (Manager ONE), Managers TWO, Manager THREE, Tracy Pugh, Hayley Clarke, Walter Brady, Lisa Belsham) about whom she had raised her concerns, with consequent ongoing contact;

249. It is correct that Manager ONE and Manager TWO would potentially have had some input into pay decisions after the Claimant had raised grievances about them. The same applies to Manager THREE, who was also a person who notified the Claimant of investigation (11 August 2016).

250. As discussed above, in May 2016, Manager TWO ceased to be the Claimant's line manager pending the grievance outcome, which was a decision which, at the time, the Claimant said she thought was unnecessary and that she would prefer to remain in contact with Manager TWO. (As also discussed above, she was instructed not to contact him, but did so, which was one of the matters leading to the August 2016 disciplinary process commencing).

251. Manager ONE left the Respondent's employment around late 2015, but was contacted by Manager TWO as part of his information gathering in relation to the Claimant's performance review for 15/16.

252. Ms Clarke did issue the grievance outcome and the Claimant appealed that outcome. However, the Claimant did not bring a grievance against Ms Clarke before the outcome and Ms Clarke did not make decisions about the Claimant after issuing the outcome.

253. Ms Pugh and Mr Brady and Ms Belsham were HR advisers who gave advice to managers about various aspects of the Claimant's interactions with the Respondent. We are not satisfied that the Claimant raised anything that might be called a grievance about any of them during the time that they were involved in providing their respective advice.

F43 In respect of that grievance and each grievance that the Claimant had previously lodged, no mediation services were offered by the Respondent to mediate between the Claimant and any of the persons concerned despite HR recommendation to that effect;

254. No mediation took place.

255. Mediation between the Claimant and Manager ONE did not take place because, amongst other reasons, by the time the Claimant lodged her December 2015 grievance (which was withdrawn in January 2016), the Claimant was no longer reporting to Manager ONE (who, in any event, left the Respondent's employment around this time).

256. Manager TWO declined to enter mediation with the Claimant because he did not regard it as necessary or appropriate. The Claimant stated to him that she thought mediation with him was preferable to her raising a grievance. His opinion, which he shared with the Claimant was that there was no need for mediation and that, if she thought otherwise, then bringing a grievance was appropriate.

257. Ms Clarke recommended mediation between the Claimant, Manager THREE and Mr Nikolaidis. She did not include Manager TWO because he had already submitted his resignation. This did not take place because, amongst other reasons, the Claimant did not want to have contact with Manager THREE and because she found a position on another team (Manager FOUR's) and wished to leave the Managers TWO & THREE-Nikolaidis as quickly as the Respondent would permit.

F44 07.12.16 onwards: The Claimant was allocated a 'Single Point of Contact' by the Respondent but they worked in HR and were of no practical assistance to the Claimant either in terms of staying in touch with her theoretical job at the Respondent or providing any information in respect of the ongoing grievance and disciplinary procedures;

258. The Single Point of Contact ("SPOC") was first HS and later KC. The Claimant was informed appropriately about the change over. It was appropriate to choose SPOCs who were HR employees, due the confidential nature of the role. It was not the SPOC's role to make decisions, but to pass information promptly back and forth between the Claimant on the one hand and the relevant managers, HR professional on the other hand.

259. Neither SPOC caused a delay, or caused there to be missing information, in relation to the grievance, suspension, disciplinary or medical issues.

F45 16.12.16: The Respondent indicated that it was ready to provide an outcome to the Claimant's grievance appeal, but it was never provided;

260. Around 11 October 2016, the Claimant, Ms Carruthers and the Claimant's union representative met. As mentioned above, the handwritten notes taken by Ms Carruthers have not been located. By email of 13 October 2016, she sent a brief typed summary of the discussion. The email said Ms Carruthers was going to be on leave for 2 weeks and would provide an update after that. Ms Carruthers also had some sickness absence around this time.

261. Ms Carruthers received and took account of further information received from the Claimant in late October and early November 2016. She spoke to a person named by the Claimant as a potential witness, AC, who declined to be involved. On 15 November 2016, Ms Carruthers, having been informed of the suspension by the Claimant, updated the Claimant and said she intended to conclude the grievance appeal as soon as possible.

262. Ms Carruthers was ready to give her decision by 29 November 2016. She was advised by Ms Belsham that the Claimant's fit note expired on 14 December 2016 and so the meeting to convey the decision could be scheduled for after that date.

263. On 16 December 2016, the SPOC, KC, provided the Claimant with an updated on various matters (2873). Amongst other things, the Claimant was told that Ms Carruthers (the officer dealing with the appeal against Ms Clarke's grievance outcome decision) was "ready to meet with you to provide you with an outcome to your appeal. A letter from [Ms Carruthers] will follow shortly."

264. No specific date was offered to the Claimant for a meeting. On around 20 January 2017, the SPOC sent an update to the Claimant from Ms Belsham which stated that Ms Carruthers remained ready to meet and that the Respondent was progressing an OH referral and, depending on the outcome of that, the Respondent would advise the Claimant and Ms Carruthers of any necessary adjustments for the meeting. The letter also mentioned the 2 other on-going grievances and the disciplinary. The Claimant replied asking the Respondent to give specific dates for all the proposed meetings and to speed things along generally. She did not comment expressly on the grievance appeal, and did not say that she was willing to meet immediately or that she would accept a written outcome without a further meeting.

265. We accept that Ms Carruthers did draft the document at 3186 of the bundle (dated 19 April 2017) and that it does represent her honest opinions, and the outcome that she was ready to deliver to the Claimant around 29 November 2016. We do not accept that this was posted or emailed to the Claimant around 19 April or at all. Ms Carruthers was unclear about who did send the document to the Claimant and by what method. Since the Claimant did not receive it and the Respondent has no proof of sending, the most likely explanation is that it was not sent at all. (Even on the Respondent's case, it was not sent until after the end of employment).

266. Ms Carruthers remained willing to meet the Claimant, and the reason that she did not do so is that, after informing the Claimant of her readiness, the Claimant was signed off sick again and the Respondent decided to obtain OH advice.

267. The letter was short and effectively agreed with all of Ms Clarke's outcomes. That is, the appeal was not upheld.

F46 11.01.17: Lisa Belsham, Ian Turner, Walker Brady and/or Ms Kerry Clark rescheduled a disciplinary hearing to 20 January 2017 and informed the Claimant that material had been added to the case without further explanation;

268. The Claimant was off sick from 10 November 2016, the day after Mr Turner's 9 November letter to her. Her communications with Manager FOUR informed him that she was upset by the letter and concerned about losing her job.

269. The Claimant submitted a fit note stating that she was unwell until 14 December 2016.

270. Manager FOUR and Ms Belsham believed that it was made clear to the Claimant that the disciplinary matter was temporarily put on hold pending either the end of her sickness absence or further review if a further fit note was supplied to cover the period after 14 December. They were under the impression that was what the Claimant wanted to happen and, in any event, it was Ms Belsham's opinion that a delay was appropriate.

271. In December, Ms Belsham made efforts to contact the Claimant's treating clinician (AW, a psychiatrist) by phone. The Claimant was informed in January 2017 that Ms Belsham had left a message and not had a call back. She did speak to Dr Geoghan of OH Assist, who had provided the most recent (12 October 2016) OH report. (It was his advice which had led to the Respondent seeking information from the Claimant's GP in October 2016, which had not been forthcoming).

272. The Claimant informed the SPOC that another fit note was to be sent to the Respondent and Ms Belsham decided to seek OH advice prior to proceeding further with the ongoing grievance and disciplinary matters. The Claimant was informed of this, via the SPOC. On 20 December 2016, she replied to state that she had not agreed to the processes being put on hold during the period covered by her fit note to 14 December 2016 and implied that she did not want the processes to be on hold during her on-going absence.

273. After Xmas, Ms Belsham regarded the Claimant's 20 December 2016 email as being the Claimant's indication of willingness to proceed with the disciplinary matter which was due to be head by Mr Turner. Therefore, she helped draft a letter in which Mr Turner invited the Claimant to a hearing on 20 January 2017. The letter:

    273.1 Noted that the Claimant was currently off sick

    273.2 Noted what the 20 December email said

    273.3 Noted that 20 January was after the expiry of the current sick note

    273.4 Asked the Claimant to comment on whether she would want a postponement in the event her sick note was extended

273.5 Said that, in the event of postponement, OH advice would be sought to "further understand how we can best move this hearing forward"

274. The letter also included some supplementary evidence.

275. Although dated around 11 January, the Claimant did not see it until around 15 or 16 January. She asked her union rep to accompany her but he was unavailable (for entirely understandable personal reasons that were not connected with the Claimant) (2926) and the hearing was postponed.

276. The Claimant queried whether adding additional evidence was allowed by the Respondent's procedures and was informed that it was.

F47 20.01.17: Ms Lisa Belsham and/or Mr Walter Brady put the Claimant's grievances on hold until an OH report was obtained and decided that when matters resumed the disciplinary hearing would take precedence; this was communicated to the Claimant;

277. In November/December 2016, the Respondent put the procedures on hold, first until the expiry of the fit note which was due to end 14 December 2016, and then again when the Claimant informed the Respondent of an extension.

278. In January, following consideration of the email which implied that the disciplinary proceedings had been unilaterally suspended by the Respondent, the Respondent offered to hold the disciplinary hearing on 20 January 2017, while making clear its willingness to postpone pending OH advice.

279. On 20 January, following the postponement of the disciplinary hearing, Ms Belsham wrote to the Claimant via the SPOC. Amongst other things, the email stated:

> I would like to take this opportunity to provide you with an update in relation to how we wish to proceed with all of your outstanding cases.
>
> Firstly as discussed between myself and Manager FOUR we are in the process of progressing an occupational referral to understand how best to enable you to cope with the various hearings. This will include advice on any necessary adjustments that may need to be made. This will either be through our existing OH provider or, should they not have the necessary clinician, another independent third party. We have used your diagnosis as submitted by [AW] to ascertain an appropriate clinician. We intend to have identified an appropriate route within the next week and will inform you of the clinician's detail ahead of them contacting you directly.
>
> On receipt of the report, it is our intention to conduct the investigations/hearings in the following order:
>
> 1. Grievance appeal - Manager, Caroline Carruthers. Caroline is ready to progress and is awaiting confirmation from us as to when to proceed. We will make her aware of any adjustments required once we have a better understanding on receipt of your report.

> 2. Grievance Investigation Hearing - Manager, Leigh White. Leigh is ready to progress.
>
> 3. Grievance Investigation Hearing - Manager, Donna Geoghegan. Donna is ready to progress.
>
> 4. Disciplinary Hearing - Manager, Ian Turner. Ian is ready to progress.
>
> With regard to your disciplinary, I have attached the policy as previously requested. For clarity, in the course of any investigation hearing or appeal, the manager involved can request at any point supplementary material to ensure a broader understanding of any of the issues at the centre of the allegations.

280. The above-mentioned email was in response to the Claimant's of 19 January which set out her opinion on the state of play in each procedure and concluded: "Please address these points and say what will be done to improve on the present situation."

F48 09.02.17: The Respondent accused the Claimant of having sent one or two recent responses to work-related e-mails (i.e. when suspended) and made a further threat of disciplinary action without identifying the emails in question or explaining the reason why sending them was a disciplinary issue (Ms Lisa Belsham, Mr. Manager FOUR);

281. On Thursday 9 February 2017 (at 21:52), Ms Belsham sent an email to the SPOC for forwarding to the Claimant. It was forwarded on Monday 13 February at 09:32.

282. The email [3086] was 4 paragraphs, each dealing with a separate topic. The fourth paragraph stated:

> Can I ask in the meantime that you desist in copying Manager FOUR directly. He has made me aware and has asked that you note the terms of your suspension and the single point of contact only. He has also made me aware that you have sent one or two recent responses to work related emails, whilst we note your intention of trying to be helpful, this is also a breach of the terms of the suspension. Should this continue, this facility will be removed from the windows phone and it will remain purely to receive and make calls to [KC, the SPOC] only.

F49 14.02.17: The Respondent failed to respond adequately to the Claimant's requests for objective detail of a disciplinary case against her; and to her concerns about the impact of the process and her requests for reasonable adjustments (Mr Walter Brady, Ms Lisa Belsham, Ms Tracy Pugh, Ms Paula Armstrong, Mr. Manager FOUR);

283. On Tuesday 14 February 2017, the Claimant sent an email (3115) to SPOC at 09:02. It requested a response to 4 questions (to be sent via SPOC or via her union rep, also cc'ed) in 3 working days from Ian Turner. The questions were:

> 1. What is the business aim of pursuing the disciplinary action against me?
>
> 2. What alternative means of achieving this business aim have been considered? What was the basis of rejecting it/them?

> 3. How has the classification of alleged offences been calculated as "gross misconduct" (as opposed to -for example - a lesser charge of simple misconduct)?
>
> 4. What adjustment has been implemented since this action was initiated in mid August 2016?

284. The panel was not taken to a direct response to that email from Mr Turner (or from Ms Belsham or from anyone else). It was forwarded to Ms Belsham on 15 February at 1528 (3115). The Claimant sent a chaser on 22 February 2017, which was forwarded to Ms Belsham that day (3130).

285. The Claimant's fit note of 13 February 2017 was forwarded to Ms Belsham via the SPOC on 13 February 2017. It covered the period 13 February to 13 March and stated that the Claimant conditions were "anxiety and borderline personality disorder" and that she might be fit to work with workplace adaptations, being "improve planning time, prior notices and support with communications with relevant people at work".

286. On 14 February at 15:34, the Claimant sent an email to SPOC intended for Ms Belsham, which was forwarded to Ms Belsham at 1612. Ms Belsham's response back to SPOC was 17:04, and forwarded to the Claimant on 15 February at 12:09. The Claimant's email (with subject line Duty of care / to make reasonable adjustment) included:

> I refer to Lisa's letter stating that the EAP is the means by which Network Rail considers its duties discharged. I am writing to let you know, again, that it is not fit for purpose for my needs as an individual.
>
> …
>
> I KNOW I can't control actions or omissions of others: what I need is proactive support managing the destructive emotions and impulses that I experience as a result. Apparently the EAP are unable to offer this support - all they can offer is counselling. Counselling is known not to be productive for someone like me, partly because it involves verbalising /exploring emotions in order to process them. I am not capable of doing this, no matter how much effort I put in.
>
> Please tell me what alternatives NR can put in place to support me while we wait for whatever it is Validium are doing.

287. Ms Belsham's response stated:

> Thank you for your email. I am sorry that you are finding our EAP not suiting your requirements. Validium are trained to work with employees with a variety of needs in many different situations, the helpline is 24/7 so I suggest that you continue to use their service, as Network Rail has defined this as the most suitable avenue for all its employees in need of support.
>
> Your distress and coping mechanisms should be a detailed conversation for your care in the community, so please contact your GP / 111 or the walk in centre if you are in need of immediate support.

I have discussed the status of your case with Validium who have written to both your GP and Psychiatrist for medical records and assessment. They will continue to follow up until they are in receipt of them -they will then be able to move forward very quickly.

288. The correspondence continued on 15 February. At 13:27, the Claimant wrote stating, amongst other things:

> For avoidance of doubt, this is not a threat of any kind. I am simply making you aware that my health has again deteriorated (this week) to the point of self-harm and other destructive behaviours, for which NR is already seeking my dismissal. I had been doing much better up to a few weeks ago. You're already aware of the clinical diagnoses of a resistant depressive episode (last summer/autumn) anxiety (may 2016 and prior) and more recently borderline.
>
> I need to know whether NR is knowingly accepting the risk of further injury …

289. Ms Belsham's response was sent to the Claimant the same day and said:

> We are concerned with this email. Late Monday evening we received your fit note from your visit to your doctors surgery that day. This fit note is at odds with the email below about your health deterioration. As your employer we are unable to ignore the seriousness of this content, therefore we will be contacting your GP today to request that they make contact with you.

290. The Claimant replied stating, amongst other things:

> Feel free to contact my gp - I thought that was being done anyway.
>
> …
>
> There is no emergency; you do not need to do anything like you did before in calling emergency services. I can do that myself if necessary.

291. Another email shortly afterwards added:

> Ps. My Fit Note specifically said "may be fit" assuming adjustments were made. You have failed to make adjustments... the Fit Note is therefore not contradictory, you have just misunderstood the amplified influence NR is able to exert on my levels of distress. Things that other people wouldn't be affected by ... hence "impairment" under the [Equality] Act

<u>F50 14.02.17: The Respondent offered [3105] the Claimant only two hours of access (on 23.02.17) to its IT systems in order to obtain information for her ET claim, in the event she had three hours of access a month later on 23.03.17;</u>

292. On 14 February 2017, Ms Belsham wrote to the Claimant (forwarded by SPOC at 12:09 on 15 February, stating:

> I write regarding your access to Network Rail systems for the purposes of your Tribunal and pending hearings and / or investigations. We are able to provide access on Thursday 23 February between 13:30 —15:30 at our Eversholt Street

offices. Please advise if you require train tickets and I will arrange for them to be sent to your home address.

Conditions of the access:

Any material will be in print form only as it is against IT policy to upload Network Rail information onto your private computer.

Access is granted in order that you may obtain the information you require in respect of the following only:

• Your claim in the employment tribunal

• The disciplinary investigation; and

• Your 4 grievances

No other information can be taken [and to ensure data protection for other Network Rail employees / 3rd parties, we will ask you to disclose any printed material before leaving the premises]. Your access will be supervised by myself and 1 other Network Rail employee.

If you require specific policies please let me know which ones you require by 4pm on Monday 20 February and we will be happy to provide you with copies on the day.

If this time is convenient, please report to Network Rail reception 3`d floor Eversholt Stand someone will come and collect you. Should you be unable to make this date, please let me know at the earliest convenience.

293. It was rearranged at the Claimant's request and the access, on terms as set out above was granted on 3 March 2017. The access had been planned for 1pm to 3.30pm that day. The Claimant arrived at around 1.25pm. The access was allowed to continue until around 4.45pm which was when Ms Belsham had to leave for the day. The Claimant was offered the opportunity to return on a later date. In fact, she resigned the following day.

<u>F51 15.02.17: The Respondent initiated a disciplinary process without all of the relevant information attached and requested that the Claimant bring documents when she had no access to email (Mr Walter Brady, Ms Lisa Belsham, Ms Tracy Pugh, Ms Paula Armstrong, Mr. Manager FOUR);</u>

294. The Claimant has access to her work email account via her work phone.

295. Some work-related emails were sent to the Claimant's email account. (Presumably from people who were unaware of the suspension. The Claimant and the SPOC were corresponding via the Claimant's personal email address.) An email was sent to her on 13 January (2933) asking her to supply a particular template. The Claimant forwarded a copy of that email to Manager FOUR (with her comments on it) later the same day. She also sent it to the SPOC and the union rep, and commented that her reason for contacting Manager FOUR directly was that the SPOC and the union rep were both out of office.

296. On 9 February 2017, Ms Belsham's email to the Claimant (as well as including the fourth paragraph quoted above) made her aware of potential disruption to the Respondent's email system.

297. The Claimant's reply to the SPOC at 10:26 on 13 February (3085) included:

> My Windows phone is not synced up to NR, as you already know. You mentioned you would send me a user guide to get set up and I would be grateful if you would adhere to this commitment.
>
> Not sure which "recent" work emails I'm supposed to have responded to? Please be specific or retract the criticism, which is implied. Furthermore, if I am not to cc [Manager FOUR] please ensure your staff do not continue to do the same. The situation is confusing enough already.

298. This query caused Ms Belsham to ask the audit department for a list of emails sent from the Claimant's work email account. On 14 February 2017, a printout of such emails covering the period 14 November 2016 to 9 February 2017 was produced. The reason Ms Belsham asked for it to commence 14 November 2016 is that that was the date of the suspension and the date on which the Claimant was told not to contact others. The decision to suspend was first communicated to the Claimant shortly before 11am on that date, and the details explained more fully after 4pm.

299. The list of emails between 3098 and 3100 shows that between 11am and 4pm, the Claimant sent one email each to Carruthers, Turner and Manager FOUR. Other than that, as far as the list shows, the remaining emails were all either to the SPOC or her union rep or from her work email to her personal email other than:

299.1 13.01.17 – the email to Manager FOUR mentioned above

299.2 A small number sent to account(s) in the name of …

It is hypothetically possible that emails in the list were sent to more than one person, since the printed list in the bundle only appears to show one recipient even where there is more than one (as a comparison with page 2933 demonstrates). However, evidence of the Claimant contacting Manager FOUR <u>from</u> <u>her work email account</u> other than on 13 January was not provided to the panel.

300. On 15 February at 15:03 (3113-4), the SPOC forwarded to the Claimant a letter (3103) from Manager FOUR and a covering email from him and a copy of the "Acceptable Use of Information and Information Systems" policy, and a copy of pp 3098 to 3100 of the bundle (with filename "Table Style.pdf"). Since the Claimant was supplied with a pdf version of the latter document, it follows that she would not have been able to adjust column widths (eg to attempt to see if more than one recipient was mentioned for any given email) even if that had been something which the original document allowed.

301. The letter was headed "Investigatory Interview —Alleged Misconduct" and said the Claimant was required to attend a disciplinary interview to consider breaches of the "Information Security Policy". The letter stated that dismissal was one possible outcome. The covering email stated:

Dear XYZ,

In an email of 13 February 2017, you asked that we verify your breach of the terms of your suspension with regard to email usage. At that time, we were aware of a small number of emails that had not been limited to either your union representative, Mr Richard Heslop or your point of contact Mrs Kerry Clark, via your company mobile device. in requesting this information, we discovered further breaches of company policy, that now necessitates an investigation into misconduct. I have attached the letter which outlines this.

The investigation interview will be arranged once we are in receipt of the independent medical report. Please ensure that you comply with Network Rail's IT policies and the conditions of your suspension.

Kind regards,

302. In other words, if, and to the extent that, the allegation was of sending emails from her work account to her personal account, then that was not expressly stated, and nor were any specific emails on the list specified. No details of specific emails from the Claimant's personal address (eg the one at 8 February 2017, 14:50, sent to Manager FOUR as well as SPOC – see 3158) were given.

303. The letter stated that the Claimant could supply documents to Manager FOUR if she wished to do so, it did not say that she was obliged to. The letter also stated that if she did not have access to documents that she wished to refer to, she could supply details of the documents so that they could be obtained.

304. In due course, around the end of February, an attempt was made to produce a more focussed list of emails sent by the Claimant (excluding, for example, those to her union representative). On 10 March, the audit department provided what they could, but were hampered by the recent IT issues.

<u>F52 17.02.17: The Respondent failed to respond to the Claimant's emailed request with suggestions of reasonable adjustments (Mr Walter Brady, Ms Lisa Belsham, Ms Tracy Pugh, Ms Paula Armstrong, Mr. Manager FOUR);</u>

305. XYZ 1 includes "17-Feb-17 Claimant emails Respondent some suggestions for reasonable adjustments."

306. At 17:37 and 17:53 on Friday 17 September, the Claimant emailed the SPOC. Each email included a link to documents available on the internet.

306.1 In the first email, the Claimant commented on the effects of suspension on her and stated: "Please also let me have the responses from Manager FOUR and Ian that are awaited this week (both had confirmed in black and white that they would address any queries or issues for me)."

306.2 In the second, she said: "And this one... being suspended does not mean I suddenly stop needing adjustments!"

307. We were not taken to emails sent directly in response to either of those. At the time, Ms Belsham was awaiting on the OH advice (and comments from the

Claimant's own clinicians) in order to make decisions about how to progress matters. That was her reason for not directly replying to these particular emails when they were sent to her by the SPOC on Monday 20 February. As mentioned above, responses had been sent on 14 and 15 February to earlier emails about adjustments, and the Respondent had informed the Claimant that it was obtaining medical advice.

308. On Tuesday 21 February 2017 (3129), the Claimant wrote to Manager FOUR (directly, not via SPOC) stating, amongst other things:

> I just wanted to write to say thank you, for today but more importantly for having always behaved fairly towards me and with kindness and sensitivity. …
>
> …
>
> I know I'm not supposed to contact you except via [SPOC] … however, in case I don't get the chance to say this in person {i know I'm to be dismissed as soon as occ health give the OK - so adding to the rap sheet hardly makes a difference now) thank you - and please know how much I mean it -for your support. You're a good person and I hope you continue to flourish at Network Rail: the Company and its people can only benefit from managers like you.

<u>F53 24.02.17: The Respondent failed to respond to a further request from the Claimant for copies of its policies (Mr Walter Brady, Ms Lisa Belsham, Ms Tracy Pugh, Ms Paula Armstrong, Mr. Manager FOUR);</u>

309. On 27 February 2017, the Claimant was handed printed copies of various policies. She emailed the SPOC to say that she had requested some that were not included in the pack and the SPOC asked her to be specific. By email on 1 March 2017, the Claimant sent a list of around 40 policies [itemised (a) to (an)] which she said were missing from the terms of her initial request which had been:

> 1. up-to-date copies of all the policies referenced in my grievances, including the appeal and most recent document sent to Manager FOUR
>
> 2. Network Rail to indicate for each item whether it is contractual or non-contractual.

310. The SPOC replied on 2 March 2017 to state that numerous items from the list did not exist and that, for those that did exist and were on the intranet, the Claimant could access and print them the following day. (3 March being the Claimant's visit to the Respondent's premises mentioned above).

311. The Claimant replied the same day stating, amongst other things, that the Respondent should supply specific information about which extracts from policies were relevant to the disciplinary investigations. The SPOC forwarded the email to Ms Belsham on Friday 3 March. No response was sent prior to the Claimant's resignation the following day.

<u>F54 04.03.17: The Claimant resigned with immediate effect claiming repudiatory breaches of contract;</u>

312. The Claimant agreed with a new employer that she would start work on Monday 6 March 2017.

313. She applied for the job before Xmas 2016 and went through the selection process no later than January 2017.

314. The conditional offer letter was dated 1 February 2017 and emailed to the Claimant on 2 February with a request that she sign to accept. The salary offer was £55,000 which was a significant increase on the Claimant's existing salary with the Respondent. However, the work location was London, rather than Milton Keynes, and so the travel time was significantly longer. The Claimant was sent a draft contract and queried/negotiated some of the terms.

315. The Claimant states that she is unable to recall when she agreed the specific start date with the new employer or when it was confirmed by the new employer that the offer was no longer conditional. She is unable to recall which aspects of the communications were conducted orally and which were in writing, and unable to recall whether she still has access to copies of written communications (if any) on these issues.

316. We reject the Claimant's suggestion in her oral evidence that she did not make a decision to leave the Respondent until Saturday 4 March 2017, and that she had not made up her mind to start with the new employer on the Monday until then. Our finding is that by the date she agreed with her new employer that she would start work with them on Monday 6 March, she had no intention of reneging on that agreement and had already made up her mind to inform the Respondent that her employment contract with them was being terminated by her. She had also made up her mind by then that (a) she would not inform the Respondent until as late as possible and that (b) the stated termination reason would be alleged constructive dismissal. Amongst other things, the Claimant wished to visit the Respondent's premises and to print off various documents before informing the Respondent that she was leaving.

317. As noted on page 4083, the Claimant informed her medical advisers on 27 January 2017 that she had decided to accept the new job (she was awaiting formal offer at the time) and we are satisfied that she had already decided to leave the Respondent by that point. On 10 February (4085), she had already decided that she was going to leave the Respondent without giving notice. Her start date was not yet decided. At the following appointment, on Thursday 2 March 2017, she was already aware of her start date, which was the following Monday, 6 March, and was still intending to leave the Respondent without giving notice.

318. On 21 February 2017, at the Claimant's request, Manager FOUR made arrangements to meet with her in the office so she could come in and collect some belongings from her locker. Our finding is that before this date, the Claimant had already decided that she was leaving the Respondent's employment and moving to the new employer. In other words, the conditional offer had become unconditional by this date. On 3 March 2017, she handed her pass and other equipment to Ms Belsham.

319. The Claimant's email at 17:35 on Saturday 4 March 2017, to the CEO (the "Mark" mentioned in the greeting) and others stated:

> Mark et al
>
> **By email only to expedite delivery**
>
> I write to you to resign from my position as Senior Analyst with immediate effect.
>
> Network Rail has failed to resolve my concerns over safety and discrimination; I have spent more than two years trying to aid improvement in these areas without success.
>
> - My original grievance is on hold indefinitely (Appeal paper dated 16 September 2016 attached);
> - Issues arising have not been dealt with adequately or at all;
> - I believe that the Company would dismiss me.
>
> I am gutted to be forced out in this way. As an ex molecular biologist I've loved the complexity and challenge afforded by different roles over the years. I'll miss the sense of purpose that working for the railway and its people used to bring me. I'm more worried than ever about the risk that still exists for my colleagues, especially within ….
>
> I feel that my position has become untenable. I will not create an exhaustive list of reasons here; however, please consider the following:
>
> Wasted cost to the taxpayer
>
> I guesstimate that for my situation the business has probably incurred pecuniary costs running to six figures (staff, overheads, solicitors' fees, etc.) as well as significant loss of productive time and associated value-add. Based on time and labour rates the public purse could now be losing out to the tune of £1,500 per week in time alone.
>
> I struggle very much with this idea. You might argue that these expenses fall under business as usual; however, I'm convinced they were avoidable.
>
> - According to the World Health Organisation in 2015 the proportion of the European population with depression was 12 per cent; the equivalent figure for anxiety was 14;
> - According to the Health and Safety Executive / Validium "Work-related stress alone accounts for 35% of all work-related ill health and 43% of all days lost due to sickness";
> - According to Network Rail's own 'Supporting attendance at work' document we saw £4.5m in costs associated with mental health absence (though it is not clear what time-frame was covered).

Disingenuous culture

You may have noticed that my story about anxiety featured on Connect last October for World Mental Health Day.

- Opening up about this disability put me outside my comfort zone but I did it anyway because hoped to encourage and enable others to access support;

- i was glad of the care and sensitivity shown by Internal Communications and Diversity and Inclusion personnel, not to mention my boss, Manager FOUR;

- By contrast, the approach taken by Human Resources - to chastise me via email and veto publication on Safety Central -served only to highlight some of the very concerns I'd asked Network Rail to resolve.

I hope no one else ever has to go through an experience like mine. I've observed far too much lip service and nowhere near enough integrity or moral accountability: Please do more to implement safety, equality, inclusion and ethics policies (business improvement will surely follow).

320. Our finding is that the communication was read by the Respondent that same day, 4 March 2017. Its opening sentence unambiguously communicated that the Claimant was terminating the contract of employment with immediate effect from the same day, 4 March.

F55 28.03.17: The date relied upon by the Respondent as the effective date of termination, on which they treated the Claimant as having resigned;

321. On 7 March Manager FOUR, following advice from Ms Belsham, wrote a letter which was posted to the Claimant that day. It was sent by email via the SPOC on 10 March. The letter stated that the Respondent did not “accept” the Claimant’s “resignation with immediate effect”. It said that she was required to give two months’ notice. The letter contained an implicit offer that if she retracted the resignation then the Respondent would accept the retraction. It stated that whether she resigned or not, the Respondent was willing to continue to deal with grievances and disciplinaries, whether during the notice period (if the Claimant worked her notice) or, in any event, if she retracted.

322. The Claimant replied to the 7 March letter and 10 March email by writing to the SPOC with the heading “cease and desist” and stating any correspondence should only be from the Respondent’s lawyers or Manager FOUR (and, in the latter case, not via any intermediary). The reply made clear that as far as the Claimant was concerned, the contract had been terminated.

323. Manager FOUR wrote on 16 March stating that the Claimant was still on payroll, asking for confirmation she had not started in any new job, and asking to meet to discuss OH and the progression of the grievances. The Claimant did not reply. (The letter asked for the response to be to the SPOC.)

324. As well as posting, Manager FOUR sent the 16 March letter by email to the Claimant's work account on 22 March and personal account on 27 March. Manager FOUR was aware that the posted versions of the letters had not been collected by the Claimant.

325. On 28 March 2017, on behalf of the Respondent, Manager FOUR wrote to say that given the contents of the previous letters and the lack of response (apart from the email of 10 March), the Respondent was treating the Claimant as having resigned with effect from 28 March and that pay would cease.

F56 As at termination, the Claimant's grievances (including those begun December 2015 and July 2016) were unresolved;

326. The December 2015 grievance was paused in January 2016 and not resumed. The draft grievance sent to Manager TWO in May 2016, the final version of which was sent to Ms Clarke in July 2016, had the outcome delivered to the Claimant in August 2016. No outcome on her appeal had been given to her by the termination date.

327. Subject to those clarifications, it is correct that the grievances commenced by the Claimant had not had outcome letters by the termination date.

F57 As at termination, the Claimant's disciplinary process (begun August 2016) was unresolved;

328. This is factually accurate. The events which followed the commencement of that disciplinary are discussed above. The hearing before Mr Turner had not taken place by the termination date.

F58 As at termination, the Claimant had been suspended and had remained suspended without any or any regular review since 14.11.16

329. No formally documented reviews of the suspension took place. As of 4 March 2017, the suspension had not ended.

330. During the suspension, Ms Belsham sought to contact the Claimant's treating clinician, AW. On around 16 January 2017, AW sent a message to the Claimant stating:

> HI XYZ, I was contacted by Lisa Belsham today is that the right name? Anyway we had a long conversation the upshot was my recommendation would be that an independent psychiatrist does a report for you and the company as that would rule out any bias perceived by the company and would not put our relationship under pressure. I said to her what your diagnoses were and that I felt it would be better for your depression to have lifted before the disciplinary hearing. She said that you had also raised 4 internal investigations which were continuing. The letters regarding diagnosis etc apparently would have to be copied to all the different individuals involved in the various investigations and occ health. She said that the way the company works does not allow employees to just be sacked. I think as far as another job is concerned you would have to think very carefully about whether you would be up to managing it and what you would do about the network rail situation.

331. During the suspension, Ms Belsham, on behalf of the Respondent continued to seek medical advice about adjustments for the Claimant. The Respondent's position was that it had agreed with the Claimant and her union rep on 14 November 2016 (which was the suspension date and while the Claimant was off sick) that the grievances and disciplinaries would be on hold for at least the duration of the current fit note, and reviewed pending medical advice if the absence continued. When the Claimant notified the Respondent that she thought this was a unilateral decision, the offer was made to hold a meeting for the August 2016 disciplinary on 20 January 2017.

332. The Respondent's attempts to obtain medical advice continued. The Claimant's GP did not reply to the requests sent to them.

333. On 6 February 2017, Ms Belsham wrote to the Claimant via the SPOC stating:

> Please find attached letter and conditions with regard to an independent medical assessment. Full details are contained in the letter. I have also sent via recorded delivery to assist should you not have access to a printer.

334. The Claimant forwarded that to AW on 21 February 2017, who replied to the Claimant on 23 February 2017, and stated:

> Dear XYZ, I don't have Lisa's e mail. I have seen you on a number of occasions which resulted in an initial first contact assessment and follow up GP letters. This is different to a psychiatric assessment based on all of our contacts. At the moment your consent covers an assessment carried out by me I imagine based on all of our contacts I don't think it covers me releasing a whole lot of GP letters to Validium. Do you have Lisa's e mail so I can communicate with her or can you forward this e mail to her.

335. The reason that the suspension continued, notwithstanding (for example) the Claimant's emails of 17 February 2017, was that Ms Belsham did not believe and did not advise managers that there had been a relevant change of circumstances. Her opinion had been, and remained, that medical advice was needed about the subjects raised by the Claimant, especially the topic of potential reasonable adjustments.

336. Our inference from the lack of reply from the GP, and the contents of AW's communications with the Claimant, that the clinicians did not believe that they had sufficiently clear express consent from the Claimant to answer the specific questions posed by the Respondent.

337. The Respondent sent many emails to the Claimant via the SPOC during the suspension which made clear that it wanted medical advice and was seeking to obtain it.

338. That concludes our findings re F1 to F58. Our findings of fact in relation to the alleged PCPs are as follows.

'PCP.A' [from September 2014 onward throughout the Claimant's time working in the IAP team]: requiring the Programme Team (of which the Claimant was a member) to

work significantly longer hours than contractually agreed (approximately 65-70 per week)

339. The Respondent was aware between September 2014 and until April 2015, that workloads were high on Manager ONE's team and that great demands were put on the team. As mentioned above, we do not find that the Claimant hours were as high as 65-70. Manager ONE sought to inform the Claimant that she, the Claimant should reduce her hours. From April 2015 onwards, the situation improved.

'PCP.B' [from September 2014 onward – throughout the Claimant's time working in the IAP team]: putting excessive pressure on the Programme Team to complete projects with irreconcilable goals, an example of which was the requirement to provide an 'Olympics Timetable' while at the same time delivering a cash saving

340. We are not satisfied that the Claimant was given irreconcilable goals or that she had to provide an "Olympics Timetable". Further, we are not satisfied that she had to provide something similar to an "Olympics Timetable" while delivering a cash saving.

341. The Claimant is a highly motivated worker and she put pressure on herself to perform. She sought to get the best appraisal rating she could and she aimed to advance to Band 2. She was not put under excessive pressure by Manager ONE or by the Respondent to complete projects.

'PCP.C' [from September 2014 onward – throughout the Claimant's employment]: evaluating the performance of employees without reference to objectively ascertainable and measurable objectives or criteria, but instead by using subjective descriptors such as 'good'

342. Employees were able to, and were expected to, draw up their own draft objectives for discussion. Once agreed, the final version would be signed off by employee and line manager.

343. The Respondent's aim was to use the SMART system. Manager ONE supplied information to the Claimant about the process. The Respondent arranged for Manager ONE and the Claimant to have the assistance of and HR employee when they met to seek to agree/finalise the objectives.

344. Manager ONE sought to make clear to the Claimant that it was not possible to come up with wording that would mean that there was some scientific process which would determine, at the end of the year, whether the Claimant's rating would be "good" as opposed to "outstanding" or "exceeded". Manager ONE genuinely believed, and made a genuine attempt to convince the Claimant, that the evaluation exercise at the end of the year, of performance measured against the objectives, would take into account how the Claimant had organised the projects through the year, including how the Claimant had dealt with particular challenges as they arose, and that it was impossible for Manager ONE to know in advance what challenges might arise and – therefore – to specify what actions by the Claimant in response might be deemed "outstanding" or "exceeded".

345. To the extent that the allegation is that there would be some degree of subjectivity at the end of the year as to whether the final decision would be (say) "good" as

opposed to “outstanding” or “exceeded”, then it is true that this was the system which operated.

346. If it is implied that the Respondent did not allow the employee to have input into both (a) drafting the objectives and (b) deciding upon the correct evaluation after year end, then that is not factually accurate. The Respondent’s policies were that employees would have input into the decision-making and would have a written record of their line-manager’s justification for an appraisal grading.

347. ‘PCP.D’ [throughout the grievance processes from 16.5.16 until 4.3.17]: not changing persons to whom an employee is subordinate, or who make material decisions affecting that employee’s employment when the employee brings a grievance against them

348. Manager TWO’s position as the Claimant’s line manager was changed when the Respondent decided that the May 2016 (draft) grievance would be dealt with formally. The Respondent did not have an unvarying practice that it was not willing to change a line manager. It assessed matters on a case by case basis.

349. The Respondent did not think that Manager THREE should be removed from the Claimant’s line management, and therefore made no decision that he should be removed.

350. There were other changes in line management in the period. The Claimant moved into Manager FOUR’s team (from the Managers TWO & THREE team) in September 2016 as a result of her successful application to be appointed to his team. The Respondent did not think that Manager FOUR should be removed from the Claimant’s line management, and therefore made no decision that he should be removed.

351. The HR advisers were those who supported whichever area of the business that the Claimant was working in at the time.

‘PCP.E’ ["from September 2014" and, on 26 August 2015, 14 December 2015, 12 February 2016, March 2016, 7 May 2016 and between 10 May and 4 June 2016]: taking each medical and/or HR issue raised by an employee as an individual matter, instead of considering it within the context of all other issues raised by that employee during the course of their employment; by the same token, not providing medical assessors with the full history of known medical issues raised during employment

352. The Respondent did not impose any requirement that its medical advisers be limited in the information that they could access. The referral forms required the manager to supply certain information, including – importantly – an outline of why advice was being requested.

353. It was obvious to all concerned (the referring manager, the employee being referred and the OH practitioner) that the referral form itself only contained limited information (and all concerned could read the form to see that information).

354. To the extent that any employee wanted the OH practitioner to have more information, then the Respondent did not prevent the employee either: (a) asking the referring manager to include additional information on the referral form; and or

(b) supplying additional information directly to OH; and/or (c) suggesting to either the referring manager or OH or both that contact be made with someone else. In the latter case, such a course of action would be ineffective without the employee giving consent to release the information, but that is because of professional ethics and data protection requirements, not because the Respondent imposed a limit on what information could be supplied to OH.

'PCP.F' [25.11.15; 15.12.15; April 2016; 22.9.16;]: not taking into account any or any suitable medical assessment or knowledge of an employee's medical circumstances when making management decisions that affect that employee, by consequence of PCP.E or otherwise

355. The Respondent did not have a requirement or practice that it was unwilling to take account of medical advice. Our finding is that the Respondent was, in principle, ready and willing to act in accordance with medical advice received about its employees when taking management decisions, including disciplinary decisions.

356. For example, in the Claimant's case, it was willing to defer the disciplinary hearing pending medical advice.

'PCP.G' [grievance process from 16.5.16 onward; disciplinary process suspension 12.8.15-16.9.15; disciplinary interview 27.9.16; notification of disciplinary hearing 9.11.16]: applying or attempting to apply its grievance and disciplinary procedures, including whistleblowing policy, without modification for the individual characteristics of the employee involved, by consequence of PCP.E or otherwise

357. The Claimant's argument for asserting that this PCP exists is that she alleges that it is what happened to her. Ie that there was an attempt to apply grievance and disciplinary procedures (and other procedures) without modification for the individual circumstances.

358. However, our finding is that that is not what happened. The Respondent was willing to take account of the Claimant's individual circumstances. It put the disciplinary on hold, offered to take it off hold, and sought specific medical advice about how to proceed.

359. In relation to its whistleblowing policy, the Claimant was put in touch with Mr Bowsher, Diversity and Inclusion Manager. This was voluntary (that is the Claimant did not have to agree). The Respondent did not have a rigid practice that – for example – contact with its Speak Out line would always follow a predetermined path.

'PCP.H' [facts F27-F52 above]: failing to follow its own internal policies and procedures as set out in the documents available to the Respondent's employees

360. We have addressed each of F27 to F52.

361. We are not satisfied that the Respondent had a general practice of either deliberately or accidentally failing to follow its own policies.

362. That concludes our findings re the PCPS. Our findings of fact in relation to some other relevant matters not covered above are as follows.

Additional Findings of Fact

363. In seeking to recruit an JOB TWO, Manager TWO had no set starting salary in mind. On 29 July 2015, he was advised that he had a discretion as to starting salary provided the offer was in the range £42,000 to £47,250, and to set a starting salary to be reviewed after 3 or 6 months, rather than wait until the usual annual salary review. (862). [Mr Nikolaidis was being paid above that range because he had joined the team from a post at which he was already paid above it.]

364. On 4 August 2015 (860), Manager TWO decided to offer the Claimant a salary of £43,568 as being 2% above her existing salary (of £42,714). He took into account that she had not been long in a Band 3 role and that she would need to gain skills and experience on his team. He was potentially willing to review it after 3 months, once he saw how the Claimant was progressing and once he knew if she had obtained the MSP qualification.

365. The advice re salary came to Manager TWO from the resourcing team, and they also handled negotiations with the Claimant on behalf of the Respondent. In September 2015, in response to the Claimant's counter offer seeking around £45,000, Manager TWO agreed to the Respondent offering £44,200 which she accepted, and she started work on those terms. The Claimant did not have to meet any condition or achieve any objective (within any time limit or at all) to be paid £44,200. The willingness to review after 3 months remained. However, there was no promise that the Claimant's salary would be increased after 3 months (by any agreed amount, or at all). Commencing MSP training was something which Manager TWO envisaged that the Claimant might well be able to achieve within the first 3 months, and good progress to obtaining the qualification was something which Manager TWO would have been likely to take into account when deciding whether to increase the Claimant's salary. However, there was no guarantee that if she obtained the qualification she could get a salary increase and no condition that she could not get a salary increase if she did not obtain it.

366. Manager TWO did not make a decision to increase the Claimant's salary after 3 months. He did not reach a decision that the £44,200 had been too low and that she should get an extra increase ahead of the annual review.

The Law

Non-attendance of witness

367. In appropriate circumstances, a tribunal can (but is not obliged to) draw adverse inferences from the absence of a witness that a party has failed to call. It would not be appropriate to draw adverse inferences if there was a reasonable explanation for the witness's non-availability. The mere fact alone that a witness had knowledge of a particular issue that the party's other witnesses lacked would not be sufficient for an adverse inference to be drawn. The tribunal would have to be satisfied that there was an important and relevant matter, and that it ought to have been obvious to the party that the witness could have given evidence about that matter, before deciding if an inference should be drawn.

Disability

368. Section 6 of the Equality Act 2010 ("EQA") provides the definition of disability.

A person (P) has a disability if—

P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

369. A reference to a disabled person is a reference to a person who has a disability.

370. Schedule 1 contains various supplementary provisions. Paragraphs 2(1) and 2(2) of the Schedule provide:

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

371. Sub paragraphs 5(1) and 5(2) provide:

> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

372. So, in summary, the tribunal must consider is whether the person has a physical or mental impairment; whether the impairment affects the person's ability to carry out normal day to day activities, whether the effects on such activities are substantial (which means more than trivial) and the effects must be long-term. The third and fourth matters, long-term and substantial, can be analysed separately but also they go hand in hand with each other. The substantial effects must also be long-term.

373. In Walker v SITA Information Networking Computing Ltd [2013] 2 WLUK 272. the Employment Appeal Tribunal noted that when considering whether an individual is disabled, the tribunal must concentrate on the question of whether she has a physical or mental impairment. The cause of the impairment (or the apparent absence of a cause) is not of zero significance, but the significance is evidential rather than legal. In other words, a cause identified by a medical expert might corroborate that the evidence that impairment actually exists. Or the lack of a proven cause might lead the tribunal to conclude that the claimant does not genuinely suffer from the alleged impairment. However, provided the tribunal is satisfied that the symptoms are genuine, then lack of a specific diagnosis of the cause does not mean that the claimant cannot have an impairment.

374. Day to day activities are things that people do on a regular or daily basis. Examples include shopping, reading, writing, having a conversation, using a phone, using the internet, watching TV, getting washed, getting dressed, preparing food, eating food, carrying out household tasks, walking, travelling by various modes of transport and talking part in social activities. Activities which are not performed by the majority of the population can still be day to day activities and activities. Some activities which are usually only performed in connection with work (such as – say - attending job interviews or maintaining shift pattern, those kinds of things) might potentially be considered day to day activities. If the activities are highly specialised or they involve high levels of attainment, then that might mean that they are not normal day to day activities. It is a matter for the tribunal to decide.

375. The issue of whether the claimant meets the definition is to be decided as of the date of the alleged contravention of the Equality Act. This is particularly important when considering the part of the definition that refers to long-term. If, by the time of the alleged contravention the impairment already had a substantial adverse effect on the ability to carry out normal day to day activities for at least 12 months then it is unnecessary to consider the alternative parts of the definition of long-term. However, if that is not the case it is necessary for the tribunal to analyse the situation as of the date of the alleged contravention and ask itself whether as of that particular date the effects were likely to last for 12 months in total (or until death, if sooner). The tribunal has to avoid hindsight. Having said that, the fact that there might not have been - by the date of the contravention - a diagnosis from the doctor does not in itself prevent the tribunal deciding that it was likely - as of the date of the contravention – that the adverse effects were likely to last for 12 months.

376. The employer's knowledge or opinion is not relevant to this part of the analysis. The fact that, as of a particular date, the employer did not know the impairment (existed or) was likely to last for 12 months does not prevent the tribunal deciding that, as of that date, the Claimant had met the definition in section 6.

Time Limits

377. Time limits applying to an Equality Act complaint are to be found in section 123 of the Equality Act. Section 123 of EA 2010 states (in part):

> (1) Subject to sections 140A and 140B 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) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

378. As per 123(1), the time limit is extended by early conciliation. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

379. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The facts that might potentially be helpful to the exercise of wide discretion include the length of and the reasons for the delay on the part of the claimant, the extent to which because of the delay, the evidence is likely to be less cogent than if it had been brought within time and whether any conduct of the respondent after the cause of action arose is relevant including the way in which the respondent has dealt with requests for information or documents. If the claimant has a good reason for the delay, then that is something that can be taken into account. The absence of a good reason for the delay (while relevant) does not mean that time cannot be extended in an appropriate case. Time limits are there for a reason, and the onus is on the Claimant to persuade the tribunal to extend time; however, that does not mean that time can only be extended if there are exceptional circumstances. The tribunal should take into account all relevant circumstances (and ignore all irrelevant circumstances) and weigh up the prejudice caused to the Claimant by refusing the extension against the prejudice caused to the Respondent by extending time. There is always at least some prejudice to a claimant of refusing an extension (because there will not be an adjudication on the substantive merits) and at least some prejudice to the Respondent (because it will not have the benefit of a dismissal of the complaint on procedural grounds), but there might be additional prejudice

Burden of Proof

380. The burden of proof for Equality Act complaints is referred to in s.136 of the Equality Act. It is applicable to all the contraventions of the Equality Act as per the allegations in this action. S.136 states in part 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.

381. In other words, it is a two-stage approach. At the first stage the tribunal considers whether the tribunal has found facts (having assessed the totality of the evidence from both sides) from which the tribunal could potentially conclude in the absence of an adequate explanation and that the contravention has occurred. At this stage it is not sufficient for the claimant to simply prove that the facts that she alleges did happen. There has to be some evidential basis from which the tribunal could reasonably infer from the facts it has found that there was a contravention of the Equality Act. However, the tribunal can look at all the relevant facts and circumstances when considering this part of the burden of proof test and it can make reasonable inferences where appropriate. If the claimant succeeds at the first stage, then that means the burden of proof shifted to the respondent and the claim has to be upheld unless the respondent proves the contravention did not occur.

Equal Pay

382. With effect from 1 October 2010 EQA is the legislation governing equal pay. Part 5 EQA - “Work” - includes sections 64 to 83 dealing with “Equality of Terms.”

383. The specific sections on enforcement in relation to equal pay claims are sections 127 to 135. In addition, section 136, re Burden of Proof, applies.

384. Section 64 states:

64 Relevant types of work

(1) Sections 66 to 70 apply where—

(a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;

(b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.

(2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.

385. EQA 2010, s 65(2) defines work as like work if: (a) the work done by claimant and comparator is the same or broadly similar; and (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

386. Section 65(3) provides that in comparing the work it is necessary to have regard to: (a) the frequency with which differences occur in practice, and (b) the nature and extent of the differences.

387. The leading authorities are Capper Pass v Lawton [1976] I.R.L.R. 366 and Waddington v Leicester Council for Voluntary Services [1977] I.R.L.R. 32. The tribunal must undertake a two-stage test:

387.1 The first stage is for the tribunal to consider whether the nature of the work is the same or broadly similar. This requires a broad, general consideration, avoiding a pedantic approach;

387.2 The second stage requires the tribunal to analyse the details of the work more closely and to determine:

387.2.1 the differences, it any, in the tasks actually performed;

387.2.2 the frequency or otherwise with which such differences occur in practice;

387.2.3 the nature and extent of any such differences.

388. In this second stage analysis, the tribunal must carefully scrutinise the whole content of the relevant jobs. The similarities, as well as the dissimilarities, are relevant and over-concentration on the latter would tend to provide a skewed understanding of the roles.

389. The tribunal needs to consider whether the different tasks really make different demands on the employees. Tasks which might be described differently on paper might, in reality, require similar effort, skill, etc.

390. At paragraph 36 of the Equality and Human Rights Commission's Code of Practice on Equal Pay, it is noted that

It is for the employer to show that there are differences of practical importance in the work actually performed. Differences such as additional duties, level of responsibility, skills, the time at which work is done, qualifications, training and physical effort could be of practical importance.

A difference in workload does not itself preclude a like work comparison, unless the increased workload represents a difference in responsibility or other difference of practical importance

391. Section 69 states in part:

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

392. If a woman has shown that she is engaged on 'like work' to that of an appropriate male comparator, then it is presumed that any difference between her salary and that of her comparator is due to the difference of sex.

393. In Glasgow City Council and ors v Marshall and ors 2000 ICR 196, in the House of Lords, Lord Nicholls stated that the material factor defence will succeed if the employer can show that the factor put forward as the reason for the pay differential at issue is:

393.1 genuine and not a sham or pretence

393.2 a material factor — i.e. is significant and relevant and caused the variation

393.3 not 'the difference of sex' — i.e. not due to sex discrimination, whether direct or indirect, and

393.4 a material difference — i.e. a significant and relevant difference between the woman's case and the man's case.

394. Provided there is no indirect discrimination, an employer who can prove a valid material factor explaining a pay differential, that does not involve treating the claimant less favourably because of her sex, defeats the equal pay claim; such a material explanation for the differential suffices and there is no need for the employer to justify its actions as being fair or reasonable etc.

395. Where there is evidence that the material factor, or anything about employer's pay practices and decision might be affected by indirect sex discrimination (eg, where statistics demonstrate a disparate adverse impact on women when compared with men), the defence will not succeed unless the employer can also convince the tribunal that its actions were 'objectively justified' as a proportionate means of achieving a legitimate aim.

Victimisation

396. The definition of victimisation is contained in s.27 of the Equality Act.

> 27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

397. So, there is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act. The alleged victimiser's improper motivation could be something that is conscious or unconscious. A person is subjected to a detriment if they are placed at a disadvantage. There is no need to prove that their treatment was less favourable that another's.

398. As per section (2)(d), an act might be a protected act where the allegation is either express or implied and there is no requirement for the claimant to have specifically mentioned phrase Equality Act or used any particular magic words such as discrimination or victimisation and so on.

399. To succeed in a claim of victimisation the claimant must show she was subjected to the detriment because she did a protected act or because the employer believed that she had done or might do a protected act.

400. Where there has been a detriment and a protected act then that is not sufficient in itself for the complaints to succeed. The tribunal must consider the reason for the claimant's treatment and decide what consciously or subconsciously motivated the respondent to subject the claimant to the detriment. That requires identification of the decision makers and consideration of the mental processes of the decision makers.

401. If the necessary link between the detriment suffered and the protected act is established the complaints of victimisation succeeds. The claim does not succeed simply by establishing but for the protected act she would not have been subjected to the detriment. The claimant does not have to persuade us that the protected act was the only reason for the detriment. If the employer has more than one reason for the detriment, then the claimant does not have to establish that the protected act was the principal reason.

402. The victimisation complaint can succeed provided protected acts have a significant influence on the decision making. For an influence to be significant it does not necessarily have to have been of huge importance. A significant influence is an influence which is more than trivial.

403. A victimisation claim might fail where the reason for the detriment was not the protected act itself but some feature of the communication which could properly be treated as separable from the protected act itself, such as the manner in which the protected act was carried out for example.

404. Section 136 applies and so the initial burden on the claimant to prove facts from which we could infer victimisation. If the claimant does do that then the burden shifts to the respondent.

<u>Section 15 Equality Act 2010</u>

405. In relation to discrimination arising from disability, s.15 Equality Act states:

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—

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

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

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

406. The elements that must be made out for the claimant to succeed in a s.15 claim are that there must be unfavourable treatment, there must be something that arises in consequence of the claimant's disability and the unfavourable treatment must be because of (that is caused by) the something that arises in consequence of the disability. The claim fails if the Respondent can show that either 15(1)(b) or 15(2) apply.

407. The word unfavourable in s.15 is not separately defined by the legislation and it is to be interpreted consistently with case law including taking account of the Equality and Human Rights Commissions Code of Practice. This section does not require the disabled person to show that his or her treatment was less favourable than that of a comparator. The fact that a particular policy has been applied to a disabled person or in circumstances in which the same policy would have been applied to a non-disabled person does not in itself mean that there has been no unfavourable treatment. In other words, a decision that adversely affects the claimant could potentially still amount to treating the claimant unfavourably even if the decision was based on a policy that applied to other people as well. However, it does not follow that there has been unfavourable treatment merely because a claimant can prove that they genuinely believe that they should have had better treatment

408. The unfavourable treatment must be because of something arising in consequence of the disability, as opposed to being because of the disability itself. The latter might be a breach of some other part of the Equality Act, but is not a breach of s.15.

409. We must consider two separate steps in relation to causation: (a) Is "something" arising in consequence of the disability. That is an objective test; (b) Was the unfavourable treatment (if any) because of that "something". That requires analysis amongst other things of the decision maker's thought processes, both conscious and sub-conscious.

410. The unfavourable treatment does not have to have been caused solely by the "something" but the "something" must be more than a trivial reason for the unfavourable treatment.

411. In relation to s15(1)(b) and proportionality, it is not necessary for the respondent to go as far as proving that the course of action it chose to follow was the only possible way of achieving its legitimate aim. However, if less discriminatory measures could have been taken to achieve the same objective, then that might imply the treatment was not proportionate. It is necessary to carry out a balancing exercise taking into account the importance to the respondent of achieving its proposed legitimate aim and taking account of the discriminatory effect of the treatment on the claimant. It is not necessary for the respondent to prove that it itself carried out the balancing exercise at the time of the unfavourable treatment; the exercise is one for the tribunal to do.

412. If a respondent employer has failed in an obligation to make a reasonable adjustment (as defined in the Equality Act 2010) which would have prevented or minimised the unfavourable treatment, then it will be difficult for the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

413. When considering what the respondent knew and/or what it could not reasonably have been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. If there are examples of unfavourable treatment at different times, it is necessary to consider the respondent's state of knowledge or constructive knowledge as of the date of each time it treated the claimant unfavourably.

Reasonable adjustments

414. In relation to failure to make reasonable adjustments s.20 and 21 of the Equality Act 2010 says in part

> 20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (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.
>
> 21 Failure to comply with duty
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a 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.
>
> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

415. Paragraph 20 of Schedule 8 states in part:

> A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know …. … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

416. The expression provision criterion or practice or PCP is not expressly defined in the legislation, but we must have regard to the guidance given by the EHRC, and its Code of Practice on Employment, to the effect that the expression should be construed widely so as to include for example any formal or informal policies, rules or practices, arrangements, criteria, etc.

417. The claimant has to clearly identify the PCP to which it is asserted that adjustments ought to have been made. We must only consider the PCPs so identified by the claimant. When considering whether there has been a breach of s.21 we must

precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the claimant in comparison to when the same PCP is applied to persons who are not disabled. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and there are facts from which it could reasonably be inferred that the duty may have been breached. If she does so, then we need to identify the step or steps, if any, which the respondent could have taken to prevent the claimant suffering the disadvantage in question (including taking account of the Claimant's suggestions of possible steps). If there appear to be such steps the burden is on the respondent to show that the disadvantage would not have been eliminated or reduced by the potential adjustments and/or that the adjustment was not a reasonable one for it to have to had to make.

418. There is no breach of s.21 if the respondent did not know and could not reasonably have been expected to know that the claimant had the disability. Furthermore, in relation to a specific disadvantage there is no breach of s.21 of the employer did not know and could not reasonably have been expected to know that the PCP would place the claimant at that disadvantage.

Direct Discrimination

419. Section 13(1) the Equality Act 2010 defines direct discrimination.

> 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.

420. In relation to direct discrimination in relation to disability, the appropriate comparator for a claimant is a person who has the same abilities as the claimant but who does not share the same disability.

421. When we consider the reason that the claimant was treated in a particular way and/or the reason for different treatment to the claimant and that of a comparator we must consider whether the treatment was because of a protected characteristic or not. That means we must analyse both the conscious and the subconscious mental processes or motivations for actions and decisions. Again, s.136 of the Equality Act regulates the burden of proof. Whether the comparator that is used, if one is used, is an actual person, or a hypothetical person, the comparator's circumstances must be the same as the claimants, other than the protected characteristic in question.

422. Section 23 EQA includes:

> 23 Comparison by reference to circumstances
>
> (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.
>
> (2) The circumstances relating to a case include a person's abilities if—
>
> (a) on a comparison for the purposes of section 13, the protected characteristic is disability;

423. In relation to comparators in relation with disability the EHRC Code gives useful guidance. Paragraphs 3.29 and 3.30 in particular, and the example which follows:

> 3.29 The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).
>
> 3.30 It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.
>
> Example:A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights.

Indirect Discrimination

424. Indirect discrimination is defined in s.19 of the Equality Act. It applies to the protected characteristic of disability:

> 19 Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

425. All four conditions in section 19(2) must be met before a successful claim for indirect discrimination can be established.

426. Section 136 applies. The matters that have to be established before the burden of proof is reversed are (a) that there was a provision, criterion or practice applied both to employees without the Claimant's disability and those with it (b) that it disadvantaged people with the disability generally, and (c) the aspect of the PCP which was a disadvantage to people with the disability generally created a particular disadvantage to the Claimant. If those facts are found, then the employer is required to justify the provision, criterion or practice, by showing the explanation for the PCP and that it is a proportionate means of achieving a legitimate aim.

427. In terms of deciding whether the Respondent has the PCP or not, the question is to be analysed by considering the PCP as alleged by the Claimant, not whether the Respondent can establish a different PCP. Allonby v Accrington and Rossendale College and ors 2001 ICR 1189, CA. There are not different tests for

whether something does/does not amount to a PCP when considering section 19(1) EQA as opposed to section 20(3).

428. When considering the disadvantage which the Claimant alleges has been caused by a PCP, it is necessary to construct a pool for comparison, which consists of those who are disadvantaged in that way by the PCP, and then consider whether more persons with the same disability as the Claimant are within the selected pool are within that pool than those without that same disability. The mere fact alone that an employee is placed at a disadvantage by a PCP (because of a disability) does not, in itself, mean that there is indirect discrimination; there has to be an ostensibly neutral PCP adversely affecting an identifiable group. However, the comparison can be a hypothetical one (for example, where there are no other actual employees with the same disability).

429. A complaint of indirect discrimination can succeed even if the Respondent was unaware that the Claimant had the disability.

Contraventions of Equality Act

430. Section 39 of the Equality Act 2010 contains the prohibitions on discrimination and victimisation by an employer. Section 39(7)(b) states:

> (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
>
> (b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

431. A constructive dismissal should be held to be discriminatory if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach.

Constructive Dismissal

432. Section 95(1) (c) of the Employment Rights Act 1996 (“ERA”) reads

> For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

433. This is colloquially referred to as constructive dismissal. In order to prove constructive dismissal, an employee must prove that:

433.1 The employer has committed a breach of contract

433.2 which is sufficiently serious,

433.3 that the employee left because of the breach (or at least in part because of the breach, it does not have to be the only reason)

433.4 the employee must prove that they have not waived the breach by affirming the contract.

434. In London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493, the Court of Appeal gave the following summary:

> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761*.
>
> 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA [1998] AC 20* , 34H–35D (Lord Nicholls) and 45C–46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".
>
> 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666* , 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).
>
> 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).
>
> 5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. The Court of Appeal quoted from para [480] of Harvey on Industrial Relations and Employment Law:
>
> > "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

435. At paragraph 15 of Omilaju, the court added that that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence and referred to Lewis v Motorworld Garages Ltd [1986] ICR 157, for the principle that:

> In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term…This is the "last straw" situation.

436. Then, at paragraph 16 of Omilaju the court added:

> Although the final straw may be relatively insignificant, it must not be utterly trivial:

437. And at 22

> Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above)..

438. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, The Court of Appeal clarified the analysis in Omilaju and added to it. The court reiterated that the "last straw doctrine" is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach. It does not, have any application to a case where the repudiation consists of a one-off serious breach of contract.

439. The Court of Appeal also made clear that – in a last straw case – the fact that the employee might have affirmed the contract after some of the earlier conduct does not mean that it is not possible for the claimant to rely on that earlier conduct as part of a cumulative breach argument. At paragraph 55, it summarised the correct approach which it had set out in more detail in the preceding paragraphs:

    (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    (2) Has he or she affirmed the contract since that act?

    (3) If not, was that act (or omission) by itself a repudiatory breach of contract?

    (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation ...)

    (5) Did the employee resign in response (or partly in response) to that breach?

440. Where the answer to question 4 is “no” (eg the act that triggered the resignation was entirely innocuous), it is necessary to consider whether any earlier breach has been affirmed. See: Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT 0108/19

441. On the facts of Chadwick v Sainsbury’s Supermarkets Ltd EAT 0052/18, the EAT overturned a tribunal’s finding that a threat of disciplinary action was entirely innocuous.

442. In relation to affirmation, it is necessary to consider all the circumstances. The time delay between the act relied on and the resignation is a significant factor, but by no means the only one. It is necessary to consider the employee’s reasons for the delay. The fact that the employee had sought clarification from the employer, or challenged the employer’s decision, or made clear that they disagreed with it

and were seeking the decision to be overturned and/or were considering resigning might all be relevant. It is also relevant to consider whether the employee was attending work and working normally during the period of the delay or whether instead they were absent for any reason, such as sickness, suspension or holiday.

Unfair Dismissal

443. In relation to unfair dismissal, section 98 of the Employment Rights Act describes the provisions on fairness including the need to consider whether there is a potentially fair reason for a dismissal and the general fairness provisions under s.98(4).

444. If the claimant is deemed to have been dismissed, then the respondent bears the burden of proving on the balance of probabilities that the dismissal reason was a fair reason. In a constructive unfair dismissal case if there is found to have been a dismissal, then the reason for the dismissal is deemed to have been the conduct by the employer which caused the employee to resign.

Protected Disclosures

445. The term "qualifying disclosure" is defined by section 43B Employment Rights Act 1996 ("ERA 1996") , which provides, in part:

> 43B.— Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (a) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> …
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> … or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

446. There must be a disclosure of information. A disclosure of information may be made as a part of making an allegation. See Kilraine v London Borough of Wandsworth [2018] ICR 1850: "In order for a communication to be a qualifying disclosure it has to have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

447. In the reasonable belief of the worker making the disclosure, the information must tend to show one of the matters set out at paras. 43B(1) (a) to (f) ERA 1996 In the reasonable belief of the worker making the disclosure, it must be made in the public interest. The worker must believe, at the time of making it, that the disclosure is made in the public interest, and that belief must be reasonable. Underhill LJ considered this latter requirement in Chesterton Global Ltd v Nurmohamed [2018] ICR 731:

447.1 The tribunal has to ask (a) whether the worker believed, at the time that they were making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable

447.2 The tribunal must not substitute its own view of whether the disclosure was in the public interest for that of the worker. The tribunal might need to form its own view on that question, as part of its thinking, but the tribunal's view is not determinative

447.3 The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. What matters is that the Claimant's (subjective) belief was (objectively) reasonable.

447.4 While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be their predominant motive in making it.

447.5 Parliament has chosen not to define the phrase "in the public interest" and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression.

448. A "protected disclosure" is a qualifying disclosure which is made by a worker in accordance with any of sections 43C to 43H.

449. Workers are protected against being subject to detriment done on the ground that they made protected disclosures by section 47B ERA.

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. …

450. "Detriment" is not specifically defined in the legislation, but should be interpreted consistently with case law relating to discrimination and claims for detriment relating to trade union activities. (For example: Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337)

451. As a result of section 48(2), if the Claimant proves on the balance of probabilities by the claimant there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment, the burden shifts to the respondent to prove that the worker was not subjected to the detriment on the ground that they had made the protected disclosure. This means that the Respondent has to show that the protected disclosure did not (or, at least, did not more than trivially) influence the employer's motivation for subjecting the employee to the detriment. Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372

452. Section 47B(2) of the ERA 1996 provides: "(2) ... This section does not apply where—(a) the worker is an employee, and (b) the detriment in question amounts to dismissal (within the meaning of Part X)."

453. Employees are protected against being dismissed for making protected disclosures by section 103A ERA 1996 :

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

454. It is for the Respondent to prove what its reason was for dismissing the employee. However, if the tribunal decides that the reason or the principal reason for the claimant's dismissal was something other than a protected disclosure then the claim for breach of s.103A fails even if the dismissal was for a reason that is different to the one put forward by the employer see for example Kuzel v Roche Products Ltd [2008] ICR 799.

455. Evidence that the employer has acted in a high handed or unreasonable or peremptory fashion or has deliberately turned a blind eye to evidence that the employee was not guilty of wrongdoing are not necessarily sufficient. Their only relevance would be if they supported an inference that the employer's purported reason was not the true reason for the dismissal (or the conduct that caused a constructive dismissal).

456. As per the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55, where the real reason for the dismissal (or the conduct that caused a constructive dismissal) is hidden from the decision maker behind an invented reason, it is the tribunal's duty to look behind the invented reason. If a senior manager wants to get rid of the employee and they trick or deceive the decision maker into making decisions that cause the constructive dismissal, then the senior manager had for wanting to get rid of the employee can potentially be attributed to the employer as the dismissal reason for s.103A purposes.

457. An employer can be acting lawfully if it subjects an employee to a detriment (or conduct which causes a constructive dismissal) solely because of the non-protected aspects of the whistleblower's conduct, including where the non-protected conduct is closely connected with the protected disclosures. Tribunals are obliged to treat such claims by employers with great caution; just because a respondent argues that (i) the non-protected aspects of the conduct can be separated from the protected disclosure and (ii) it was the non-protected conduct (only) which was the reason for the detriment, it does not follow that a tribunal is obliged to take the respondent at its word; on the contrary, it is for the employer to demonstrate both those propositions are true.

Analysis and conclusions

458. We will now give our analysis. The underlined headings below are from the List of Issues. Item 1 was time limits; we will deal with time limits as we go through rather than at the outset.

459. We were asked by the Claimant to draw adverse inferences from the fact that Tracy Pugh was not a witness for the Respondent. We do not do so. Of course, in both our fact-finding and analysis, we have borne in mind that we have not heard from Ms Pugh as a witness to provide explanations of her motivations for anything which she wrote or any advice she gave. However, we do not infer that, had she been a witness, she would have made admissions that were damaging to the Respondent, or that the Respondent was seeking to conceal some relevant evidence by omitting to call Ms Pugh. The Respondent called 9 witnesses. As both parties told us on

Day 1, it was a tight squeeze to fit all of the witness evidence into the allotted timetable. The Respondent was entitled to have the opinion that the aspects of the Respondent's decision-making which involved Ms Pugh were adequately covered by other witnesses. Proportionality is important and parties should not be unreasonably penalised for failing to call a tenth witness, especially where it was obvious to the party that doing so would potentially cause difficulties for the timetable. We accept the Respondent's counsel's submission that the Respondent had been satisfied that calling her as a further witness was not needed because the witnesses that it did call adequately addressed – in the Respondent's opinion – the points that needed to be addressed.

2. DIRECT SEX DISCRIMINATION

2.1 Did the Respondent act as follows:

2.1.1 make the Claimant a conditional salary offer?

(a) If so, did the Respondent include the same (or similar) condition(s) in an offer to Fotis Nikolaidis?

2.1.2 Was Fotis Nikolaidis given the opportunity to act into a role of line manager ([F8] below)? In light of that:

(a) Did the Respondent consider the Claimant for the same (or similar) opportunity?

(b) Alternatively, did the Respondent, having considered the Claimant, decide not to offer her the opportunity?

2.2 If so, did any of the above constitute less favourable treatment of the Claimant in relation to an appropriate male comparator whose circumstances are not otherwise materially different to the Claimant's (the Claimant relies on Fotis Nikolaidis and/or R's average offers for Band 3 roles)?

2.3 If so, was the reason for that treatment the Claimant's sex?

460. The allegation in 2.1.1 is out of time. It was not included in Claim 1 (submitted 4 October 2016) and even if it had been, time started to run no later than September 2015 when the Claimant was started in post on Manager TWO's team (following salary negotiations in July to September 2015). Thus, the claim was already out of time by 11 August 2016 when early conciliation commenced, and therefore time was not extended by that (or any other) period of early conciliation. The allegation that there was a difference in pay between the Claimant and Mr Nikolaidis was made in the Further and Better Particulars for Claim 1 submitted in July 2017 (though not in the precise terms as alleged here). Significantly, in Claim 2, the Claimant brought a claim that was in time (early conciliation being commenced less than 6 months after the end of her time in the post) alleging breach of the equality clause. The Respondent has been able to provide documents about the pay negotiations and has been able to rely on Managers TWO & THREE as witnesses. Therefore, notwithstanding the fact that the Claimant has not shown good reasons for failing to bring the complaint in time (or else, at the latest, to include it within Claim 1), we are satisfied that the Respondent has not been unduly prejudiced in its ability to defend the claim (and much of the material would have

had to be considered in any event in relation to the equal pay claim) and therefore it is just and equitable to extend time.

461. It is not correct that the Respondent made a conditional offer. The Respondent made the offer of £44200 unconditionally. Nor did it fix any specific condition on eligibility for an increase in salary.

462. Mr Nikolaidis did not have a condition placed on his starting salary in the team.

463. The Claimant has not proven any facts from which we might infer that her starting salary was less favourable treatment because of sex. The reason that she was offered £44,200 was that it was within the band for the job and was considered an appropriate and reasonable starting point. In fact, Manager TWO's opinion was that £43,568 was an appropriate and reasonable starting point, but he and Manager THREE approved the increase to £44,200 during negotiations.

464. Allegation 2.2 is out of time. It is not included in Claim 1. In any event, the email stating that Mr Nikolaidis would be day to day lead until the end of June 2016 was sent on 11 May 2016, and the Claimant read it and responded the same day. Therefore the allegation would have been out of time even if it had been included within Claim 1.

465. This is a distinct and different allegation to the complaint that the Claimant was treated less favourably than Mr Nikolaidis in relation to salary for doing the same job. The first time the allegation is set out in the litigation is in the July 2017 Further and Better Particulars (page 101 of bundle, where the allegation is incorrectly dated 12 May 2016).

466. As per our findings, Mr Nikolaidis had had more experience on the team by the time the Claimant commenced in post. He had been given more responsibilities throughout and especially from January 2016 onwards when Manager TWO was working in London on the PDSW assignment.

467. The Respondent did not consider offering these temporary extra duties to the Claimant instead of Mr Nikolaidis. On the facts as we have found them, the burden of proof has not shifted. There are no facts from which we might infer that sex played a part in Manager TWO's or Manager THREE's motivation. We are satisfied that the reason that they asked him to take on these duties was that he was believed to be the employee who was best placed to perform the duties in Manager TWO's absence, including for the reasons stated in Manager TWO's email of 12 May 2016, as quoted in the findings of fact.

468. The Claimant was not as qualified and experienced as Mr Nikolaidis.

<u>3. EQUAL PAY</u>

<u>3.1 Were the Claimant and Fotis Nikolaidis employed on work that was equal in that it was like work during the period of or at any time between September 2015 and September 2016 when they were both working in the [same] team?</u>

<u>3.2 Was the Claimant's salary less favourable than the salary of Fotis Nikolaidis?</u>

3.3 If any such term was less favourable, can the Respondent prove that the difference was due to a material factor which was not directly or indirectly discriminatory?

469. It is our decision that the Claimant and Mr Nikolaidis were each employed as JOB TWO role. The first stage of the analysis is to consider whether the roles were broadly similar. They were. The intention, at the commencement of the Claimant's appointment to Manager TWO's team in September 2015 was that the Claimant would, in due course, do the same job as Mr Nikolaidis, each of them reporting to the team manager, Manager TWO.

470. As things turned out, the Claimant did not actually perform tasks that were similar to those done by Mr Nikolaidis. In the first few months, that was because she was new to the team and because Manager TWO gave her appropriate tasks to aid development.

471. However, the Claimant was not taken on as a "trainee" or similar. She was taken on as a fully-fledged JOB TWO, albeit one who was going to gain (both parties hoped) on the job skills and experience. The duties given to her were different to those of Mr Nikolaidis because of the short time that she had been on the team, and the lack of experience, not because the Respondent (or the Claimant, or Mr Nikolaidis) believed that the work she was employed to do was different. For the purposes of considering whether the Claimant was in like work to Mr Nikolaidis, we do not think it appropriate to take into account those aspects of Manager TWO's role which he performed from January 2016 onwards.

472. Therefore, on balance, we are persuaded that differences between their work are not of practical importance in relation to the terms of their work.

473. However, the reason for the difference in pay as of September 2015 is that Mr Nikolaidis joined the team on a higher salary because he retained his salary from a previous team. This was not a reason directly or indirectly because of sex. The Claimant, in fact, was given an increase in salary on joining the team, whereas Mr Nikolaidis was not.

474. Furthermore, the reason that the difference in pay was not eliminated during the 12 months in which she remained on the team is that Mr Nikolaidis had more experience in the work and was doing additional duties (covering Manager TWO) which the Claimant was not performing. He had the MSP qualification and she did not. These are not reasons directly or indirectly because of sex.

4. DISABILITY

4.1 The Respondent concedes that at all material times the Claimant had Asperger's Syndrome amounting to a disability and that she had 'mixed anxiety and depression' amounting to a disability from September 2015 onwards.

4.2 Did the Claimant have the following conditions in the period between September 2014 and March 2017:

4.2.1 Borderline Personality Disorder;

4.2.2 Work-related stress and fatigue;

4.2.3 Anxiety disorder (from March 2015 onwards);

4.2.4 Acute stress reaction, post-traumatic stress, adjustment distress and/or other reactions to severe stress (from August 2015 onwards);

4.2.5 Persistent depressive episodes (from October 2015 onwards).

4.3 Did any such condition(s) and/or symptom(s) amount to a disability within the meaning of Section 6 of the Equality Act 2010?

4.4 In respect of all conditions and/or symptoms found to be disabilities, did the Respondent know, or could It reasonably have been expected to know, that C's condition(s) and/or symptom(s) would be likely to amount to a disability at the relevant times?

4.5 If so, from what date(s) did the Respondent know, or could the Respondent reasonably have been expected to know, that the Claimant's condition(s) and/or symptom(s) were a disability? The Respondent concedes that it knew the Claimant had a disability (namely anxiety and depression) from 7 May 2016 onwards.

4.6 Of which disabilities did the Respondent have knowledge, or could it reasonably have been expected to have knowledge at the relevant time(s)?

4.7 Accordingly, which of the disabilities alleged by the Claimant should be taken into account by the Tribunal when considering her disability discrimination claims? What symptoms of those disabilities was the Respondent aware of or should it reasonably have been expected to have been aware of?

4.8 What was the effect of such disabilities on the Claimant's day-to-day activities?

475. The Claimant has not proven that she has the condition she calls "borderline personality disorder". We note AW's report (sent to the Claimant's GP around 9 January 2017) and, what it says in the heading after diagnosis, at page 3896-3897. However, AW was not a witness. In the body of the report, it states:

> XYZ has been researching her symptoms on-line and was able to identify with the symptoms described as Emotionally Unstable Personality Disorder.

476. The paragraph immediately following that is redacted. We are not sufficiently satisfied that this was AW's own opinion rather than a self-diagnosis by the Claimant, and it is not possible to know whether the redacted paragraph expressed a more nuanced view and/or said that AW did not think she was in a position to agree or disagree with the Claimant's opinion. In any event, the basis for any such diagnosis is not referred to in the much shorter "to whom it may concern" version on 3899A. It is not mentioned in the referrals from AW (who was advising the Claimant through her employer's scheme) to NHS. Those referrals were important documents in which AW wished to ensure that the Claimant could get NHS assistance if AW's role ceased if the Claimant's employment terminated. We think it unlikely that AW would have omitted to mention "borderline personality disorder" or Emotionally Unstable Personality Disorder if, by late 2016, she had believed that she had made such a diagnosis.

477. We are not satisfied that comments in the GP fit notes are based on anything other than the contents of the 9 January 2017 report.

478. The Claimant has had Asperger's Syndrome since birth. It was diagnosed after she ceased working for the Respondent. The effects on her day to day activities include those set out in paragraphs 8 to 12 of her impact statement. Communicating and socialising can be difficult for her.

479. The Claimant has suffered various episodes of anxiety. The Claimant has had various episodes of depression. In both cases, the history of the impairment dates back to significantly before the Claimant commenced working for the Respondent. See, for example, the comments in the discharge summary from Hazel Freeman dated 3 November 2004 and, for example, the entry and discussion of medication in the GP notes of 06.08.2007. The effects were as described in paragraphs 30 to 37 of the Claimant's impact statement, subject only to the qualification that October 2014 (anxiety effects) and October 2015 (depressive episode effects) were not the first time in her life that the Claimant had suffered these effects. It is perhaps slightly artificial (and we are not saying this as a criticism of the Claimant or anyone else) to try to compartmentalise which symptoms (for example paragraph 34 of the impact statement) were specifically because of anxiety (and/or "stress") and which were specifically because of depression. However, we accept that the Claimant did have those symptoms at the times stated.

480. The Claimant has had a mental impairment which has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities since prior to September 2014. She has had a disability within the meaning of section 6 EQA since prior to September 2014.

481. The Respondent did not know, and could not reasonably have been expected to know that she fell within the definition until after Manager TWO and others saw the 7 May 2016 report from OH. That report mentioned anxiety and depression and offered the opinion that the Claimant had symptoms that were longterm and which were having a substantial adverse effect on day to day activities. It did not give detailed information about the effects, but did refer to the Claimant being treated by GP and also having commenced psychological support with Validium.

482. This report did not alert the Respondent to the fact that the Claimant had Aspergers. The Respondent did not know, and could not reasonably have been expected to know, that she had that specific condition while the Claimant was an employee of the Respondent.

483. That being said from May 2016, the Respondent was on notice that the Claimant might have stress reactions and that she might have difficulty communicating with colleagues. The Respondent did not need to specifically know whether or not the Claimant had Aspergers to know (or, alternatively, to be reasonable expected to know) that a mental impairment can have significant and far-reaching consequences on mood, ability to concentrate, ability to respond promptly and efficiently to written or oral requests.

484. We are satisfied that in the circumstances of this case, the Respondent could not reasonably have been expected to know, prior to May 2016, that the Claimant had

a longterm impairment. On the contrary, while the Claimant knew that, she withheld the information from Manager TWO and Occupational Health. In particular, in August and December 2015, she asserted to Occupational Health that she was having a reaction to Manager ONE's conduct on 10 August 2015 (re the release date to Manager TWO's team) and 12 August 2015 (suspension and commencement of disciplinary). The OH advisers were entitled to rely on the information which the Claimant gave them, and the managers were entitled to rely on the contents of the reports. The Respondent gave the Claimant the opportunity to give historic information to the Respondent and/or to OH, but she chose not to. (In particular, she asked AW to produce a 1 page "to whom it may concern" letter on 5 March 2016 and asked Validium to edit out the references to episodes at school and university from the version supplied to the Respondent). In all the circumstances, the Respondent could not reasonably have been expected to know that her impairment had commenced earlier than the date (summer 2015) which the Claimant alleged at the time, and could not reasonably have been expected to know that the impairment was likely to last for at least 12 months. We do not ignore the fact that Manager ONE's original referral was in July, arising from concerns that she had following discussions over the setting of objectives. However, that does not change the fact that when the medical evidence was obtained in August 2015 (page 911), it did not suggest that the Claimant had an impairment which commenced as early as July 2015 (albeit it did give the Claimant's version of events that, in May, she had told Manager ONE that Manager ONE's actions were causing stress).

485. The effects of the impairment on the Claimant that the Respondent was, or ought to have been aware of, from May 2016 did not include:

485.1 Taking things too literally;

485.2 Inability to understand facial expressions;

485.3 Inability to understand jokes, or vagueness

486. Furthermore, while the Respondent was aware that the Claimant had high standards of work and wanted to achieve good appraisal ratings and career advancement, the Respondent could not reasonably have been expected to know that these were because of a mental impairment which amounted to a disability.

487. From summer 2016 onwards, the Respondent was on notice that the effects of her impairment potentially included self-harm and behaviour that might be regarded by others (adopting the word used by the Claimant in her paragraph 10 of the Impact Statement) as "clingy". The fact that the Respondent (and the Claimant) did not know at the time that the Claimant has Asperger's and the fact that the Claimant now classifies (in her impact statement) the symptoms as being because of Aspergers does not mean that the Respondent could not reasonably have been expected to know that someone with anxiety or depression who self-harmed or appeared to place excessive demands on others was doing so because of a mental impairment.

6. INDIRECT DISABILITY DISCRIMINATION

6.1 Did the Respondent act, or fail to act, as alleged by the Claimant by applying any of the PCPs set out in Appendix 1?

6.2 If so, did any such act(s) or omission(s) amount to the Respondent applying a provision, criterion or practice (PCP) to the Claimant, which it applies or would also apply to employees who do not share the Claimant's disability?

6.3 If the Respondent did apply any PCPs to the Claimant, did, or would, such PCP(s) put employees who have the Claimant's alleged disability / disabilities at a disadvantage compared to employees who do not have that particular disability/disabilities (such group including disabled and non-disabled employees)?

6.4 If so, did such PCP(s) put the Claimant at that disadvantage?

6.5 If so, can the Respondent show that the PCP(s) was/were a proportionate means of achieving a legitimate aim?

1. requiring the Programme Team (of which the Claimant was a member) to work significantly longer hours than contractually agreed (approximately 65-70 per week) ('PCP.A') [from September 2014 onward throughout the Claimant's time working in the IAP team]

2. putting excessive pressure on the Programme Team to complete projects with irreconcilable goals, an example of which was the requirement to provide an 'Olympics Timetable' while at the same time delivering a cash saving ('PCP.B') [from September 2014 onward – throughout the Claimant's time working in the IAP team];

3. evaluating the performance of employees without reference to objectively ascertainable and measurable objectives or criteria, but instead by using subjective descriptors such as 'good' ('PCP.C') [from September 2014 onward – throughout the Claimant's employment];

4. not changing persons to whom an employee is subordinate, or who make material decisions affecting that employee's employment when the employee brings a grievance against them ('PCP.D') [throughout the grievance processes from 16.5.16 until 4.3.17];

5. taking each medical and/or HR issue raised by an employee as an individual matter, instead of considering it within the context of all other issues raised by that employee during the course of their employment; by the same token, not providing medical assessors with the full history of known medical issues raised during employment ('PCP.E') ["from September 2014" and, on 26 August 2015, 14 December 2015, 12 February 2016, March 2016, 7 May 2016 and between 10 May and 4 June 2016];

6. not taking into account any or any suitable medical assessment or knowledge of an employee's medical circumstances when making management decisions that affect that employee, by consequence of PCP.E or otherwise ('PCP.F') [25.11.15; 15.12.15; April 2016; 22.9.16;];

7. applying or attempting to apply its grievance and disciplinary procedures, including whistleblowing policy, without modification for the individual characteristics of the employee involved, by consequence of PCP.E or otherwise ('PCP.G') [grievance process from 16.5.16 onward; disciplinary process suspension 12.8.15-16.9.15; disciplinary interview 27.9.16; notification of disciplinary hearing 9.11.16];

8. failing to follow its own internal policies and procedures as set out in the documents available to the Respondent's employees ('PCP.H') [facts F27-F52 above].

488. In relation to PCP A and Appendix 1.1:

488.1 Our findings were that the Claimant was encouraged by Manager ONE to work shorter hours than the Claimant did, in fact, work. However, we accept that up until April 2015, the workload was such that the Respondent knew that Manager ONE and the employees on the team (both the Claimant and the others) would have to work long hours in order to attempt to manage the workload. This requirement ceased as of April 2015. After that date employees on the team (both the Claimant and the others) were able to work normal hours.

488.2 So, up to April 2015, we accept that "PCP A" was applied to others without the Claimant's disability, but not after that. Early conciliation commenced 11 August 2016, and so an indirect discrimination claim related to PCP A was already long out of time. (Indeed, even if, contrary to our findings, the PCP did not cease in April 2015, the Claimant's last day of work for Manager ONE's team was 12 August 2015, and she had formally moved to Manager TWO's team by September; in other words, it was long out of time by 11 August 2016 in any event.)

488.3 We do not extend time. The delay in bringing the claim has hampered the Respondent's ability to collate specific and detailed evidence about what hours team members worked and why. Importantly, the Claimant brought a grievance in December 2015 and "paused" it in January 2016, informing the Respondent that she acknowledged that the Respondent might treat the grievance as closed (albeit the Claimant made clear it was not resolved to her satisfaction). Taking into account that the grievance process came to an end, and that the Claimant had left Manager ONE's team in September 2015, and that Manager ONE left the Respondent's employment at the end of 2015, the balance of prejudice is against extending time from April 2015 to October 2016, and we do not do so.

489. In relation to PCP B and Appendix 1.2, the Respondent did not have such a PCP. Our findings of fact were that the Claimant was not given irreconcilable goals or put under excessive pressure. It was not proven that other people were either.

490. In relation to PCP C and Appendix 1.3,

490.1 It is correct that when assessing performance, there was subjectivity and that that was true for many employees, not just the Claimant. In particular, for

Band 3 JOB ONEs (the role the Claimant had on Manager ONE's team), the employees were not given measures of performance that could be assessed without subjectivity. They did not have measures such as (for example) "produce 10 widgets per day and we will rate you as outstanding"; "achieve sales of £1 million this year and we will rate you as exceeded", etc.

490.2 The Claimant does not allege (and in any event it is not the case) that she did not know what the job of JOB ONE entailed. Rather it is her allegation that she did not want to be rated merely "good", but wanted something higher than that.

490.3 The reason that Manager ONE did not suggest measurements for which a pass/fail could be empirically ascertained by objectively examining some data at the end of the year, was that it was impossible to create such measures which would be a meaningful measure of performance.

490.4 For the appraisal year 14/15, the Claimant knew that she had been rated as good around April/May 2015. She disagreed with the rating (believing that it should be higher), but she did not lodge any proceedings within 3 months and did not make an internal complaint that the rating was disability discrimination at the time. The Claimant has not proven that she has suffered a disadvantage because of the alleged PCP. She has not proven that the objectives, as given to her particularly disadvantaged her because of her disability. In any event, the claim for this period is out of time. It was not part of a continuing act as Manager ONE completed the assessment for 14/15 and there was then a separate year (15/16) for which different objectives were supposed to be discussed and agreed.

490.5 For the appraisal year 15/16, the PCP was not applied to the Claimant. She did not agree her objectives with Manager ONE in relation to the period April to August/September, when she moved teams. She did agree some objectives with Manager TWO around September 2015, but she was not ultimately assessed against those objectives.

490.6 The Claimant has not shown that she was subjected to a particular disadvantage (and she has not, therefore, shown that there was a group of people subject to the same disadvantage, and so the issue of assessing what proportion of the group share the Claimant's disability does not arise). The fact that her performance for 15/16 was not assessed against objectives was not because she failed to agree objectives with Manager ONE. Furthermore, the Respondent did not impose particular objectives (and measures for assessing whether those objectives were met) on the Claimant against her will in Summer 2015. Rather it entered into a dialogue with her, which did not end in a resolution because of the combination of the Claimant leaving Manager ONE's team, the circumstances in which she left, and Manager ONE leaving the Respondent.

491. In relation to alleged PCPs D (& Appendix 1.4), E (& Appendix 1.5), F (& Appendix 1.6), G (& Appendix 1.7) and H (& Appendix 1.8), we have addressed these in our findings of fact. The Respondent did not apply these alleged PCPs to its

employees; it did not apply them to employees who did not have the same disability as the Claimant.

492. For these reasons, all the indirect disability discrimination claims fail.

7. DISCRIMINATION ARISING FROM DISABILITY

7.1 Did the Respondent act or fail to act as alleged in facts F1- F58?

7.2 If so, did the Respondent subject the Claimant to unfavourable treatment?

7.3 If so, did the Respondent subject the Claimant to that unfavourable treatment because of something arising in consequence of her disability? The Claimant asserts that the "something arising" was her absence from work, and stress at work.

7.4 If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) Equality Act 2010?

493. For F1, the allegation is that the whole team were required to work long hours. We state in our findings of fact what hours the Claimant worked and that Manager ONE sought to encourage her to work fewer hours and that the situation improved. The cause of the hours of work on Manager ONE's team was not the Claimant's absence from work, and stress at work. This allegation is out of time. Our findings were that the workload was alleviated after April 2015, but, in any event, the Claimant last worked on Manager ONE's team on 12 August 2015 and formally left the team in September 2015. It is not part of a continuing act. Manager ONE left the Respondent in late 2015, after the Claimant had already joined Manager TWO's team. It is not just and equitable to extend time. The Claimant made a complaint about her time on Manager ONE's team (to Mr Sugden) in December 2015 and put it on pause in January 2016. She did not commence early conciliation until 11 August 2016. The Respondent's ability to gather evidence to defend against the claim is hindered by the time delay (including by the fact that Manager ONE had left, and did not have access to all the information that she had while she was an employee, notwithstanding the fact that she did appear as a witness). The prejudice to the Claimant is slight as the claim is a weak one.

494. For F2, we did not find the allegation that this treatment occurred to be proven on the facts. Furthermore, the allegation is out of time and, for similar reasons to those stated for F1, we do not extend time.

495. For F3:

495.1 As stated in our findings of facts, Manager ONE did give a rating of "good" for the year 14/15. There were no facts from which we might infer that the cause of the 14/15 rating was the Claimant's absence from work or stress at work. Furthermore, the allegation is out of time and, for similar reasons to those stated for F1, we do not extend time.

495.2 Objectives were not finally agreed between Manager ONE and the Claimant for 15/16, but there was no refusal by Manager ONE to reach agreement. On the contrary, she met with, and corresponded with, the Claimant at length and HR became involved. The fact that no final outcome was reached was not

unfavourable treatment by the Respondent. Rather than impose a decision, it remained willing to discuss with the Claimant.

495.3 In May 2016, Manager TWO informed the Claimant that he had received feedback from Manager ONE, and was ready to complete the performance review for 15/16, taking account of Manager ONE's comments for April to August 2015 and his own knowledge of September 2015 to March 2016, and the Claimant's input. The discussions between the Claimant and Mr Bowsher and Mr Bowsher and Manager TWO resulted in an agreement that the performance review be put on hold pending the outcome of the grievance. This was not unfavourable treatment. It was done to accommodate the Claimant's concerns and with her agreement.

495.4 The Respondent did in fact implement the 15/16 performance outcome as per the recommendation in Ms Clarke's grievance outcome report. There are no facts from which we might infer that the Claimant would have been rated "exceeded" or "outstanding" but for her absences (or stress) during April 2015 to March 2016. Ms Clarke's suggested outcome of "developing in role" was not unfavourable treatment, but a sensible and pragmatic suggestion, taking into account that both Manager ONE and Manager TWO had left the business and the Claimant had had significant absence while on Manager TWO's team and taking account that a formal assessment (whether by Manager THREE or Mr Nikolaidis) would not necessarily have led to an outcome of "good" as opposed to "partially achieved" or "substantial performance improvement required".

495.5 The 16/17 review was not done because the Claimant left before 31 March 2017.

496. Allegation F4 fails on the facts. Manager ONE did not "move" the Claimant's leaving date. She agreed with Manager TWO that the Claimant would work on Manager ONE's team until end of September and would be free to start on Manager TWO's team on 2 October 2015. At the time that the Claimant was informed of this (10 August 2015), she had not reached any agreement with Manager TWO about potential start date, and there was no formal agreement in place between the Claimant and the Respondent that she would definitely move to Manager TWO's team at all. Offers and counter-offers in relation to salary continued into September. Furthermore, the allegation is out of time. The move to Manager TWO's team was a one off act in September 2015, and not a continuing act. For similar reasons to those stated for F1, we do not extend time.

497. In relation to F5, as per our findings of fact, the course which had been provisionally booked via the training team for 7 December 2015 was cancelled for reasons unconnected with the Claimant as an individual (not her stress, absence, or anything else) prior to 25 November 2015. We were not taken to contemporaneous documents showing either (a) an actual firm booking with an external provider made by the Claimant or (b) a cancellation of such booking by Manager TWO. Rather, he corresponded with the Claimant in late November (during her sickness absence which was 23 to 30 November 2015) and recommended that she not attempt the MSP course until after Xmas. After Xmas, in January 2016, she was, in fact, offered a place on a course. Thus the allegation

that he specifically "cancelled" a course was not proven to our satisfaction, on the balance of probabilities. There is confusion about this issue due to the passage of time (for example, Manager TWO himself appears uncertain as to whether he did anything to specifically cancel a course to save money, or whether he merely advised the Claimant to defer). The alleged cancellation as drafted in F5 is a one off event, and, in any case, the effects of the cancellation (if any) by Manager TWO on 25 November did not last beyond the offer made in January 2016 of a place on the MSP course (albeit we accept that the Claimant's decision to decline that place was not unreasonable). The balance of prejudice is against extending time. By the time early conciliation commenced on 11 August 2016, the allegation was already more than 5 months out of time, Manager TWO's memory seems unclear, such contemporaneous documents that we have do not support the Claimant's allegation.

498. In relation to F6, the fact that Manager TWO did not actually obtain a specific mentor for the Claimant was not caused by her absence or her stress. The Claimant was asking for a benefit to be conferred on her (a mentor for career advancement purposes, not for health reasons or emotional support reasons) that was not usual, and there are no facts from which we might infer this benefit would have been provided but for the Claimant's absence or stress. Manager TWO did have some conversations with colleagues to try to find out if there might be someone who could undertake the role, but without success.

499. In relation to F7, the reason that the formal 121 meetings did not continue after that date was that Mr was doing the PDSW work. The cause of the cessation was not the Claimant's absence or stress. Manager TWO was still in touch with the Claimant, albeit not having formal 121s.

500. In relation to F8, the allegation is out of time. On the face of it, there is a potential connection between the Claimant's absences since joining the team, potentially causing a lack of progress and experience, and the fact that the Claimant was not considered to act up into Manager TWO's role for 11 May to end of June 2016. On the face of it, there are also other reasons, not connected to the Claimant's absence, including the fact that Mr Nikolaidis had been on the team longer than the Claimant and more prior experience in the work. By 11 May 2016, one of the reasons for formally confirming Mr Nikolaidis's position was that, de facto, he had been doing the duties since January (that is, at a time when the Claimant was much newer to the team, and at a time before the Respondent knew that the Claimant was disabled). On balance, we are satisfied that the reason for not appointing the Claimant was not caused by her absence and was that Mr Nikolaidis had significantly longer on the team, and more experience (and would have still had more experience, even if the Claimant had had no absences). It is not just and equitable to extend time taking into account the prejudice to the Respondent, albeit the claim is only one day out of time.

501. In relation to F9, we are not satisfied that the cause of the Claimant's reason for moving teams was her stress or her absence (or to get away from Manager THREE). Her reasons included that she was no longer working with Manager TWO and partly to seek career advancement. The reason that there was no investigation about the reasons for her changing teams was not the Claimant's absence or stress. The Claimant made clear at the time that she did not want her

reasons to be questioned. She did not want to tell Manager THREE whether she was moving internally leaving the Respondent. She did not want the Respondent to make further enquiries about her reasons for moving teams and made that clear.

502. In relation to F10, he gave truthful answers to the questions that he was asked. It was not unfavourable treatment for him to give those truthful answers on 9 September 2016 to Ms Armstrong. The cause of his answers was not the absence or stress; he was obliged to answer the questions truthfully.

503. In relation to F11, we refer to our findings of fact. The cause of the Claimant taking the test, and the cause of the comments afterwards, was not stress or absence.

504. In relation to F12, we refer to our findings of fact. The cause of the decision not to publish the article was not the Claimant's stress or absence.

505. In relation to F13, the cause of the Claimant being affected by the policy that her bonus would be reduced due to having exceeded 20 days absence was the fact that her sickness absence was around 54 days for the year in question. The Respondent's aim in making the bonuses pro rata was to reward employees for contributing to overall company performance and to acknowledge the contribution made, pro rate. The method adopted was proportionate. It was not only sickness absence which could mean that the bonus was not the maximum, but other non-working periods such as family leave and part-time working, as well as change of role during the year, were taken into account. The discriminatory effect was that an employee absent for a disability related reason (for longer than 20 days) might not get maximum bonus, whereas an employee who did not have a disability, and who was absent for less than 20 days might do so. However, the discriminatory effect was alleviated to some extent by the Respondent's willingness to take into account disability-related absence on a case by case basis when deciding whether to make an exception to the general rule. The policy itself, and application of the reduction to the Claimant are proportionate in the circumstances. The policy struck a balance between achieving the Respondent's legitimate aim and taking account of the fact that a rigid policy with no exceptions would affect disabled persons to a greater extent than non-disabled persons.

506. In relation to F14, the allegation fails on the facts. There was no "delay".

507. In relation to F15, we refer to our findings of fact. The cause of the fact that the Respondent did not collate information provided by the Claimant to an external organisation (Validium) was not the Claimant's stress or absence.

508. In relation to F16, we refer to our findings of fact. The cause of the contents of the BUPA report was not the Claimant's stress or absence. Manager ONE supplied the information in her possession and made clear that the OH provider would need to liaise with the Claimant to obtain relevant further information. The Claimant had the opportunity to ask for more information to be added if she wanted. The allegation is also out of time (the report being prepared almost a year before early conciliation commenced). There is no continuing act given the PH provider changed from BUPA to OH Assist around November 2015. We do not extend time as the Respondent is prejudiced by the fact that BUPA and the Claimant know what information she gave to BUPA, but the Respondent can only go by the report.

509. In relation to F17, we refer to our findings of fact. The cause of the fact that the December 2015 report did not refer to the fact that the Claimant had had impairment since prior to starting work for the Respondent was not the Claimant's stress or absence. The report was based on the information which the Claimant supplied to Ms Phillips at the time.

510. In relation to F18, the allegation is expressed somewhat vaguely. However, Manager TWO did engage in a dialogue with the Claimant about adjustments, including between 14 and 17 December 2015. Some adjustments were in place and Manager TWO was willing to make others, and to discuss with the Claimant what those should be. He did not fail to engage with the Claimant because of her absence or stress. The alleged failure to have "constructive dialogue" did not happen (in our opinion, though the expression is a vague one), and was not unfavourable treatment.

511. In relation to F19, we refer to our findings of fact. The 12.02.16 report was based on the information which the Claimant supplied to Ms Phillips at the time, and the Respondent did supply Ms Phillips (who worked for the external organisation OH Assist) with the information which the Claimant supplied to Manager TWO. There was no unfavourable treatment by the Respondent in connection with the information supplied to OH Assist. The cause of the contents (ie lack of specific comments on earlier reports or lack of comment on whether the Claimant was now believed to have a longterm condition) was not the Claimant's absence or stress. Her absence was mentioned in the report as was the fact that a referral to psychological services had been made, as was the fact that it was an interim report with a further report to follow after the Claimant's next appointment in about 6 weeks' time.

512. In relation to F20, our decision, and the reasons for it, are similar to the explanation we gave for F18. During March and April, Manager TWO continued to have a dialogue with the Claimant, meanwhile the information which Validium and AW were allowed to release to the Respondent was controlled by the Claimant. He received the Validium report on 25 April and immediately approved the CBT. They communicated in relation to the request for reasonable adjustments form. He made his further referral to OH based on the contents of the Validium and AW reports in the bundle which, due to choices made by the Claimant contained less information than Validium and AW actually had available to them; however, Manager TWO was not aware of that. He did not fail to engage with the Claimant because of her absence or stress. The alleged failure to have "constructive dialogue" did not happen (in our opinion, though the expression is a vague one), and was not unfavourable treatment. He did not appoint a buddy to provide emotional support to the Claimant because he made enquiries of HR who told him that the Respondent did not employ anyone who might be able to fulfil the role (while reminding him of the services of Validium, which operated a phone line to provide support).

513. In relation to F21, there was no unfavourable treatment by the Respondent in connection with the information provided by it to OH Assist. We cite from the report in our findings of fact. It is not clear on what basis the Claimant alleges that the contents of the report fail to adequately address what her mental health condition was. However, and in any event, even if that is hypothetically the case, the cause

was not the Claimant's absence or the Claimant's stress. Furthermore, and in any event, the Respondent had been seeking to obtain full details from the Claimant that were relevant to her mental health condition. To the extent that the Claimant means Aspergers, she did not receive that diagnosis from her own clinicians until March 2017 and there is no evidence from which we could conclude that, on the evidence before her Ms Carver ought to have been able to make the diagnosis.

514. In relation to F22, we refer to our findings of fact. The interim report was not produced until August 2016 (9 August 2016 on the front page, and 25 August 2016 on the electronic signature page). The first time that it was seen by the Respondent was approximately 11 October 2016 when released to Manager FOUR by the Claimant. The responsibility for the contents is Dr Brennan's not the Respondent's, but, in any event, the contents did not make fresh recommendations. It reminded the Respondent that the recommendation had been for a buddy (and made clear Dr Brennan knew that had not been implemented; she did not withdraw or amend the recommendation). The Respondent still did not provide the Claimant with a buddy, for the reasons supplied to her by Manager TWO in May. There was no need for the Respondent to do anything about the Claimant's line management by the time it saw the report, because Manager FOUR was managing her and she was not objecting to that. There was no need for the Respondent to recommend resumption of the sessions with Dr Brennan given that the report stated that the Claimant had not found them helpful. In any event, to the extent that there was unfavourable treatment, the cause was not the Claimant's absence or stress. The only recommendation not implemented was that no emotional support buddy was not appointed.

515. In relation to F23, see findings of fact. This was not unfavourable treatment by the Respondent and not caused by absence or stress. No report was produced because the Claimant did not consent.

516. In relation to F24, any failure to act on the report was because the Claimant specifically instructed the Respondent not to do so and to delete it. She said that it should not have been sent to Manager THREE. So the cause of the alleged lack of action was not stress or absence.

517. In relation to F25, see F39 below.

518. In relation to F26, as per findings of fact, no formal written assessment was done using the Respondent's forms. The fact that the forms were not completed prior to November 2016 was not because of the Claimant's absence or stress prior to then. See also F38.

519. In relation to F27, these are things that the Claimant did, not alleged unfavourable treatment by the Respondent.

520. In relation to F28, it is out of time and not part of a continuing act. The suspension ended in September 2015 and the Claimant was formally told by Ms Downing that there was to be no further action. The Claimant did complain in December to Mr Sugden, but ended that complaint (using the word "paused" but acknowledging that the Respondent would potentially treat as over) in January 2016. Manager

ONE left the Respondent's employment around end of 2015. It is not just and equitable to extend time for similar reasons to those given for F1.

521. In relation to F29, the cause of the Respondent's decision not to discipline Manager ONE was not the Claimant's stress or absence. It is not just and equitable to extend time for similar reasons to those given for F1.

522. In relation to F30, it was the Claimant who did this, not the Respondent. It was not unfavourable treatment by the Respondent.

523. In relation to F31, it was the Claimant who did this, not the Respondent. It was not unfavourable treatment by the Respondent.

524. In relation to F32, this was not unfavourable treatment. This was done with the Claimant's agreement and at her instigation. It was not done because of stress or absence.

525. In relation to F33, we accept that the tone of the Claimant's emails was because the effects of her disability including stress. The failure to adhere to sickness reporting procedures was not caused by the absence itself, but there is a connection to the absence. It had not been proven that the failure to keep calendar up to date, or inform team and Manager THREE of whereabouts was because of stress or absence. (We acknowledge that she was not working in the team area because the Respondent had agreed to implement a reasonable adjustment, and, but for that fact, she would have been more visible and there would have been less need to specifically advise Manager THREE of her whereabouts; however, that does not explain the lack of Outlook calendar access). It is likely that a significant cause of the Claimant's decision to contact Manager TWO on 31 July (in breach of the instructions given to her) was stress. The Respondent's legitimate aims include the need to know the whereabouts of its employees for service delivery reasons and health and safety reasons; the need to maintain polite and professional correspondence between colleagues; the obligation to its staff – eg Manager TWO – to ensure that they are not the recipient of inappropriate communications. The Respondent's decision to commence a formal disciplinary investigation was proportionate means of seeking to achieve those aims. It came after there had been previous instructions to the Claimant in relation to each of the 4 elements (tone of emails, not to contact Manager TWO, to grant access to calendars, to abide by sickness absence procedures). Since informal attempts had already been made, the choice was potentially between "sterner" informal warnings and a formal process. The discriminatory effect of starting an investigation into behaviours which are potentially caused by something related to a disability is alleviated by the process itself, which allowed the Claimant to put her side of things (including medical evidence) while being represented/accompanied. A process of a "sterner" informal warning is not necessarily less stressful for the employee.

526. In relation to F34, see findings of fact. This was not caused by the Claimant's stress or absence.

527. In relation to F35, as mentioned in the findings of fact, Ms Armstrong did offer to make reasonable adjustments. For reasons similar to those stated for F33, the

fact that the meeting took place was something that was caused by the Claimant's stress and absence and was unfavourable treatment, but holding the meeting was proportionate as it was part of the formal investigation process which had been commenced as a proportionate means of seeking to achieve the aims mentioned for F33.

528. In relation to F36, it has not been proven that it was unfavourable treatment because of the Claimant's stress and it was clearly not because of absence. The allegation is out of time, even if deemed to have been presented as part of Claim 2 (on 2 June 2017, following early conciliation starting 5 March 2017. This is a one off comment, not part of a continuing act. We do not consider there to be a connection between the comment and the fact that the Claimant did not eventually receive the written appeal outcome. It is not just and equitable to extend time. The Respondent's ability to defend itself (by seeking to explain or justify the remark or its context) is significantly hindered by Ms Carruthers' inability to recall the remark or to find her handwritten notes. The prejudice to the Respondent of extending time outweighs the prejudice to the Claimant of not doing so.

529. In relation to F37, as explained at F33 and F35, we accept that the disciplinary investigation was unfavourable treatment because of something arising from disability. The decision to recommend that it progress to a formal hearing was a proportionate means of seeking to achieve the aims mentioned for F33. The Respondent believed that there was a case to answer and its decision provided the Claimant with the opportunity to address, at a formal hearing, why there should be (in her opinion) no disciplinary sanction imposed. The Respondent made clear to the Claimant throughout the process that it was willing to make adjustments to the process, and to take account of medical evidence, both procedurally (for the purposes of agreeing adjustments to process) and substantively (for the purposes of allowing her to argue that her behaviours were the result of a disability and should not, therefore – on her case - lead to disciplinary action). The events connected with this disciplinary process (starting from the 11 August commencement, through the investigator, Ms Armstrong's involvement, including the suspension and including the invitations to formal meetings) form part of a continuing act. The allegations are not out of time as the disciplinary process had not ended by the end of the Claimant's employment. (In the alternative, we would extend time for these allegations)

530. In relation to F38, see our findings of fact. Manager FOUR made preparations and arrangements to do the risk assessment. The fact that it was not done on the intended date was - at least in part - because of the Claimant's sickness absence on 10 November 2016. However, after that date, it did not occur because she was suspended. This allegation is out of time. The Claimant never returned to work after the 14 November 2016 suspension, and there is no continuing act; there was no need to do risk assessment during the suspension. We do not extend time. However, in the alternative, we do not uphold the allegation that the failure to do risk assessments was caused by stress or absence. But for the suspension, it would have been done on her return to work after the 10 and 11 November 2016 absence and the cause of its not being done was the suspension.

531. In relation to F39, as per our findings of fact (including for F25), the letters to the Claimant about meeting Mr Turner do ask is she has specific needs. The letters

are also consistent with the OH advice that she should be notified in advance of hearing. The proposed hearing date was not unfavourable treatment in itself and, in any event, the hearing did not take place on that date (or at all). Inviting the Claimant to a formal hearing to discuss the allegations was unfavourable treatment because of something arising from disability (for the reasons mentioned at F37). The decision to hold a formal hearing was a proportionate means of seeking to achieve the aims mentioned for F33.

532. In relation to F40:

532.1 Ms Belsham's reasons for deciding to suspend are set out in our findings of fact. The main reason that Ms Belsham took the decision to recommend suspension was that she was concerned about the contents of the emails sent to Manager TWO and Manager THREE, coupled with what the Claimant said to Manager FOUR about the 9 November 2016 invitation to disciplinary hearing.

532.2 As we will discuss below, we reject the victimisation complaint.

532.3 Since the invitation to hearing was (for the reasons set out above) unfavourable treatment because of something arising from disability (albeit not a contravention of the Equality Act), our decision is that Ms Belsham's decision to suspend – partly because of the allegations raised in August themselves, and partly because of the Claimant's reaction to the 9 November letter – was caused by something arising from disability. Furthermore, the stated concern in paragraph 59 of Ms Belsham's statement (that the Claimant was forming an attachment to Manager FOUR) arises from the Claimant's stress reaction to the letter.

532.4 The decision to suspend was unfavourable treatment. We are not persuaded that it was a proportionate means of seeking to achieve a legitimate aim. She had not been suspended by Manager THREE, Armstrong or Turner. There were other options available such as putting her on paid special leave; implementing the SPOC system without suspending; giving instructions to the Claimant not to discuss the disciplinary with Manager FOUR (and giving clear instructions to her as to who she could and could not contact). In short, there were various options short of suspension that would have had a lesser discriminatory effect.

532.5 This allegation is therefore upheld in relation to the suspension.

532.6 The Claimant did have email access (via her phone) and the cutting off of IT access is not in itself wrongful in the circumstances (it being a natural consequence of the suspension, and the Claimant did not need the other IT systems given that she was suspended).

532.7 We have already said that we found that Ms Belsham did not speak to Dr Peters. The main reason for our finding of lack of proportionality is that there were alternatives to suspension that could have implemented by Belsham (with input from Manager FOUR and Turner where necessary) and without needing specific medical advice. Had the Respondent satisfied us that it did,

in fact, obtain medical advice specifically about suspension, then that would not necessarily have tipped the balance in the Respondent's favour. However, the point is academic, since we were not given satisfactory evidence that specific medical advice was obtained.

533. In relation to F41, it is true that she remained suspended. We have said above that the suspension decision forms part of a continuing act that continued until the termination of employment. However, once the decision to place her on suspension had been made, there was not a fresh act of discrimination by a failure to lift it. The 25.11.16 letter did not, in specific terms, object to the suspension or to the terms of the suspension. The Claimant submitted a fit note to 14 December and renewed after that date. She would have been absent even if not suspended. Though that does not, of course, mean that being suspended was not unfavourable treatment, the end of the suspension would have been when the disciplinary hearing took place (resulting, presumably, either in dismissal or return to work).

534. In relation to F42, we state in our findings of fact that the Claimant did not remain line managed by Manager TWO or Manager ONE respectively after she had raised grievances against them. In any event, to the extent that the named individuals did contribute to decisions about the Claimant, that state of affairs was not caused by her absence or stress.

535. In relation to F43, it is true that no mediation took place. This was not because of her absence or anxiety. Prior to May 2016, Manager TWO declined to do mediation rather than allow the Claimant to pursue grievance. In August 2016, Ms Clarke recommended mediation between the Claimant, Manager THREE and Mr Nikolaidis. She did not include Manager TWO because he had already submitted his resignation. This did not take place because, amongst other reasons, the Claimant did not want to have contact with Manager THREE and because she found a position on another team (Manager FOUR's) and wished to leave the Managers TWO & THREE-Nikolaidis team as quickly as the Respondent would permit.

536. In relation to F44, there was no unfavourable treatment by the SPOC. Each of them did what they were supposed to do in terms of forwarding items back and forth. To the extent, that requiring the Claimant to use a SPOC (and the Respondent to use a SPOC when contacting her) was unfavourable treatment (because it placed restrictions on the freedoms she would otherwise have had) it was not caused by her stress or sickness absence. It was caused by the suspension and by the Respondent's attempts to manage various processes.

537. In relation to F45, it is true in a "but for" sense that but for the Claimant's sickness absence she could have met Ms Carruthers face to face shortly after 29 November 2016. It was because of the Claimant's stress and absence that she did not have the grievance meeting or receive the grievance outcome. It was unfavourable treatment to delay the response for the length of time that it was delayed. Delaying from 29 November 2016 until the expiry of the 14 December 2016 was proportionate, as there were advantages to both parties of not seeking to hold the meeting while the Claimant was signed off, and of the Respondent obtaining medical advice rather than send a written outcome. The Claimant did make clear that she wanted an outcome (see for example her 21 November email on page

2798). The Respondent did take advice (eg Ms Belsham's discussion with AW in January 2017, which AW reported to the Claimant). The Respondent did make clear the reasons for the delay (eg email of 20 January 2017, page 2953). The Respondent did have a legitimate aim for delaying, namely to seek to minimise stress to the Claimant from the grievance appeal process. However, we are not satisfied that the delay was proportionate. The Claimant's own correspondence made clear that she wanted the outcome (eg the reply on 2952 to the Respondent's 20 January email). The Respondent could have delayed the disciplinary hearing pending the medical advice without also delaying the grievance appeal outcome. In particular, Ms Carruthers or Ms Belsham could have contacted the Claimant via the SPOC and specifically asked if she would prefer to have just a written outcome without a meeting. We are not satisfied that the outcome was ever sent (even in April 2017), but regardless of that, it was not proportionate to delay from January 2017 to end of employment. We note in particular that on 9 January, the Respondent took the Claimant's correspondence (objecting to matters being put on hold "unilaterally") as giving the go ahead to proceed with the disciplinary. That was a reasonable interpretation by the Respondent in relation to the disciplinary. It would have been proportionate to do (or attempt to do) something similar with the grievance appeal outcome. This allegation succeeds.

538. In relation to F46, offering to hold the meeting on 20 January 2017 was not done because of her absence or stress. The further material was not added "without further explanation" and was not added because of her absence or stress. We have already said why holding a disciplinary hearing was proportionate.

539. In relation to F47, the allegation is not factually accurate, for the reasons stated in the findings of fact. It was proportionate and appropriate to put the disciplinary hearing on hold and to wait for medical advice. The Respondent did not seek to prioritise the disciplinary over the grievances. We have commented above re the grievance appeal (Carruthers dealing with appeal against Clarke). For the other two grievances, they were comparatively recent and meetings with the Claimant would have been required. It was proportionate to put those on hold pending medical advice (see F56).

540. In relation to F48, this was not done because of the Claimant's absence. It is not proven to have been caused by the Claimant's stress.

541. In relation to F49 are decision is the same as for F48. It was unfavourable treatment to commence a disciplinary, but we are not satisfied that it was because of either of the alleged "somethings" arising from the Claimant's disability.

542. In relation to allegation F50, it is not factually accurate. The Respondent did give the Claimant absence. It was offered on earlier dates which were rearranged at the Claimant's request. She was offered the chance to come back and do it again, but she resigned rather than do that (handing in property to Ms Belsham, and having no intention to return, though not informing the Respondent of that). There was no unfavourable treatment and it was not caused by the Claimant's absence or stress.

543. In relation to F51, we refer to our findings of fact. The Claimant was no obliged to provide documents and told what to do if there were documents that she wished

to provide. The reasons for the attachments to the notification letter not being different were not connected to the Claimant's stress or absence.

544. In relation to F52, there were no specific responses to the exact email of 17 February 2017. Failing to respond to an email can be considered unfavourable treatment, but the lack of response to those exact emails was not because of stress or absence. The failure to respond to those exact emails is that the Respondent believed that it had already informed the Claimant that it was obtaining medical advice. The context is not that the Respondent maintained "radio silence" and that, after telling the Claimant that it was getting medical advice, refused to correspond full stop. The context is that the Respondent informed the Claimant a number of times that the grievances and disciplinary were on hold temporarily pending the medical advice and a plan for what adjustments were required. In these particular circumstances, it was not unfavourable treatment to omit to send a specific and direct response to those 2 emails (and the second was, in any event, a postscript to the first).

545. In relation to F53, the Respondent did give her copies of the policies. It gave her opportunity to print any others off on 3 March 2017. To extent that she did not obtain any then that was not caused by her stress or absence.

546. In relation to F54, we will group the alleged dismissal issues together below.

547. In relation to F55, the Respondent's offer to allow the Claimant to retract resignation was not unfavourable treatment. Even if the Respondent reminding the Claimant of her contractual obligation could be considered to be unfavourable treatment, it was not something caused by her stress or absence.

548. In relation to F56, it is factually accurate that the grievances were not resolved by the time of termination of employment. We have said already (see F45) that the failure to issue an outcome to the appeal against the Clarke outcome letter was not proportionate. The fact that the other grievances were on hold pending medical advice was proportionate. The legitimate aim was to avoid causing stress to the Claimant by having her taking part in hearings that she was not well enough to participate in. The Respondent did proactively seek the medical advice, including by liaising with AW. It was AW who decided that it would not be appropriate for her to provide advice to the Respondent, because she was concerned that the Claimant's existing consent to her for her to release information to the Respondent would not cover the particular contents of the advice she would need to give (if answering the Respondent's proposed questions) and because she did not want to damage the clinician-patient relationship with the Claimant. The Claimant was informed of this.

549. In relation to F57, it is factually accurate. We have already said that it was proportionate to seek to hold a disciplinary hearing. The reason it was delayed was that the Respondent was seeking medical advice. She was offered the opportunity to have it on 20 January. After that date was cancelled (due to rep's entirely understandable and unavoidable non-availability), the Respondent did not delay unreasonably in seeking to obtain the medical advice.

550. The two new grievances, plus the disciplinary hearing, were in a different category to the Carruthers appeal (re the Clarke outcome). Delaying the latter was not proportionate, because the Claimant's involvement was potentially passive, and the outcome had been ready since 29 November 2016. Delaying the former was proportionate, given the level of involvement in the meeting that the Claimant might need, and the potential seriousness (in the case of the disciplinary, at least) of the consequences of holding a hearing for which the Claimant was not fully prepared and fit.

551. In relation to allegation F58, in principle, the Respondent could have brought her back off suspension at some stage. Once the decision made to get medical evidence was proportionate to wait for outcome. We have already said that the decision to suspend was not proportionate. The fact that the Respondent did not document specific reviews, while the Claimant was off sick and while – as the Claimant was aware – medical advice was being sought was not unfavourable treatment caused by her stress or sickness absence.

8. DIRECT DISABILITY DISCRIMINATION

8.1 Did the Respondent act, or fail to act, as is alleged in facts F1-F58 above?

8.2 If so, did these acts and omissions or any of them amount to the Respondent treating the Claimant less favourably than it would treat someone who does not have the Claimant's disability but whose circumstances (including his/her abilities) are not materially different to those of the Claimant?

8.3 The Claimant relies upon a hypothetical comparator as described at paragraph 15 of the further and better particulars of the second claim. Is this an appropriate case for a hypothetical comparator?

8.4 If there has been less favourable treatment, has the Claimant proven facts from which the Employment Tribunal could reasonably conclude in the absence of an explanation that the Claimant had been subject to direct disability discrimination?

8.5 If so, can the Respondent show that disability was not the reason for the Claimant's treatment?

552. The comparator mentioned at 8.3 of the list of issues is:

> The Claimant alleges that an hypothetical comparator who had been unwell for a similar amount of time as a result of a physical condition which did not amount to a disability would not have been treated in the same way.

553. In relation to disability, in this case the claimant relies on mental impairments and therefore the relevant comparator would have to be somebody who did not have that condition. Thus, if we find that the reason for particular treatment of the claimant was that the claimant was absent from work, for example then the relevant comparator would have to be someone who was also absent from work for a similar amount of time but who did not have the same mental impairment.

554. It is true that it could potentially amount to direct discrimination to treat someone with a mental impairment differently to someone with a physical impairment if there was no material difference between the circumstances relating to each case.

555. The Claimant's absence levels were not the same for each of the alleged acts of direct discrimination.

556. The characteristics of the hypothetical comparator have to include, not just absence levels, but also having some impairment about which the Respondent required further advice, and also would have to be a person who had (for example) held back some information about their medical condition on the same occasions that the Claimant did and, for example, where relevant, contacted a line manager having been instructed not to do so, and so on.

557. Some of the allegations F1 to F58 make no sense as allegations of direct discrimination. For example, F3, contains no allegation that any other actual or hypothetical person was treated differently to the Claimant.

558. We have considered each of the allegations in turn. For each of them, we have not been satisfied that any facts have been proven from which we could infer that there was less favourable treatment because of the Claimant's particular disabilities. We have said in our findings of facts what the Respondent's reasons were for taking particular course of action.

559. The complaints of disability discrimination fail because we are satisfied that none of the employer's treatment of the Claimant would have been different if dealing with a relevant hypothetical comparator with a different disability.

9. REASONABLE ADJUSTMENTS

9.1 Did the Respondent apply any of PCPs set out in Appendix 1?

9.2 If so, did application of any of PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? In particular:

9.2.1 PCP.A, by reference to the PCP itself and the facts alleged at F1 & F4;

9.2.2 PCP.B, by reference to the PCP itself and the facts alleged at F2 & F4;

9.2.3 PCP.C, by reference to the PCP itself;

9.2.4 PCP.D, by reference to the PCP itself and the facts alleged at F42;

9.2.5 PCP.E, by reference to the PCP itself and the facts alleged at F15-F26;

9.2.6 PCP.F, by reference to the PCP itself and the facts alleged at F4-F7, F9-F10, F12-F14;

9.2.7 PCP.G, by reference to the PCP itself and the facts alleged at F27-F58;

9.2.8 PCP.H, by reference to the PCP itself and the facts alleged at F27-F58;

9.3 If the PCPs did cause the substantial disadvantage contended for, did the Respondent know or could it reasonably have been expected to know in each case that the PCP would be likely to place the Claimant at that disadvantage (para 20(1)(b), Sch 8 EqA)?

9.4 Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage, with reference to the non-exhaustive list of suggested reasonable adjustments provided by the Claimant in Appendix Two?

560. As per our analysis for indirect discrimination, the Respondent did not have PCPs B (& Appedix 1.2), PCPs D (& Appendix 1.4), E (& Appendix 1.5), F (& Appendix 1.6), G (& Appendix 1.7) and H (& Appendix 1.8). The Respondent did not apply these alleged PCPs to its employees.

561. In relation to PCP A (& Appendix 1.1), our decision is that it ceased applying after April 2015. However, even if did continue until when the Claimant left the team (last day in work 12 August; officially in Manager TWO's team September), then the claim for failure to make reasonable adjustments for PCP A is out of time (early conciliation commenced August of the following year). It is not just and equitable to extend time for the same reasons we set out for indirect discrimination.

562. In relation to PCP C, in Appendix 2 of the list of issues, the Claimant suggests

- Providing the Claimant with clear objectively ascertainable objectives and an explanation of the objective measures by which her performance would be judged.
- Setting SMART goals.
- Arranging regular scheduled meetings with the Claimant to discuss the said objectives and measures and her progress against them.

563. In relation to the appraisal for 14/15, it is not just and equitable to extend time. The Claimant was provided with her rating of "good" in April 2015, and knew that there would be no further adjustments/changes to her objectives for 14/15 or the method of measuring performance for that year.

564. For 15/16,

564.1 Manager ONE did attempt to provide the Claimant with examples of what objectives and measures might be suitable and she did comment on the Claimant's suggestion. To the extent that the Claimant suggests that the objective had to something as precise as (for a different employee) "do sales of £100K and your rating will be 'outstanding'", it would not have been reasonable for the Respondent to have had to set objectives of that type. It was not possible for assessment measures for the role of JOB ONE to be fixed in advance so precisely, for the reasons stated in our finding of fact.

564.2 There was no failure to be willing to set SMART goals by Manager ONE. It would not have been reasonable for Manager ONE/the Respondent to have had to imposed objectives on the Claimant which she did not agree with.

There were lengthy discussions with a view to reaching agreement, but no agreement was reached.

564.3 Manager ONE did have meetings with the Claimant about settings objectives. The meetings with Manager ONE did not continue after the Claimant moved to Manager TWO's team.

564.4 It would not have been reasonable for the Respondent to have had to ensure Manager TWO had regular meetings with the Claimant specifically about her objectives. He was away from January 2016 working on the PDSW project in London. He had regular discussions and correspondence with the Claimant in relation to work issues and health issues.

565. The Claimant was not disadvantaged, because of her disability, by the fact that the Respondent applied its performance management appraisal scheme to her. It was not applied inflexibly, and the Respondent allowed the Claimant to have input to the objective setting. The delay in the appraisal rating for 15/16 was at the Claimant's request, and not caused by her disability. When issues, the rating flexibly treated her as a new joiner to Manager TWO's team, even though she had been on it for more than 6 months, and her bonus was not adversely effect. It would not have been reasonable for the Respondent to have had to make additional adjustments to those which it did make.

10. ALL DISCRIMINATION CLAIMS (DEFENCE)

10.1 Did the Respondent take reasonable steps to prevent its employees from committing the alleged acts of discrimination and does it therefore have a defence to the Claimant's claims pursuant to s.109(4) Equality Act 2010?

566. The Respondent has not persuaded us that this this defence should apply in relation to the items for which we have found in the Claimant's favour.

567. The decisions to suspend the Claimant on 14 November 2016 and to fail to issue the grievance appeal outcome are not things which the Respondent took all reasonable steps to prevent its employees doing.

11. WHISTLEBLOWING DETRIMENT

11.1 Did the Claimant act as follows:

11.1.1 From September 2014, on the occasions set out at F27 above, spoke to, texted and emailed Manager ONE to raise concerns relating to the working environment and the unrealistic demands made on the team;

11.1.2 On 07 May 2015, advise Greg Sugden of excessive hours worked [F27];

11.1.3 On 08 May 2015, advise Manager ONE of a "requirement to work excessive hours to perform instructions" [F27];

11.1.4 In July 2015, orally at least every week and by email [823], escalate her concerns about working hours and the effect on the health and safety of employees to Manager ONE [F27];

11.1.5 Send a grievance to Greg Sugden on 01 December 2015 disclosing information which showed the Respondent had failed, was failing, or was likely to fail to comply with legal obligations to which the Respondent was subject [F30];

11.1.6 Raise a grievance dated 16 May 2016 alleging unlawful discrimination, failure to comply with legal obligations and endangerment of the health and safety of individuals including the Claimant [F31]; and

11.1.7 Raise a grievance on 26 July 2016 making allegations of delays in the Respondent's processes, and alleging unlawful discrimination, failure to comply with legal obligations and endangerment of the health and safety of individuals including the Claimant [F31].

11.2 If so, did such acts constitute qualifying disclosures for the purposes of section 43B Employment Rights Act 1996, namely:

11.2.1 Was there a disclosure of information?

11.2.2 If so, did the Claimant believe the information provided in the disclosures set out above, or any one of them, tended to show that the health and safety of any individual was being endangered;

11.2.3 If so, did the Claimant believe the information provided in the disclosures set out above, or any one of them, tended to show, in the case of paragraphs 11.1.5 and 11.1.6, that the Respondent was breaching a legal obligation?

11.2.4 In either case, was such belief reasonable?

11.2.5 If so, did the Claimant reasonably believe that such disclosure was in the public interest?

11.3 Was / were disclosure(s) made to the Respondent in accordance with section 43C Employment Rights Act 1996?

11.4 Was the Claimant subjected to detriment? She alleges that she was subjected to the following detriments, the first disclosure in September 2014.

11.4.1 On 10 August 2015 being allegedly advised that her leaving date from her role had been moved [F4];

11.4.2 On 12 August 2015, being suspended [F28];

11.4.3 On 25 November 2015, by her MSP course being cancelled [F5];

11.4.4 In December 2015, by the Respondent allegedly refusing to help her find a suitable mentor [F6];

11.4.5 On 19 January 2016, the Respondent held her last 1:1 prior to her submitting her grievance [F7];

11.4.6 In June 2016, her annual review was delayed pending the outcome of her grievance [F32];

11.4.7 On 6 September 2016, allegedly being informed that the Respondent had appointed an appeal manager and having that person's appointment rescinded later the same day [F34];

11.4.8 On 7 September 2016, the Respondent allegedly failed to investigate why the Claimant had decided to move roles [F9];

11.4.9 On 9 September 2016, she claims that Manager TWO told lies about her in a meeting [F10];

11.4.10 On 22 September 2016, she claims the Respondent failed to act on an occupational health report [F24];

11.4.11 On 5 October 2016 the Respondent subjected the Claimant to a time limited test in response to her training request and informed her that she would not have been offered her job on the basis of the result obtained and that she had taken the opportunity from another candidate [F11];

11.4.12 On 12 October 2016 Ms Tracy Pugh of the Respondent blocked the Claimant's World Mental Health Day feature from being published on Safety Central [F12];

11.4.13 On 21 October 2016 the Claimant was informed that the disciplinary case against the Claimant would progress to a hearing [F37];

11.4.14 On 9 November 2016 the Claimant was informed of a 22 November 2016 date for her disciplinary hearing. The Respondent did not refer to the use of Occupational Health or to the possibility of making any reasonable adjustments to the process [F25, F39];

11.4.15 On 14 November 2016 the Claimant was suspended from work 79 days after the date of alleged gross misconduct on 27 August 2016 without any explanation of why there had been such a delay. The Claimant's IT access was suspended, which thereby inhibited her ability to pursue her grievances, or her Employment Tribunal claim [F40];

11.4.16 After the Claimant had submitted a grievance on 25 November 2016 her suspension continued and does not appear to have been reviewed (Respondent's grievance reference number 103219) [F41];

11.4.17 On 11 January 2017 the Respondent rescheduled the disciplinary hearing again to 20 January 2017, and informed the Claimant on 15 January 2017 that material had been added to the case against the Claimant without any explanation [F46];

11.4.18 On 13 January 2017 the Respondent paid the Claimant's arrears in respect of her bonus payment but did not reimburse her for the deductions because of her disability-related absences [F13];

11.4.19 On 20 January 2017 the Claimant was informed that all of the outstanding matters (her grievances) were on hold until an Occupational Health report had been

obtained and when matters resumed the disciplinary hearing would take precedence though the other matters predated this [F47];

11.4.20 On 1 February 2017 the Claimant's Line Manager had sought to arrange the Claimant to be provided with a replacement mobile phone, but this was then delayed [F14];

11.4.21 On 9 February 2017 the Respondent accused the Claimant of having sent one or two recent responses to work-related e-mails without any evidence of the same, and made a further threat of disciplinary action [F48];

11.4.22 On 14 February 2017 the Claimant requested objective detail of the disciplinary case against her. The Claimant also informed the Respondent of the negative impact of her on-going, open-ended suspension, and requested reasonable adjustments to the process. The Respondent failed to respond adequately, or at all to these statements [F49];

11.4.23 Also on 14 February 2017 the Respondent offered the Claimant only two hours (eventually taking place for three hours on 23 March 2017 (London)) in response to the Claimant's repeated requests for access to the Respondent's IT systems in order to obtain information for her ET claim [F50];

11.4.24 On 15 February 2017 the Respondent decided to initiate further disciplinary action against the Claimant and informed her that it was initiating further disciplinary action whilst informing her that only "Some of the information is attached along with this letter". The Claimant was also asked to bring any documents which she wished to be considered as part of the investigation. The Respondent would have known that this was an impossible task since the Claimant no longer had access to her own e-mail accounts [F51];

11.4.25 On 17 February 2017 the Claimant e-mailed the Respondent with suggestions of reasonable adjustments which could be made by the Respondent to support her as a disabled person. The Respondent did not ever respond to this e-mail [F52];

11.4.26 On 24 February 2017 the Claimant requested again those policies, which the Respondent had promised to provide by 23 February 2017. The policies were still not provided [F53];

11.4.27 The Claimant alleges that the following omissions were a consequence of her protected disclosures:

i) The Claimant's grievance (reference number 93420) in respect of her health and safety disclosures, submitted by DR on KB's behalf on 16.5.16 [F31], had not been addressed;

ii) There was an on-going failure to fully implement the grievance recommendations in respect of the Claimant's pay arrears (i.e. from the grievance outcome on 18.8.16) [F13];

iii) The Claimant's grievance (reference number 103219) in respect of her earlier suspension, submitted to Greg Sugden on 1.12.15 [F30], had not been heard;

iv) The Disciplinary Investigation had not been concluded since institution on 11 August 2016 [F33, F57];

v) The Claimant's Disciplinary Hearing had been repeatedly postponed for 17 weeks since 9 November 2016 [F57];

vi) In acting as set out in (i) – (v) above the Respondent had breached numerous sections of its own policies including the statement that "every endeavour will be made to deal with your grievance as speedily as possible"; and

vii) The Claimant had been suspended on 14 November 2016, and remained suspended without any, or any regular review 16 weeks after it had started [F40].

11.5 If so, did detriment occur because the Claimant had made a protected disclosure for the purposes of section 47B Employment Rights Act 1996?

568. The Claimant did not make protected disclosures on the occasion F27(1). We do not have a copy and are not satisfied that it conveyed information which the Claimant reasonably believed was a breach of a legal obligation or of health and safety, or that the disclosure was in the public interest.

569. The Claimant did not make protected disclosures on the occasion F27(2). We are not satisfied that it conveyed information which the Claimant reasonably believed was a breach of a legal obligation or of health and safety, or that the disclosure was in the public interest. As set out in the findings of fact, the main thrust of the communication is that the Claimant believed that the work could be better organised, and – by implication – that the Respondent as a whole, and Manager ONE and the Claimant in particular would benefit from that. She did not state or imply that there was be a breach of a legal obligation (or danger to health and safety, etc).

570. The Claimant did not make protected disclosures on the occasion F27(3). We are not satisfied that it conveyed information which the Claimant reasonably believed was a breach of a legal obligation or of health and safety, or that the disclosure was in the public interest. As set out in the findings of fact, nothing in these communications could be interpreted by the Claimant or anyone else as tending to disclose breach of a legal obligation or as relating to health and safety issues

571. The Claimant did not make protected disclosures on the occasions F27(4) for the reasons set out in the findings of fact, broken down by date. We are not satisfied that it conveyed information which the Claimant reasonably believed was a breach of a legal obligation or of health and safety, or that the disclosure was in the public interest.

572. The Claimant did not make protected disclosures on the occasions F27(5) for the reasons set out in the findings of fact. She did refer to other people's preferences as well as her own, but we are not satisfied that it conveyed information which the Claimant reasonably believed was a breach of a legal obligation or of health and safety, or that the disclosure was in the public interest.

573. The Claimant did not make protected disclosures on the occasions F27(6) for the reasons set out in the findings of fact. There was a discussion about the Claimant

needing and additional staffing resource, but we are not satisfied that it conveyed information which the Claimant reasonably believed was a breach of a legal obligation or of health and safety, or that the disclosure was in the public interest.

574. Thus. in summary, there were no protected disclosures as set out in 11.1.1, 11.1.3 or 11.1.4.

575. We were not satisfied that the Claimant made a communication to Mr Sugden on 7 May 2015 that was a protected disclosure (11.1.2).

576. Item 11.1.5, the 1 December 2015 grievance to Mr Sugden (1032) was not a protected disclosure. It communicated information to him and alleged breaches of legal obligations owed to the Claimant. While it is likely that the Claimant believed the disclosure was in the public interest, that was not a reasonable belief. Her reference, for example, to Manager ONE being a "a tangible danger to both me and others" has to be seen in context, and the examples given are of conduct towards the Claimant.

577. Item 1.1.6 (the 16 May 2016 document at 1496) is mainly focused on the Claimant. However, we accept that the reference to alleged breaches of the Equality Act in relation to recruitment by an organisation of the size and importance of the Respondent make this a protected disclosure. The Claimant did believe that the disclosure was in the public interest and the belief was a reasonable one.

578. Similarly, the amplified version of the same document (11.1.7) is also a protected disclosure.

579. In relation to the alleged detriments, all the claims fail. The Respondent has satisfied us that none of the conduct was because the Claimant made a protected disclosure:

    11.4.1 did not happen, also no protected disclosure before then

    11.4.2, not suspended because of protected disclosure but because of interactions with Manager ONE

    11.4.3 Course not cancelled by Manager TWO and request to defer until after Xmas not because of protected disclosure

    11.4.4 not because of protected disclosure or a difference in treatment

    11.4.5, not because of protected disclosure, was because of PDSW

    11.4.6 this was with the Claimant's agreement because of what she said in her grievance

    11.4.7 not a detriment, not because of protected disclosure

    11.4.8, not because of protected disclosure, she told the Respondent to cease and desist asking why she was moving

    11.4.9 Manager TWO didn't lie

11.4.10 nothing that the Respondent should have done that they failed to do; the Claimant complained about the report being sent to the Respondent

11.4.11 the Claimant was asked to do the test as a result of a conversation between her and Manager FOUR about her abilities, not because of protected disclosure

11.4.12 not because of protected disclosure; was because named a current employee who was line manager and referred to grievance

11.4.13, Armstrong did not make the recommendation because of protected disclosure. Nor did Manager THREE inappropriately attempt to manipulate the outcome.

11.4.14 not true that she told there was no possibility of reasonable adjustments and the invitation was not sent because of a protected disclosure

11.4.15 not because of protected disclosure. (The reasons for the suspension are explained in the analysis of the section 15 complaint)

11.4.16 failure to lift suspension was not because protected disclosure; it was because the Claimant was supplying fit notes, the Respondent needed OH advice and did not think there had been a change of circumstances

11.4.17 not because of protected disclosure

11.4.18 because of the Respondent's pay policy not protected disclosure

11.4.19 not true and not because of protected disclosure

11.4.20 not true

11.4.21; 11.4.22; 11.4.24. The disciplinary action was commenced because, firstly, the Claimant was asked not to contact Manager FOUR, because she had sent one or more emails (eg one on 8 February 2017) to him. Her request for specific detail led to Ms Belsham forming the view (genuinely, though not necessarily correctly) that the Claimant had sent a large number of emails from her work account since suspension. It was nothing to do with the protected disclosures.

11.4.23 not true and not because of protected disclosure

11.4.25 not because of protected disclosure, as discussed above in relation to the section 15 claim

11.4.26 the Respondent did provide policies to the Claimant and said she could print off others; nothing was withheld because of protected disclosure

11.4.27.

(i) It is not true that this alleged omission was because of protected disclosure; the Respondent told her that it was treating her complaint as an individual grievance not a collective grievance. No other named

individuals asked to be part of a collective grievance. The Respondent made reasonable efforts to address the subject matter raised by the Claimant in a proportionate manager. It would not have been dealt with differently if it had not contained a protected disclosure

(ii) This was not because of protected disclosure. When followed up with Manager FOUR, he did it. Previously it had been on hold

(iii) It was the Claimant who put this on hold, not the Respondent

(iv) The investigation was concluded. Ms Armstrong wrote to her to say there would be a disciplinary hearing and so did Mr Turner.

(v) The hearing was postponed. Before Xmas it was postponed because the Claimant was ill. On 20 January, it was postponed because the Claimant's representative was not available. The delays after 20 January 2017 were because the Respondent thought OH advice was needed, not because of protected disclosure

(vi) There were delays, but not because protected disclosure. The delays were because of complexity and because the Respondent thought OH advice was needed. The Claimant also wanted there to be reasonable adustments made to the process. The Claimant did not make sure her own GP responded, and the Claimant was told by AW that AW was not going to provide a report to the Respondent

vii) The reason was not protected disclosure. We set out Ms Belsham's reasons above when saying why we do not agree that it was proportionate in relation to the section 15 complaint.

12. VICTIMISATION

12.1 Did the Claimant act as follows:

12.1.1 On 01 December 2015 raise a grievance [F30];

12.1.2 Raise a grievance dated 16 May 2016 alleging unlawful discrimination [F31];

12.1.3 Raise a grievance on 26 July 2016 making allegations of delays in the Respondent's processes [F31];

12.1.4 Submitted a grievance appeal on 16 September 2016;

12.1.5 On 25 October 2016 escalated her complaint against a previous manager.

12.2 If so, did such act(s) constitute protected act(s) or alternatively did the Respondent believe that the Claimant had done, or may do, a protected act for the purposes of section 27 of the Equality Act 2010?

12.3 Was the Claimant subjected to detriments as alleged above at F1 – F57, insofar as the alleged facts post-date 01 December 2015. the following detriments:

12.3.1 On 12 August 2015, being suspended [F28];

12.3.2 On 25 November 2015, by her MSP course being cancelled by Manager TWO [F5];

12.3.3 In December 2015, by the Respondent allegedly refusing to help her find a suitable mentor [F6];

12.3.4 On 19 January 2016, the Respondent held her last 1:1 prior to her submitting her grievance [F7];

12.3.5 In June 2016, her annual review was delayed pending the outcome of her grievance [F32];

12.3.6 On 6 September 2016, allegedly being informed that the Respondent had appointed an appeal manager and having that person's appointment rescinded later the same day [F34];

12.3.7 On 7 September 2016, the Respondent allegedly failed to investigate why the Claimant had decided to move roles [F9];

12.3.8 On 9 September 2016, Manager TWO told lies about the Claimant in a meeting [F10];

12.3.9 On 22 September 2016, she claims the Respondent failed to act on an occupational health report [F24];

12.3.10 On 5 October 2016 the Respondent subjected the Claimant to a time limited test in response to her training request and informed her that she would not have been offered her job on the basis of the result obtained and that she had taken the opportunity from another candidate [F11];

12.3.11 On 12 October 2016 Ms Tracy Pugh of the Respondent blocked the Claimant's World Mental Health Day feature from being published on Safety Central [F12];

12.3.12 On 21 October 2016 the Claimant was informed that the disciplinary case against the Claimant would progress to a hearing [F37];

12.3.13 On 9 November 2016 the Claimant was informed of a 22 November 2016 date for her disciplinary hearing. The Respondent did not refer to the use of Occupational Health or to the possibility of making any reasonable adjustments to the process [F25, F39];

12.3.14 On 14 November 2016 the Claimant was suspended from work 79 days after the date of alleged gross misconduct on 27 August 2016 without any explanation of why there had been such a delay. The Claimant's IT access was suspended, which thereby inhibited her ability to pursue her grievances, or her Employment Tribunal claim [F40];

12.3.15 After the Claimant had submitted a grievance on 25 November 2016 her suspension continued and does not appear to have been reviewed (Respondent's grievance reference number 103219) [F41];

12.3.16 On 11 January 2017 the Respondent rescheduled the disciplinary hearing again to 20 January 2017, and informed the Claimant on 15 January 2017 that material had been added to the case against the Claimant without any explanation [F46];

12.3.17 On 13 January 2017 the Respondent paid the Claimant's arrears in respect of her bonus payment but did not reimburse her for the deductions because of her disability-related absences [F13];

12.3.18 On 20 January 2017 the Claimant was informed that all of the outstanding matters (her grievances) were on hold until an Occupational Health report had been obtained and when matters resumed the disciplinary hearing would take precedence though the other matters predated this [F47];

12.3.19 On 1 February 2017 the Claimant's Line Manager had sought to arrange the Claimant to be provided with a replacement mobile phone, but this was then delayed [F14];

12.3.20 On 9 February 2017 the Respondent accused the Claimant of having sent one or two recent responses to work-related e-mails without any evidence of the same, and made a further threat of disciplinary action [F48];

12.3.21 On 14 February 2017 the Claimant requested objective detail of the disciplinary case against her. The Claimant also informed the Respondent of the negative impact of her on-going, open-ended suspension, and requested reasonable adjustments to the process. The Respondent failed to respond adequately, or at all to these statements [F49];

12.3.22 Also on 14 February 2017 the Respondent offered the Claimant only two hours (eventually taking place for three hours on 23 March 2017 (London)) in response to the Claimant's repeated requests for access to the Respondent's IT systems in order to obtain information for her ET claim [F50];

12.3.23 On 15 February 2017 the Respondent decided to initiate further disciplinary action against the Claimant and informed her that it was initiating further disciplinary action whilst informing her that only "Some of the information is attached along with this letter". The Claimant was also asked to bring any documents which she wished to be considered as part of the investigation. The Respondent would have known that this was an impossible task since the Claimant no longer had access to her own e-mail accounts [F51];

12.3.24 On 17 February 2017 the Claimant e-mailed the Respondent with suggestions of reasonable adjustments which could be made by the Respondent to support her as a disabled person. The Respondent did not ever respond to this e-mail [F52];

12.3.25 On 24 February 2017 the Claimant requested again those policies, which the Respondent had promised to provide by 23 February 2017. The policies were still not provided [F53];

12.3.26 On 4 March 2017 resigning in response to an alleged cumulative serious breach of contract [F54], comprised of the following omissions:

i) The Claimant's grievance (reference number 93420) in respect of her health and safety disclosures, submitted by DR on KB's behalf on 16.5.16 [F31], had not been addressed;

ii) There was an on-going failure to fully implement the grievance recommendations in respect of the Claimant's pay arrears (i.e. from the grievance outcome on 18.8.16) [F13];

iii) The Claimant's grievance (reference number 103219) in respect of her earlier suspension, submitted to Greg Sugden on 1.12.15 [F30], had not been heard;

iv) The Disciplinary Investigation had not been concluded since institution on 11 August 2016 [F33, F57];

v) The Claimant's Disciplinary Hearing had been repeatedly postponed for 17 weeks since 9 November 2016 [F57];

vi) In acting as set out in (i) – (v) above the Respondent had breached numerous sections of its own policies including the statement that "every endeavour will be made to deal with your grievance as speedily as possible"; and

vii) The Claimant had been suspended on 14 November 2016, and remained suspended without any, or any regular review 16 weeks after it had started [F40].

12.4 If so, did such detriments occur because the Claimant had done, or the Respondent believed she had done or may do, (a) protected act(s) pursuant to section 27 of the Equality Act 2010?

580. Each of the 5 alleged protected acts were in fact protected acts. She referred to the requirements of the Equality Act 2010 and alleged contraventions.

581. The earliest protected act was 1 December 2015, and the alleged detriments before that date are not victimisation for that reason. We do not accept that the Respondent believed (in August 2015, for example) that the Claimant was likely to allege breach of the Equality Act. The Claimant was not asserting at the time that she was disabled (or that there was any breach of Equal Pay legislation, or sex discrimination). The Claimant was making complaints about (for example) objectives and performance setting, but in relation to illness and sickness absence, was alleging that it was a new situation caused by Manager ONE, not that she was disabled.

582. For the same reasons that we reject the whistleblowing detriment complaints, we reject the victimisation detriment complaints. The Respondent has satisfied us that the protected acts were in no way whatsoever influenced, including subconsciously, by the protected acts.

583. We explained why we have decided that the suspension decision breached section 15, because it was not proportionate. However, the reasons for the suspension were that Ms Belsham genuinely believed that the Claimant should have been suspended earlier, and genuinely believed that she was putting inappropriate pressure on Manager FOUR.

584. We explained why we have decided that the failure to give the grievance appeal outcome breached section 15, because it was not proportionate. However, the reason for the delay was that the Respondent genuinely believed that waiting until the OH advice was received was appropriate.

13. CONSTRUCTIVE UNFAIR DISMISSAL

14. The relevant questions for the Employment Tribunal in a claim for constructive unfair dismissal are:

a) whether the Respondent has breached the employment contract, by reference to the facts alleged at F1-F58;

b) whether the breach(es) was/were sufficiently serious to be repudiatory;

c) whether the Claimant resigned, at least in part, in response to the breach(es); and

d) whether the Claimant affirmed the contract prior to resignation.

15. In this case the repudiatory breaches relied on are characterised as being breaches of the implied term of trust and confidence as defined in Malik v. BCCI [1997] ICR 606, as modified by Baldwin i.e. whether, assessed objectively, the Respondent, without reasonable and proper cause, acted in a manner either calculated, or likely, to destroy, or seriously to undermine the trust and confidence between the Claimant and the Respondent.

16. If dismissed was there a potentially fair reason and if so was dismissal fair in all the circumstances?

17. If the Claimant was unfairly dismissed would she nevertheless have been fairly dismissed in any event?

585. Our decision is that the Claimant was not dismissed.

586. A significant factor in the Claimant's resignation was that she had obtained a new job at a much higher salary (albeit with longer travel time).

587. We do accept that the Claimant genuinely holds the opinions expressed in her 4 March 2017 resignation email, quoted in full above.

588. We have found that the suspension decision was a breach of the Equality Act on 14 November 2016. The suspension was protracted because of decision to postpone the disciplinary hearing until after OH advice. However, the Respondent had been attempting to set up the hearing before Xmas and fixed a further date on 20 January 2017. It was not a breach of trust and confidence, for the Respondent to have suspended with the intention being that the suspension would be short in

duration. The Claimant waive any breach in any event as she remained in correspondence with the Respondent and seeking grievance outcomes (and grievance appeal outcomes, while submitting fit notes. She made up her mind in January that she was leaving but did not submit the resignation until March. Importantly, when submitting her resignation email, a document that she had known for several weeks that she would be writing (when resigning without notice) she did not include the suspension decision made more than 3 months earlier on 14 November 2016. It was not a more than trivial part of her reason for resigning.

589. In contrast, she did refer to the failure to supply grievance appeal outcome. For the reasons mentioned in the next paragraph, we do not regard this as a repudiatory breach of contract.

590. Her reasons for resigning were those stated in the resignation email (as well as the fact that the new job was starting on the Monday). We do not consider that any of the matters in the resignation email (separately or taken together) amount to conduct which breaches the so-called "Malik term", that is, as being conduct which impinged on the employment relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. The Claimant had been told that the grievance appeal outcome was ready to be issued, and she knew that the only reason for the delay was that she was on sickness absence and the Respondent wished to have medical advice before giving her the appeal outcome. It was to be the first procedure (before the other 2 grievances and the disciplinary) that was going to be dealt with once the OH advice was received, and the Claimant] was aware that the Respondent had contacted both her GP and AW to seek their input. To the extent that the resignation email implies that the Claimant believes that she was being ignored or forgotten about, when viewed objectively, that was not the case. To the extent that the Claimant was concerned that she might be dismissed as a result of the disciplinary process, that was certainly a possibility, but, viewed objectively, the Respondent was expressly promising to follow appropriate procedures, make reasonable adjustments to the process, and take her evidence and points of view into account.

591. In her resignation email, the Claimant refers to wasted costs for the Respondent – but in general terms, not as an alleged breach of her contract. She criticises HR, including in relation to not allowing the article to be published the previous September, but she praises her most recent line manager, Manager FOUR, which is consistent with her comments to him and about him elsewhere.

592. Having decided that the matters relied on in the resignation email are not, in themselves, breaches of the Malik term, following Kaur, we have sought to consider whether this is a "last straw" case. She made the decision, before Xmas, to apply for the new job, and made the decision in January to accept it, and by 10 February 2017, to resign without notice. The Claimant did not resign in response to a "last straw". In the circumstances, it is unclear what specific conduct by the Respondent triggered her decision. The most recent specific events relied on in the resignation email are the lack of publication of her article, and the non-issuing of the grievance appeal. She had affirmed her contract since each of these incidents.

Outcome and next steps

593. The parties will be notified of the dates for the remedy hearing. The tribunal is willing to hold the hearing in person and at the same venue as the liability hearing. If there are any changes in the reasonable adjustments required for the new hearing, parties should please write to the tribunal as soon as possible with details.

Employment Judge Quill

Date: 30 September 2021
RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
1 October 2021

FOR EMPLOYMENT TRIBUNALS