EMPLOYMENT TRIBUNALS

Claimant: Ms AB

Respondent: Equinor UK Ltd

Heard at: London Central Employment Tribunal (in private by CVP)

On: 12, 13, 14, 15, 16, 20, 21, 22 September 2022 (23 September in chambers)

Before: Employment Judge Adkin
Ms D Keyms
Mr D Shaw

Appearances:
For the claimant: in person
For the respondent: Mr C Stone, counsel

JUDGMENT

1. The following claims are not well founded and are dismissed:

    1.1 Discrimination arising from disability (section 15 Equality Act 2010 ("EA"));

    1.2 A failure to make reasonable adjustments (sections 20-21 EA);

    1.3 Victimisation (section 27 EA);

    1.4 Automatic unfair dismissal (whistleblowing) (section 103A Employment Rights Act 1996 ("ERA")).

2. An order for lifelong anonymisation under rule 50(3)(b) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") will be made in a separate order in relation to the Claimant ("the Claimant", "AB") and an alleged perpetrator of historic sexual harassment of the Claimant ("XY") which forms part of the background to the claims.

WRITTEN REASONS

The Claim

1. The Claimant presented her claim on 23 February 2021.

2. An agreed list of issues is attached as an appendix to this claim, subject to some modifications made as agreed during the course of the hearing in relation to elements of the claim of failure to make reasonable adjustments.

Procedure

3. This was a video hearing using CVP. The Claimant joined the video hearing from one of the Tribunal rooms by video.

4. The Claimant sought to rely on an argument that she had been given wrong advice by her solicitor about submission a claim to the Tribunal in support of a request that the Tribunal exercise its just and equitable discretion to extend time in relation to claims brought on the face of it out of time. The Respondent applied for disclosure on the basis that privilege been waived and that we needed to see the complete advice on this point.

5. The Tribunal granted the Respondent's application in a qualified way. We ruled that if the Claimant wanted to rely on correspondence which would ordinarily attract legal professional privilege, she would be deemed to waive privilege in respect of all communications with her solicitor during which she said she had been under a misapprehension and she would be required to disclosure them to the Respondent. The alternative was not to rely upon this evidence.

6. The Claimant decided not to waive privilege and accordingly we disregarded this correspondence and followed that the Claimant could not rely upon error of her solicitor as a reason why it was just and equitable to extend. There were other arguments which felt to be considered.

7. The bundle did not comply with paragraph 24.4 of the Presidential Guidance on remote and in-person hearings issued by the President of the Employment Tribunal's (England & Wales) on 14 September 2020. Some time was wasted and occasionally confusion caused by the fact the electronic and hardcopy page numbers did not line up. We acknowledge that Mr Stone diligently and efficiently identitied "electronic" as well as hardcopy numbering during the public part of the hearing.

Evidence

8. The Tribunal heard evidence from the Claimant herself.

9. From the Respondent we heard oral evidence:

    9.1. Catherine Allsop

9.2. Margrethe Husebo

9.3. Margit Berger Rosland

9.4. Martin Devor

9.5. Sinead Pope

9.6. Bente Hovland

9.7. Rob Cross

9.8. Hanna Caroline Imig (statement only not oral evidence).

10. We received a hearing bundle of 1,394 and a supplementary bundle of 135 pages.

Findings of fact

Background

11. The Respondent is a UK based subsidiary of the national oil company of Norway, which was previously called Statoil.

12. The Claimant is an accountant by training. She worked for the Respondent in the finance function. The Claimant's employment commenced on 15 March 2006 with Statoil or a subsidiary in Baku, Azerbaijan. She reported to XY a manager in Baku in the period 2006-2008. Thereafter she worked for a period in Norway.

13. On 30 August 2011 the Claimant's employment commenced with the Respondent a UK based subsidiary. She moved to London in 2012.

Disability

14. The parties agreed that the Claimant met the statutory definition of a disabled person within the meaning of the Equality Act 2010 from 13 January 2020 due to anxiety and depression.

2014

15. There was an incident involving the Claimant and her line manager XY outside Fortnum & Mason following a leaving dinner for a colleague on 21 January 2014.

16. This is the first of three allegations of sexual harassment, all of which are alleged to have taken place after social events. These allegations made by the Claimant form the background to her claims before this Tribunal, although not the substance of her claims, which relate to subsequent events. This incident and the others have been described by the Claimant in somewhat differing ways over the period 2015 to 2019 as part of grievance investigation processes and conversations with an expert preparing a medico-legal report.

17. The second incident on 14 October, the Claimant says that XY tried to hug her and touch her after a social event with the result that she ran away to the Underground. When asked about whether witnesses might have seen his behaviour, she said they would have just thought he was drunk.

2015

18. At another leaving event at Rokka, a restaurant, on 9 June 2015 the Claimant says that there was another incident involving XY. Again the Claimant has described this incident in different ways at different times.

19. It is not necessary for the purposes of this claim for this Tribunal to make specific findings on specifically what occurred on these three occasions. These events are background to the claim rather being the basis of the claim. It is clear from subsequent events and the Tribunal accepts that the Claimant felt that she had been treated inappropriately by XY, that she felt that this had impacted on her subsequent career and that she found it difficult to move on from these events.

2016

Grievance (first protected act)

20. On 5 February 2016 Claimant made a complaint about XY orally to Rob Adams and followed this up with an email. She complained that he was discouraging her from engaging with other business units, telling her that colleagues would think she was flirting if she smiled, and how to dress. He told her that her career would be limited at the Respondent because she spoke to too many people. She described him as aggressive. In relation to the Rokka incident on 9 June 2015 she said "[XY] was very drunk and he put his hand on mine, squashing my hand - telling me that `if' he wasn't married he would be after me". There was no complaint in this email about the two incidents in 2014 referred to above.

21. The Claimant continued to raise her concerns in number of emails in the period March-April 2016. On 10 March 2016 the Claimant raised in an email to Mr Adams entitled "conflict issues, private and confidential" complaints about her working relationship with her manager XY and some specific examples of friction in their working relationship relating to the financial matters that they worked on. She characterised her complaint at one stage as being "six years of his comments and behaviour".

22. Following on from this email though were some follow-up emails in which the Claimant said that she was feeling stressed. She says that her GP told her she was suffering from severe anxiety and she needed counselling. She had lost weight. She was struggling to sleep. She told her doctor that she did not want to take time off work, but was stressed over the weekend and was concerned that XY was trying to pass messages to her via colleagues and make her feel guilty for reporting him.

23. She complained about him ignoring her for long periods of time, gossiping about her or complaining to her about her behaviour which he felt could be construed as flirting with colleagues or her dress sense.

24. These complaints were dealt with by the Respondent under its grievance procedure.

GP attendance April 2016

25. On 8 April 2016 the Claimant attended her GP, who recorded "anxiety – emotional harassment at work by her manager"

> "emotional harrassment at work by manager. has been working with him for 7 years. finally got courage to tell HR and has been moved to another manager
>
> element of sexual harrassment in story - when drunk at events has made inapprorpriate comments and she feels intimeiated by him. **denies any physcial actions however touched her hand at an event once** and made her feel uncomfrtable. comments on her appearance and dress. tells her she smiles too mcuh at men"
>
> (sic) [**emphasis** added]

OH advice July 2016

26. Dr Natalia Bogatcheva an Occupational Health physician prepared a report on 11 July 2016. In this report she noted that the Claimant's GP had diagnosed her with "severe anxiety" following weight loss. The occupational health physician however considered that she was currently fit to undergo full-time duties. The issue at work with the Claimant's line manager was said to cause the patient to suffer from anxiety and her symptoms get remarkably worse when she came to contact with him.

27. Dr Bogatcheva did not consider that this was likely to be a disability.

Outcome of grievance July 2016

28. On 6 July 2016 the Claimant attended an meeting as part of the Respondent's investigation of her grievance, being heard by Sam Parmar, Contracts Claims Manager. The Claimant was accompanied. In that meeting she stated that she had concerns for her safety once XY knew that there was a grievance.

29. The Claimant explained that there was a cultural problem between her and XY. She observed that now that the two of them had moved to a Western culture his expectation that she should sit quietly was causing conflict.

30. As to the elements of alleged sexual harassment, the Claimant explained that in Autumn 2015 XY had touched her hand in the office and there was an incident at a leaving dinner where he touched her hand and said if he wasn't married, he would be after her.

31. The grievance was investigated by Mr Parmar speaking to the Claimant and to XY and colleagues Ms Alderman and Geir Bjornstad.

32. By a letter dated 28 July 2016 Mr Parmar provided a written outcome to the Claimant's grievance. The grievance was upheld in respect of an allegation of XY ignoring the Claimant when he could have approached her to understand why she was going to sit away from him in focus rooms. It was also upheld that he behaved aggressively at his desk and banged his keyboard.

33. It was upheld in part a complaint about clearer communication in relation to clarification of the Claimant's role tasks.

34. The grievance was not upheld in relation to some other allegations. It was found that was no evidence to support an allegation that he had told her off for exhibiting flirtatious behaviour. He admitted that he had told her not to talk so much, but explained that this was about being succinct and to the point. An allegation about being aggressive in a discussion about allocation of tasks was not upheld.

35. As to gossiping, XY admitted that he had talked about the situation at work, but no evidence was found that he was gossiping and spreading personal stories about her.

36. As to speaking in Russian XY explained that he had not understood was a problem and that in fact the Claimant would initiate conversations with him in Russian.

37. The allegations about the three events in 2014/2015 said to have taken place outside of the work place but on work social events were <u>not</u> upheld. Mr Parmar concluded as follows:

> "Whilst I am not implying that you are not telling the truth, it is your word against [XY's] with no witnesses to provide supporting evidence."

38. The was however evidence from interviewees that XY had displayed aggressive behaviour which was unacceptable and contradictory towards the Respondent's values. A recommendation was to be made that XY and his line manager seek for him to improve his conduct in these behaviours.

39. Following on from the outcome of the grievance the reporting line was changed so that the Claimant did not report to XY and instead reported to Geir Bjørnstad. The seating plan was also changed.

<u>Grievance appeal</u>

40. On 2 August 2016 the Claimant appealed the outcome of her first grievance. She reiterated the allegation in relation to the 9 June 2015 incident of sexual harassment. She complained about XY's reaction to her grievance which was to suggest that it had made him unwell.

41. The grievance appeal was dealt with by Margaret Mistry, who carried out some further interviews and considered medical evidence written by the company doctor.

42. On 27 September 2016 the written outcome of the grievance appeal was sent to the Claimant by Ms Mistry. As to the allegations of sexual harassment she found that there was no corroborative evidence and therefore she found it was not possible to come to a conclusive decision. That the issues in her grievance had had a significant impact on her health was acknowledged. Ms Mistry reiterated that some actions on the part of XY might be categorised as "bullying" and that action had been taken in this respect.

43. Ms Mistry recommended that Mr Rob Adams should ensure that informal references were not taken from XY as part of her attempts to move on from this department.

She also recommended that Mr Adams should clarify what the Claimant's role was within the wider network.

OH advice November 2016

44. Dr Alan Kohn an occupational health physician, produced a report dated 10 November 2016, in which he noted that the Claimant had derived benefit from counselling to deal with verbal bullying and sexual harassment, although she said that four sessions were not enough. She complained that her tasks remained within XY's area of control and that he had denied her necessary email access and spread rumours about her. She reported sleepless nights and weight loss. Nevertheless Dr Kohn said that the Claimant looked well and gave a good and coherent account of herself. We suggested that there was no evidence of depression or of inappropriate anxiety. He went on:

> "in my view this is a case of workplace bullying, and if proven is totally unacceptable. I appreciate that the company have taken steps to move [AB]'s (sic) manager away from her, but merely he still has some influence over her work situation, and the company must address this."

45. He recommended further sessions with a counsellor and went on:

> "Ms AB is fit to perform her full duties, and to attend any welfare meetings. I believe that her condition IS likely to fall under the protection of the Equality Act, though this is a legal statement, and really should be made by a court.
>
> Adjustments to be made include HR involvement to further separate her from her old manager, and help to attend further counselling sessions. Intrinsically her work would aggravate her problem if it involves contact with her old manager.
>
> I believe that Ms AB's prognosis is excellent, and that we could look forward to her providing long and full service if the above measures can be put in place."

XY moves to Norway

46. In November 2016 XY was moved to Norway.

47. Based on the evidence that the Tribunal has received this represented the end of any interactions between the Claimant and XY.

Remarks about Azerbaijan

48. On 16 December 2016 Robert Adams and Angela Alderman had an email exchange, prompted by the Claimant's out of office message which read "On holidays and don't have an access to emails. Should you have any urgent questions pls contact Eugene Pereira. Will be back January 09, 2017"

49. The exchange was as follows [547]:

> Adams: No access to emails for almost 4 weeks. Azerbaijan more backward than I thought, or she lost her phone at the cheese market
>
> Alderman: It's a bit cold. And it doesn't help her case for promotion. She doesn't own a personal phone, she uses her work phone so perhaps she will respond.
>
> Adams: I saw in the paper that the cheese market was mobbed and so couldn't cope with the number of people!
>
> Alderman: They did a massive social media campaign promoting the event, and the actual market space is not the large. I am not surprised, it all great publicity for the food producers though.

50. The Claimant was not aware of this exchange at the time, but discovered its existence nearly 18 months later due to a data subject access request ("DSAR").

51. It seems from an investigation carried out by Mr Cross in 2019 that the reference to the cheese market was about an overcrowding incident at Borough market, and was unrelated to Azerbaijan.

2017

OH report

52. On 13 July 2017 Dr Kohn produced another occupational health report. In it he reported that counselling had helped her a lot and that she felt more confident with reduced anxiety levels. He referred to a recent breach of confidentiality which upset her and the to her being prescribed sleeping pills by her GP, although he noted that she had not taken them. He recommended that counselling continue and that she should be allowed to conduct some of the work in a home setting to reduce stress levels. He reiterated that her condition would come under the protection of the Equality Act.

Change of manager

53. On 24 October 2017 the Claimant attended a meeting with her new manager Mr Eugene Pereira. In this meeting she stated that she could not work long hours on a regular basis. She had recently been working a lot of overtime. She explained that she had taken on 80% of XY's tasks. She raised a concern about being scapegoated. She had been blamed for XY having "heart issues". She felt that her position had been treated unfairly in relation to pay.

2018

DSAR

54. On 15 May 2018 the Claimant made a data subject access request of the Respondent, exercising her right under data protection legislation ("DSAR").

55. On 8 August 2018 the Claimant was signed off as not fit for work due to "work related stress" for one week. She then remained on sick leave until 2 January 2019.

56. On 14 August 2018 the Respondent responded to the Claimant's DSAR.

57. At some stage the Claimant instructed Slater & Gordon, a firm of solicitors provided by her trade union, to act for her in a claim of personal injury. She refers in her particulars of claim and witness statement to a personal injury claim being "ongoing" in December 2018. It seems that this claim may not have been issued with the court until a date in 2019, but it may be that there was pre-action correspondence prior to this.

2019

58. On 2 January 2019 Claimant returned to work after sick absence since 8 August 2018.

59. On 16 January 2019 a further Occupational Health report was prepared by Dr Alan Kohn, which noted that:

59.1. The Claimant have been off work for 5 months with what she describes as work-related stress. She returned to work on 2 January 2019.

59.2. She was treated with counselling, medication was not necessary.

59.3. The manager with whom she had interpersonal difficulties is no longer working with her, nor has any control of over her. However she feels aggrieved because she feels that the legacy from previous troubles has been that she has promoted that she is in general disrespected by the workforce.

60. He concluded:

> "Domestically she is managing her life normally.
>
> I think that we are left with an aggrieved employee, who is determined to take a grievance is down the legal route.
>
> …
>
> She is fit to return to work."

Second alleged protected act – grievance – February 2019

61. On 22 February 2019 the Claimant raises further grievance ("Grievance 2") with Mr Martin Devor, VP. He was the most senior person in "PO" (People & Organisation, i.e. Human Resources) in the UK operation.

62. Notwithstanding that she had not worked with XY for over 2 years, the Claimant continued to complain her career prospects, health and dignity had been affected and alleged that she had experienced discrimination on the ground of her sex and race discrimination under XY, who had told her that "I would never have a successful career because of my ethnicity and gender". She complained about XY's defamation of her character relation the basis of her gender and ethnicity. She said he proposed eliminate her role, labelled her a "troublemaker" and a "problem employee". She said he chose to rewrite a history after she rejected his sexual advances. She

alleged that she been threatened in relation to her job security, demotion and disciplinary actions.

ACAS EC process

63. On 6 March 2019 the Claimant commenced the ACAS early conciliation process. A certificate was issued one month later on 6 April 2019. In fact she did not present a claim until nearly two years later.

Ms Bente Hovland

64. The Claimant's manager (leader) Mr Pereira reported to Ms Bente Hovland, VP Finance & Control, who was subsequently to have a role in the capability process in 2020.

65. In the hearing before the Tribunal the Claimant was keen to emphasise that when Ms Bente Hovland started working alongside her (as her second line manager) in the London office in March 2019, Ms Hovland was chatty and happy to talk to her informally about settling into living in London with children. The Claimant's evidence was that this might happen three times a day.

66. It seems Ms Hovland was open and friendly toward the Claimant and did not have any difficulty in her relationship with the Claimant in 2019 when she started working in this role.

Response to February 2019 grievance

67. On 8 March 2019 Martin Devor wrote to the Claimant to confirm that her 2016 grievance would not be reinvestigated. That letter set out the background to the grievance and appeal in 2016, highlighting that her recent allegations substantially overlapped with allegations already dealt with, and emphasised that the Respondent had at all times taken her allegations seriously.

68. On 2 April 2019 the Claimant wrote to complain further to Mr Al Cook, who was Executive VP (Global Strategy and Business Development) & UK Country Manager.

69. This complaint was responded to by Ms Hovland on his behalf on 5 April 2019. Ms Hovland reiterated that concerns were taken seriously, but that the Claimant was now raising new points. She highlighted that the Claimant's contention that "the harassment and discrimination is still ongoing" was not substantiated by any new allegations.

Psychiatrist report (Ornstein) – March 2019

70. On 28 March 2019 a Psychiatric Medicolegal Report prepared in relation to the Claimant, following an interview on that day, by Dr Jonathan Ornstein a Consultant Psychiatrist to support her claim for personal injury caused by the actions of XY. He dated the period of being psychiatrically unwell back to February 2016. He concluded that:

    70.1. The Claimant suffered from a Generalised Anxiety Disorder from approximately February 2016 through to November 2016.

70.2. Since then where her anxiety has flared up, most noticeably in June 2017, July 2018 and August 2018 and during her sick leave at the end of 2018.

70.3. The cause of the symptoms was the conduct of XY and the lack of management support when the Claimant raised this with XY's superior.

Third Grievance – April 2019

71. Following from the DSAR disclosure, on 2 April 2019 the Claimant emailed Mr Al Cook regarding "Inappropriate comments about Azerbaijan". She suggested that an earlier complaint made about the email exchange about Azerbaijan have been refused.

72. The Claimant seems to have believed that the exchange was between Rob Adams and Eugene Pereira her new manager since October 2017. This misunderstanding is likely to have been caused by the fact that documents disclosed to the Claimant in response to her DSAR had the names of other colleagues redacted. In fact, according to documents seen by the Tribunal the exchange was between Mr Adams and Ms Alderman.

73. It seems likely that, for understandable reasons, this unfortunate misunderstanding undermined the Claimant's trust in her line manager at the time.

Mr Devor's request for a meeting

74. On 16 May 2019 Mr Devor wrote to the Claimant in an email in pleasant terms hoping that she had fully recovered and asked if they could have a conversation next week as suggested in his previous emails. The Claimant wrote back following day saying that she was waiting the trade union to come back to her about it.

75. Mr Devor replied on 17 May 2019, inviting her to a meeting on Wednesday 22 May to discuss concerns that the business had about her relationship with the Respondent. For the avoidance of doubt he explained that this would be a formal meeting.

Personal injury claim & sick absence

76. On 21 May 2019 a County Court claim for personal injury caused by sexual assault was issued on the Claimant's behalf. Also on that day she went off sick with work related stress and remained on sick leave until 20 June 2019.

Third alleged protected act – grievance – 27.5.19

77. On 27 May 2019 in preparation for a grievance meeting due to take place on 28 May 2019 the Claimant submitted a formal grievance document in the form of a chronology stretching from 29 August 2011 through to 18 May 2019 on a little over 13 pages of close type – 656-669.

78. One of the features of this document is that the allegations of sexual harassment went significantly further than when they were raised in 2016. For example on page 657 the Claimant alleges that XY told her that he would have sex with her on the incident on 9 June 2015. She went further and says "he started touching me in the

office". This suggestion that he was physically sexually harassing her in the office appears to be qualitatively different to earlier allegations which, although relating to inappropriate conduct, were confined to incidents outside the office when XY was under the influence of alcohol.

79. This allegation reiterated the allegations against XY, described as "sexual advancements" but included some new ones, going back as far as 2013.

80. Mr Rob Cross, VP Midstream Business Development dealt with the grievance. He met with the Claimant on 28 May 2019 and in a letter dated 6 June he attempted to summarise the grievance in a letter on two sides of A4. The allegations as summarised by Mr Cross were as follows:

> 1. That the emails dated 16 December 2016 (which you had received as part of the response to your DSAR and sent to Al Cook on 2 April 2019):
>
> 1.1 showed that the Equinor management are racially prejudiced against you;
>
> 1.2 were bullying in nature;
>
> 1.3 ridiculed you for taking vacation during the Christmas period; and
>
> 1.4 showed that Equinor managers can act with impunity.
>
> 2. That you have lost trust in Equinor because the 2016 Grievance was not investigated properly, that the previous grievance was conducted to protect Equinor management and that Equinor had not protected you as part of the 2016 Grievance process.
>
> 3. That Equinor management can treat you badly without being punished. You cited XY's actions as the example of this.
>
> 4. That XY was not suspended following the evidence of bullying and harassment you presented as part of the 2016 grievance, and that XY was promoted and advanced within the business.
>
> 5. That steps taken by Equinor following your 2016 Grievance to protect you were ineffective, and specifically that your tasks and responsibilities remained under the direct supervision of XY following your 2016 grievance.
>
> 6. That Equinor are preventing you from raising concerns and are delaying the process. Specifically:
>
> 6.1 That your 2016 grievance was investigated 4 months after your request;
>
> 6.2 That when you emailed Martin on 22 February you were not immediately called for a grievance hearing, and you were then required

> to escalate your concerns to Al Cook (by email dated 2 April 2019) and to Eldar Saetre and Magne Hoyden dated 8 May 2019; and
>
> 6.3 That Martin Devor asked to meet with you informally rather than allow you to proceed with the formal grievance process, but that you rejected this invitation as you thought that only the formal process should be followed.
>
> 7. That Equinor provided a response to your DSAR 89 days after you submitted your DSAR, and that the response was not satisfactory

OH report June 2019

81. A further report by Dr Kohn, dated 10 June 2019 described the Claimant as suffering an anxiety state relating to her current situation, amounting to less than a Generalised Anxiety Disorder" which had been the case in 2016.

82. This report included the following: [253-255]

> Miss AB returned to work in January, but says she found herself becoming stressed at work as she felt that she was being excluded, that the overtime … [Illegible]… was being denied, and that inappropriate comments were being made about her and her country of origin. The detailed chronology is in her formal grievance log.
>
> Eventually Ms AB says that she felt so stressed that she was forced to go off sick on 21st May. Initially she says that she felt so unwell that she was virtually confined to her bed, not wanting to get out. The symptoms slowly subsided, and by the time I saw her on 7/6/19, formal testing indicated that she had a GAD7 score of 8/19, indicating moderate anxiety, and a depression score of 8/22, indicating a mild depression.
>
> To my knowledge she is not currently on any treatment or therapy.
>
> …
>
> We cannot ignore the fact that she is going through a grievance and legal process, and she is finding this stressful. She feels unsupported at work, and regardless of if her perception is accurate or not, it has an impact on her performance.
>
> 2.4.2 I would not describe Ms AB's condition as a mental impairment as such, given the nature of her alleged grievances any person going through this process would experience stress, and her condition could result in sickness absence along the lines of her recent current history. Depending how long the legal and grievance process lasts for, her sickness absence pattern could well persist for a year or more.
>
> …

> It is clear from what Ms AB has said to me, that at earlier stages of her condition (anxiety) Ms AB had substantial adverse effects on her day to day activities such as not being able to get up, or get out.
>
> 2.4.5 and 6 The company have already separated Ms AB from the Employee XY who appears to be the reason for Ms AB's anxieties. I would draw your attention to paragraph 8 of the minutes of the UK Works Council Meeting 5/5/18 "there are areas of concern around workplace culture, leadership skills and examples of inappropriate behaviour. They also see some uncertainty around PL policies and concerns around career progression"
>
> It is likely that implementation of some fresh policies around these areas would form a useful basis for 'adjustments", help to reduce anxiety in this employee, and hopefully encourage a more normal working pattern.

83. By an email on 19 June 2019 the Claimant wrote to Mr Cross that if she had not made it clear in the grievance letters dated February 22, 2019 and May 27, 2019. She requested that he investigate how the sexual harassment was handled by the company. She submitted new information from DSAR. She stated that therefore it was a new case and she requested for it to be investigated.

Settlement of County Court claim

84. In July 2019 the Claimant's claim brought in the County Court for personal injury arising from XY's treatment of her was settled.

Ethics helpline complaint

85. On 17 July 2019 the Claimant made a report to the Respondent's Ethics Helpline regarding discrimination, bullying, harassment and victimisation.

86. She complained that there was routine cover up of allegations of unlawful discrimination and harassment in the workplace. She complained that Rob Cross had refused a full investigation of all events submitted in the grievance letter and the discrimination and harassment was ongoing and had a detrimental effect of her health.

MP letter

87. On 23 July 2019 the Claimant's MP, Tulip Siddiq, wrote to the Respondent about the Claimant's work-related complaints. This was responded to by the Respondent on 31 July.

Two letters on 30 July

88. On 30 July 2019 Ms Sinead Pope, Leading Consultant, People & Organisation wrote to the Claimant inviting her to attend meeting about her relationship with her team, her Leader (i.e. her manager Mr Pereira) and the Respondent company. Whilst acknowledging the Claimant's strong feelings, she highlights that the Claimant's actions are seen as being confrontational and difficult. She says that the Claimant had escalated matters in a way that had undermined the process that was designed to be fair to all those involved.

89. Also on the same day Ms Pope wrote to the Claimant inviting her to attend meeting about her sickness absence.

Abortive informal discussion with Mr Devor – 30 July

90. Also on 30 July 2019 Mr Devor approached the Claimant in the office for an informal discussion, in which he hoped to initiate some sort of without prejudice discussion.

91. The Tribunal has been provided with a transcript of this conversation, and the audio of a recording made surreptitiously by Mr Devor. The decision to make this recording seems to have caused some disquiet certainly in the mind of a colleague Ms Rosland who considered the matter later. Mr Devor justified making this recording however on the basis that he thought that the Claimant would be likely to misrepresent what occurred. In his view that concern was entirely borne out by subsequent events, given that the Claimant did materially misrepresent the content of this conversation.

Admissibility of audio recording of 30 July 2019 meeting

92. The Tribunal has considered whether we ought to receive evidence of a recording made covertly, in this case without the knowledge of the Claimant.

93. The case law draws a distinction between the different circumstances in which a covert recording might have been made and the effect on whether that evidence is admissible. A recording made by a party actually present in a conversation presents different considerations to a recording made covertly by someone who had no right to be present (**Chairman and Governors of Amwell View School v Dogherty** 2007 ICR 135, EAT). In that case the Employment Appeal Tribunal found that the Tribunal at first instance had fallen into error in allowing evidence of private deliberations on disciplinary matters covertly recorded to be admitted into evidence, whereas it was entitled to receive evidence of the "public" or open part of the hearing, unless there was a good reason not to.

94. Returning to the present case, the Claimant alleges that the content of what Mr Devor said to her on 30 July 2019 was unlawful victimisation of her. There is a dispute as to what was said, although in fact during the hearing the Claimant agreed Mr Devor's transcript of the recording.

95. The recording is evidence of that conversation which the Claimant and Mr Devor participated in. We decided that the evidence would assist us in making a determination on the allegation of victimisation. We find that there is no good reason not to admit this evidence. The Claimant did not oppose the Tribunal considering the transcript not listening to the audio recording.

96. The Transcript is as follows:

> "MFD: How are you
>
> [AB]: I am ok
>
> MFD: I'll just jump straight to it. I know that the business have sent you two letters today, about your relationship with the business. So I really just wanted to get the opportunity to have a conversation with you, and if you are willing to it, have a without prejudice discussion, off the record with you to see if we can resolve it on a more kind of closed basis… so a without prejudice discussion would mean that it would be a confidential discussion between the two of us and it wouldn't be possible to use that content in any legal proceeding or anything like that. So my intention is to see if we can find an easy resolution to this rather than having to go through all the formal procedures and policies. So the question to you is whether you understand what I just said and if you are willing to have that type of discussion.
>
> [AB]: NO.
>
> MD: So you're not willing to have an off the record without prejudice discussion.
>
> [AB]: NO.
>
> MD: Okay that is your choice [AB]. Thank you."

97. We have no hesitation in accepting that this transcript is a faithful reproduction of the actual audio recording made by Mr Devor on his mobile telephone.

98. The Claimant has sought to characterise Mr Devor's manner as threatening. On the audio, which we had the benefit of listening to, the manner of Mr Devor was hesitant and tentative rather than threatening. Although he has tried to suggest that the agenda for this discussion was very open, we think it realistic to conclude that his principal objective was to try to initiate a without prejudice discussion which would involve proposing termination of the Claimant's employment.

99. The Claimant realistically, having tried to suggest that there was some question about the accuracy of the transcript, when asked did not seriously seek to dispute it.

Claimant's accounts of the 30 July discussion

100. The Claimant has described this meeting at various stages as follows.

101. She made a complaint on the same day 30 July 2019 that was misleading:

> "Martin Devor asked me to leave the company because I rejected and reported the sexual advancements of my manager and when I said I don't agree to it he was threatening me
>
> Details

> I reported sexual harassment by Equinor manager and the case was submitted to court. Today a few minutes ago, Martin Devor came to my desk and asked for a short chat. We walked to Rob Adams's office and one to one he said me that I have to leave a company because I reported sexual harassment. When I said that I don't agree he threatened me. I don't feel myself safe in the office, please help me"

102. At a meeting on 12 August 2019 the Claimant described this meeting in the following way:

> "[AB] Current health was affected when Martin Devor approached desk, took [AB] to room and stated Company was not going to investigate case and [AB] should take an agreement letter and leave the company. When [AB] told MD no, MD said that [AB] was going to regret it. This affected [AB] significantly and affected her sleep."

103. In a meeting on 15 August 2019 she further alleged that Mr Devor had smiled sarcastically, and that he said "you will regret it" several times.

104. Claimant's particulars of claim attached to the claimant submitted on 23 February 2021] describes this meeting as follows:

> "25. Shortly after the letters referred to above were received by the Claimant, Mr. Martin Devor, the Respondent's Vice President of HR, went to the Claimant's desk and asked her for a chat. They walked to Rob Adams' office where, out of the earshot of her colleagues, Mr. Devor told the Claimant that he had used his team to scare her by sending the letters to her, that the Respondent was not going to investigate her case, and that she would have to leave the Respondent's business. When the Claimant refused, Mr. Devor told her that she would regret her decision because she is "nothing". The Claimant did not reply and simply left Mr. Adams' office. She became very anxious as a result of this encounter and was visibly shaking. The Claimant was so concerned and upset by what she had been subjected to, and what had been suggested to her, that she made a report to the Respondent's Ethics Helpline.

105. It follows that the versions of this conversation portrayed by the Claimant were significantly misleading and portrayed Mr Devor as acting inappropriately when we find he had not so acted.

106. When it was put to the Claimant during the Tribunal hearing that she had been misleading about what had been said by Mr Devor she did not seek to deny it, but rather tried to suggest that the Respondent was at fault for not having recognised that she was "delusional" and taking steps accordingly. The Tribunal has not received any medical evidence to support the conclusion that she was at that stage delusional.

Kissing gesture

107. Mr Devor says that at the end of this exchange on 30 July the Claimant made kissing sounds toward him. He was emphatic in his evidence to the Tribunal that this was

not just a dry mouth as the Claimant suggested to him in cross examination, but that it was a gesture directed at him and that it made him feel uncomfortable.

108. Mr Devor raised this gesture when he was interviewed on 15 August 2019, i.e. two weeks after the material exchange. He told Ms Rosland the investigator that he had discussed the matter with Eugene Pereira the Claimant's manager, as he was seeking an explanation as to what this meant. Mr Pereira told Mr Devor that he had himself had a similar experience and conjectured that it meant "you can't touch me" or "you can't get to me". When Mr Devor provided a transcript, based on the covert audio recording during the internal investigation, he described this gesture as "pouting her lips and making kissing sounds".

109. On the basis of the audio extract which was played to us remotely over CVP once, kissing sounds were not audible. It should be said however that the recording generally is rather muffled, as if recorded on a mobile telephone through clothing.

110. The Claimant has not tried to suggest that Mr Devor has made this up. Her position in the Tribunal hearing was to try to suggest that Mr Devor misinterpreted her having a dry mouth as this kissing gesture.

111. In her witness statement submitted to the Tribunal she took a different tack and suggests that he was deliberately "slut shaming", trying to portray her as promiscuous or a problem. As a third possible explanation she alleges that her face structure and lips are different from "ethnic Norwegians".

112. The Tribunal finds that Mr Devor's evidence on this point was straightforward and we accepted it. We find he did genuinely perceive that a gesture was being made toward him. It is not necessary for the purpose of these reasons to conjecture as to precisely what the Claimant meant.

First alleged protected disclosure (the Ethics complaint)

113. On 30 July 2019 the Claimant made a report to the Respondent's Ethics Helpline regarding Martin Devor's behaviour at their meeting on 30 July 2019. As is noted above this account was misleading

Outcome of third grievance – August 2019

114. On 2 August 2019 Mr Cross provided a written outcome of the third grievance.

115. Mr Cross explained that he had interviewed six employees in addition to the Claimant herself. He treated the grievance raised through both the written grievance and through a meeting as being comprised of seven complaints.

116. As to the first complaint, he confirmed that the comment about Azerbaijan being backward was not appropriate and that the person sending it should have realised this. It was recommended that this be addressed with the individual. He explained that the reference to a cheese market was unrelated to her nationality and was a reference to a event at the Borough Market, London Bridge. He did not accept that this showed that management generally were racially prejudiced against her, or that they felt that they could act with impunity.

117. He did not uphold her other six complaints.

Meetings on 12.8.19

118. On the morning of 12 August 2019 the Claimant attended a meeting chaired by Sinead Pope regarding her sickness absence. In that meeting the Claimant's trade union representative Stephen Jones queried whether a Stress Risk Assessment was in place. He suggested that when people are off with work related stress the SRA captures what is causing the stress, which will help to mitigate it. He went on to suggest that while it was not always possible to resolve fully an SRA can go some way in supporting via a "tweak here or there". Ms Pope replied that this would be "owned by SSU department" i.e. the department responsible for safety.

119. Ms Pope has explained to the Tribunal that at the time at that Stress Risk Assessment was originally raised with her by Mr Jones in 2019 she had not come across this terminology and assumed that it would be a team wide risk assessment approach. In any event she considered that this fell under the remit of SSU rather than PO her own department.

120. On the afternoon of the same day, the same participants met to discuss the Claimant's relationship with her team, her Leader and the company.

121. In that meeting the Claimant stated that she did not feel comfortable being in a meeting with her manager Mr Perreira. She stated that her relationship with the Respondent would not be settled", but that it would go to tribunal. She stated that when the process [presumably the grievance] was exhausted by appeal "there was then the whistleblowing plan".

Ethics investigation

122. Marit Berger Rosland was appointed to hear the complaint made by the Claimant under the Ethics Helpline. On 15 August she interviewed both the Claimant and Mr Devor.

First letter on 19 August 2019: sick absence

123. On 19 August 2019 Ms Pope wrote two separate letters to the Claimant.

124. First was the written outcome of sickness absence meeting. In that letter Ms Pope wrote:

> "we mentioned that a Stress Risk Assessment could be a useful tool, and I am taking steps internally to facilitate that"

125. To reiterate, Ms Pope's evidence to the Tribunal is that she had not come across the terminology Stress Risk Assessment at the time, and believed it to be an office wide tool, rather than something that was customised to a particular individual.

126. While the Tribunal found this slightly surprising since individual Stress Risk Assessments are quite widely used, we have taken account of the fact that some other types of risk assessments are for a workplace or an activity rather than for an individual. We have carefully considered Ms Pope's subsequent actions. She

seems to have pursued the workplace wide stress risk assessment with a fair amount of effort, involving other people. On 17 September 2019 she invited colleagues to a meeting on 14 October 2019 to discuss a team wide stress assessment for the London office. This lead to the production of a Psychosocial Risk Assessment in October 2019. We find that she did genuinely believe what was being proposed was a workplace wide stress risk assessment rather than what in fact Mr Jones had in mind which was an individual stress risk assessment. We find that this was a genuine misunderstanding.

Second letter on 19 August 2019: relationship breakdown

127. Secondly, on 19 August Ms Pope sent a written outcome of meeting to discuss the Claimant's relationship with her team, her Leader and the company. In this letter she mentioned a concern that the relationship with the Claimant's line manager had clearly broken down, and that the Claimant did not appear to be willing to work with them to restore that relationship. She noted that the Claimant refused to sit with other members of her team, and refused to even attend a meeting with her direct line manager absence of Ms Hovland and her Trade Union representative. The Claimant declined to allow the participation of an independent mediator.

128. Ms Pope stated that there was a fundamental breakdown in trust between the Claimant and the Company as a whole, which the Claimant had indicated was unlikely to improve. In this letter she went on

> "I want to be clear that we are not attempting to restrict you from raising valid grievances, and appeals, which your of course entitled to do. But once these grievances have been investigated and concluded, it will sometimes be the case that we have to "agree to disagree"".

Sick absence commences 16.9.19

129. On 16 September 2019 the Claimant was certified as not fit for work due to "anxiety and depression" and signed off for six weeks. From this point onward she remained on sick leave continuously until her dismissal approximately 14 months later on 27 November 2020.

Ethics complaint investigation report corporate audit outcome October 2019

130. On 8 October 2019 the Respondent produced a Misconduct Investigation report into the Claimant's Ethics Helpline complaint.

131. This report reviewed the earlier 2016 grievances and appeal, and a grievance raised in 2019. No evidence of wrongdoing was identified and therefore there was no investigation launched. This was approved by Margrethe Husebo, an in-house lawyer who was head of the Respondent's Corporate Audit Misconduct function.

132. The conclusion of the case review is that there was no reason to criticise Mr Devor for his decision to approach the Claimant for an informal conversation.

Application to Canada life (PHI)

133. As it became likely that the Claimant's sick absence was going to be long term, a decision was made to put in a claim to Canada Life, an insurer for payments under a Permanent Health Insurance policy to be paid once the Claimant's right to contract sick pay was exhausted. In an email exchange over a comparatively length period, 30 October 2019 – 9 December 2019 Sinead Pope offered prompts and support to the Claimant in submitting a claim for Permanent Health Insurance from to Canada Life.

134. While this has been dismissed by the Claimant as mere "window dressing", we do not accept that criticism and find that Ms Pope did appropriately initiate the process of making the claim, support the Claimant and chase up where necessary.

OH report November 2019

135. In November 2019 Dr Kohn of Occupational Health produced another report. There are versions dated 11 and 1, although nothing material turns on this.

136. Dr Kohn wrote:

> "Ms AB has been signed off sick since 16/9/19. With a diagnosis of anxiety and depression.
>
> Ms AB states that her feelings of anxiety are directly related to what she perceives as continuing attempts by her company to force her to resign, and that this is related directly to her pursuance of a grievance procedure against the company, and forthcoming ACAS tribunal.
>
> Today on formal testing she demonstrated a score for a moderately severe anxiety state, and a moderate depression. Ms AB is not taking any medication for this, but she is receiving counselling
>
> Are there any modifications / adjustments which would alleviate the condition or aid rehabilitation?
>
> Mutually satisfactory resolution of employees perceived grievance, in the meantime perhaps movement to another department where the "history" of this case will not follow her.
>
> OH Opinion
>
> I cannot see this situation resolving until there is a satisfactory resolution to Ms AB's grievance perception, which may involve participation of the courts."

PHI claim

137. On 9 December 2019 the claim for PHI was eventually submitted to Canada Life, following receipt of completed paperwork from the Claimant.

2020

138. On 7 January 2020 the Claimant provided consent to OH to release their reports to the insurer Canada Life.

Onset of disability

139. On 13 January 2020 the Claimant attended her GP, who recorded as follows:

> Problem Anxiety with depression (Review)
>
> History Ongoing work related tribunial matters pending. Private counselling via work insurance has run out until April. It was helpful and waiting to restart in April again. Ongoing anxiety mainly related issued but also low mood, affecting sleep also. Would like to start medication to help with symptoms. Offered NHS counselling/therapy but would rather wait until private counselling restarts. Discussed medications and agreed trial of sertraline covering potential benefits and SE.

140. The parties have agreed in the course of this litigation that this date marks the date on which the Claimant became a disabled person.

Expiry of sick pay & verbal indication that PHI claim unsuccessful

141. On 6 February 2020 the Claimant's entitlement to contractual sick pay expired. Given that the PHI insurer had still yet to confirm the outcome of the claim, the Respondent later decided to pay the Claimant sick pay until the end of February.

142. On 28 February 2020 Canada Life provided a verbal indication that the Claimant's PHI claim would be unsuccessful.

143. On 18 March 2020 the Claimant's solicitor wrote to Mr Al Cook to raise that she had been a victim of discrimination and harassment and was now without pay.

Consultant Psychiatrist report – Dr Michael Bristow – 27.3.20

144. Dr Michael Bristow, a Consultant Psychiatrist prepared a report on the Claimant's medical condition dated 27 March 2020, following an interview on 17 March 2020. He concluded that the Claimant had depressive symptoms at the more symptomatic end of the mild range. He concluded that the overwhelming reason why she had not returned to work was the current extremely poor relationship she had with her employers and in particular with the HR Department. He characterised her current symptoms as mild-to-moderate anxiety and mild low mood [paragraph 12.5, 222].

145. He also commented at paragraph 12.2 of his report:

> Her score on the GAD-7 was 21 out of 21 which I think is an exaggeration

146. He wrote as follows:

> "12.11 What non-medical factors, e.g. employment issues, may be preventing a return to work?
>
> As stated, there is a complete breakdown in trust between her and her employer and I think it is highly unlikely that this will ever be rectified. A further factor in Ms AB's case is that she is determined not to take a settlement, especially if it involves a non-disclosure agreement and wishes to go to Tribunal, although is aware that this may take a great deal of time. She seems to feel that she is a torchbearer for other women in a similarly unfortunate position as herself."

147. Other findings which he made, which have been emphasised by the Respondent are that there was no evidence of hallucination (10.11) and no suggestion that she has any organic impairment (10.13).

Ms Pope continues to chase Canada Life

148. During the period 30 March 2020 to 16 April 2020 Ms Pope continued to chasing Canada Life the insurer for a written outcome in the claim for permanent health insurances [903-906, 914].

Second alleged protected disclosure/5th alleged protected act (the Grievance) – 9.4.2020

149. On 9 April 2020 the Claimant raised a further grievance (Grievance 4) by email to Caroline Jordan, due to conduct she contended was a fundamental breach of the Respondent's code of conduct and an abuse of human/legal rights which resulted in discrimination because of her sex, disability and nationality. She explained that she considered this treatment a fundamental breach of my employment contract, including the implied duty of mutual trust and confidence.

150. The grievance arose from the cessation of payment of sick pay. The Claimant complained about the policy of Canada Life, which was to reject a claim for permanent health insurance (PHI) in circumstances in which an employee cannot work for their current employer but could work for an alternative employer. She alleged that this policy would have a greater adverse impact on those who are ill (and have a disability) as a result of workplace issues, treatment and/or discrimination. The Claimant also reiterated her complaint about racist attitudes toward her country of origin.

Outcome of Canada Life claim

151. On 17 April 2020 Canada Life notified the Respondent in writing that the Claimant's PHI claim had been declined because the weight of the evidence indicated that the Claimant would be able to perform the insured occupation for another employer and therefore the claim was not supported. It was stated that the main barrier to the return to work was the breakdown of the relationship between the Claimant and the Respondent.

152. A written communication of this outcome was provided to the Claimant on 20 April 2020.

153. On 27 April 2020 the Claimant raised an appeal with Canada Life against the PHI claim rejection. Two days later the Respondent confirms to the Claimant that it would assist her in appealing against PHI claim outcome.

Email to CEO

154. On 3 May 2020 the Claimant emailed Mr Eldar Saetre, President and Chief Executive Officer, Equinor ASA, alleging that Equinor's Code of Conduct was not enforced in the Respondent.

Medical matters

155. On 4 May 2020 the Claimant mentioned to her GP that she was feeling overwhelmed by anxiety. The doctor increased her dosage of the anti-depressant Sertraline to 100mg per day.

156. On 6 May 2020 the Claimant forwarded email correspondence between herself and Canada Life to Ms Pope. That contained GP records and the Claimant's confirmation that her GP had doubled her dosage of medication and her non-medical description of symptoms of depression, for example being asked by her neighbours why she was so miserable and wanting to cry under a blanket.

157. On 14 May 2020 the Claimant provided Mr Jones, who was dealing with her grievance with a medico-legal report and requested that Ms Pope release to him occupational health records.

158. On 21 May 2020 Ms Pope wrote to the Claimant seeking some input from her in trying to effect a return to work:

> "We are otherwise aware that you have previously indicated that the factors which are preventing your return to work relate to, at least in part, particular individuals or working arrangements. It would therefore be most helpful if you are able to indicate what measures you believe would support you in your return to work. We shall then be able to consider these"

Fourth grievance outcome

159. On 2 June 2020 Phillip Jones provided a written outcome of the fourth grievance. As part of the grievance process he reviewed all of the Claimant's previous grievances and dealt with her complaint about the operation of the sick pay policy under eight separate headings. He rejected the grievance.

Canada Life appeal

160. On 2 June 2020 Ms Pope chased the outcome of the appeal to Canada Life by email.

161. On 12 June 2020 Canada Life notified the Respondent that the Claimant's appeal against its decision to decline her PHI claim has been unsuccessful.

The third alleged protected disclosure/6th alleged protected act (the Appeal)

162. A couple of days earlier, on 10 June 2020 the Claimant wrote to Sinead Pope to appeal Grievance 4 outcome provided by Mr Jones, reiterating her contention that the effect of the policy was discriminatory.

Medical incapacity process

163. On 29 July 2020 Raphael Arvelaiz wrote to the Claimant to confirm outcome of Grievance 4 appeal, rejecting the Claimant's appeal.

First incapability meeting – 29.7.20

164. On 30 June 2020 Sinead Pope wrote to the Claimant to invite her to First Medical-Related Incapability Meeting under the Respondent's UK Absence Management Policy. The meeting took place on 29 July 2020, chaired by Sinead Pope.

165. The Claimant was asked what could be done to help her return to work. It was agreed that there should be another occupational health report.

166. Mr Jones the Claimant's trade union representative expressed surprise that the Stress Risk Assessment which had been talked about last year had not been carried out and what had been done instead was a stress survey across-the-board instead.

167. Ms Pope followed this up on 31 July 2020 by emailing the Claimant about an individual stress risk assessment. She took advice from the HWE team.

OH report August 2020

168. A further occupational health review was carried out. A report dated 21 August 2020 prepared by Dr Grainne McGrath contained the following:

> "Current situation
>
> Ms. AB continues to describe symptoms suggestive of impaired mental health wellbeing including anxiousness, sleep disturbance, poor concentration, and forgetfulness. I understand she is awaiting a date for a tribunal hearing. She continues with the medication initiated by her doctor.
>
> …
>
> Opinion and recommendations
>
> In my opinion, Ms. AB remains unfit for work. She would require an improvement in her reported symptoms to be able to perform the duties of her role. Her symptoms are in keeping with perceived work-related stress and she is likely experiencing some mental health symptoms additionally, given the duration of her reported stressors. It is known that prolonged stress can lead to a mental health condition and as you have mentioned in your referral, her GP has now diagnosed her with anxiety and depression. Ms. AB's prognosis is likely to depend on how

her work-related concerns are resolved and I do not foresee progress in terms of resolution of her work-related concerns until the upcoming tribunal has concluded.

169. In a question and answer format this report contained the following:

"1. Does Ms AB present any symptoms which support a diagnosis or anxiety and depression, or any illness of any kind?

Ms. AB reports symptoms suggestive of impaired mental health wellbeing. The symptoms she describes are commonly reported in individuals with perceived stress, anxiety, and depression.

2. What is your diagnosis and prognosis of Ms AB's illness?

In my opinion, Ms. AB is experiencing symptoms of prolonged perceived work-related stress and anxiety. As mentioned above, her prognosis is likely to depend on resolution of her work-related concerns.

3. Taking into account your diagnosis and prognosis of Ms AB's illness, when is Ms AB likely to be able to return to work?

I do not anticipate that Ms. AB will return to work until the tribunal hearing is concluded. It will need to be seen if this will alter Ms. AB's beliefs about work.

…

5. If you consider Ms AB to currently be suffering from anxiety and depression, is there anything the Company can do to help Ms AB deal with her anxiety and depression and assist with her return to work, particularly bearing in mind primary cause of the illness as above?

Ms. AB is aware of the company EAP. Any steps taken to address Ms. AB's work related concerns would be helpful including a rapid conclusion of the tribunal hearing.

6. Does Ms AB have a mental impairment that is likely to affect her long term? By long term, we mean a period of 12 months or more.

I cannot advise you about this currently. The trigger for her perceived stress continues and I do not anticipate an improvement in her symptoms whilst her work-related issues remain. Favourably she does not describe a diagnosis of a mental health condition in the past.

7. If Ms AB does have a long-term impairment, does that impairment have a substantial adverse effect on her ability to carry out her normal day to day activities and if so, what are these substantial adverse effects?

In my opinion Ms. AB has the potential to recover from her symptoms especially if she finds a resolution for her work-related concerns. .

> 8. If you consider that Ms AB has a mental impairment that is likely to affect her long term, having regard to her role as described at paragraph 1.1 and the history of the adjustments made to date, can you advise:
>
> (a) if there are any reasonable adjustments that the Company can take to support MsAB working for the Company (and what these are); and (b) for how long such reasonable adjustments should be made.
>
> As mentioned previously, I do not anticipate that Ms. AB will return to work until the tribunal hearing is concluded as she reports this as an ongoing perceived stressor. I would recommend a review of her symptoms following this where advice may be given on her fitness for work and likely adjustments required.

Claimant's proposal

170. In an email dated 27 August 2020 the Claimant wrote to Dr Tonje Talberg with the following suggestions:

> "1. Apology – an apology should be given to me in written form, and should acknowledge and accept the company's wrong doings towards me, and should accept responsibility and accountability for those wrong doings.
>
> 2. Return to Work – any return to work should be governed in accordance with the terms and conditions of my contract of employment. I would not countenance a move to either Norway or Azerbaijan. If a return to work in London is not feasible, given the treatment I have suffered and the impact on my health, then I may be prepared to consider a move to the USA.
>
> 3. Pending these discussions being considered and concluded, and a return to work, I should be reinstated to full pay.
>
> 4. If it is not possible to secure a safe return to work in an appropriate role and at an appropriate location, then I would be prepared to consider an exit from the organisation on a suitable and appropriate package.

171. By letter dated 15 September 2020 Ms Pope confirmed that the stress risk assessment could not identify specific aspects of the working arrangement which caused stress. She responded each of the Claimant's proposals. As to 1, the Ms Pope that the Respondent did not consider that it had been guilty of wrongdoing. As to 2, she confirmed that there were no internal vacancies in the UK or US. As to pay, Ms Pope confirmed that the Claimant would be governed by the absence management policy. Point 4 appears not have been engaged with. The rest of the letter dealt with the question of incapacity and the next step under the procedure which would be a meeting with Bente Hovland.

The fourth alleged protected disclosure (the Enforcement email)

172. On 18 September 2020 the Claimant emailed Jon Erik Reinhardsen alleging that Equinor's Code of Conduct is not enforced in the Respondent.

Second incapability meeting – 24.9.20

173. The second stage incapability meeting took place on 24 September 2020 chaired by Ms Hovland, the Claimant's second line manager.

174. It was confirmed by Ms Hovland that there were no current jobs available in London but that there were four more vacancies in the US. The Claimant asked if her experience would qualify her for those positions. Ms Hovland said

> "93 BH I think potentially you could try for the Project Leader role, that could be an opportunity it could be worthwhile for you to apply.
>
> 94 SJ Do you think a transfer to another country is a reasonable adjustment?
>
> 95 BH What do you mean by reasonable adjustment?
>
> 96 SJ As per Section 20 of the Equality Act would it be considered a reasonable adjustment? Do you not think a move somewhere like the US, Canada or any country would be a stressful or disruptive process for someone who has been off ill.

175. Ms Hovland clarified to the Claimant that they were not telling her to relocate, but they were discussing jobs available on the internal market. Mr Jones highlighted that a potential move to America or wherever or even staying in the UK the occupational health says not at this moment time. The focus right now is on the Employment Tribunal which he said needed to be resolved first.

176. During that meeting again the topic of the stress risk assessment which had still not been produced to the Claimant was raised. Mr Jones pointed out that he had raised this 18 months earlier.

Stress risk assessment

177. Following two telephone consultations on 12 and 28 August 2020, Dr Tonje Talberg, a medical adviser based in Norway provided a stress risk assessment in a short summary letter. She noted the history in bullet points. As to her advice she said as follows:

> To the extent possible I advise you to find a new department for [AB] to work in. I think it will be counterproductive for [AB]'s health challenges to go back to the department where she belongs.
>
> When going back to work I think it will help [AB] to have a kind of follow-up through support and coaching the first weeks or few months.

Reconvened medical incapability meeting (2 October 2020)

178. On 2 October 2020 the Further Medical-Related Incapability Meeting chaired by Bente Hovland was reconvened. During this meeting the following comments are of note:

> 21 [AB] A role in investor relations would be of relevance and of interest to me. As I understand it for my colleagues in Performance Management in other areas it was a career pattern for them because in Performance Management you work with a lot of information that is presented to shareholders and stakeholders of the Company.
>
> In Finance & Control department I was responsible for internal controls so I think that this would be a good match for me and for the company, an interesting opportunity.
>
> 22 BH In that particular area, those activities would fall under the department that you are working for currently in London so if you wanted to work on those performance management tasks you would have the same leader.
>
> 27 BH You also mentioned in the meeting with the doctor a position in UK but also the US. Is that still relevant [AB]?
>
> 28 [AB] Yes, it is relevant, I put it in my profile too, so US is only relevant
>
> 34 BH Assuming that a role could be found in another dept when do you think you could be able to return, because you said in a previous meeting that it would be unlikely that you would want to return until after the tribunal proceedings?
>
> That was also the recommendation from Occupational Health, is that still the case?
>
> 35 MT Yes the priority is my health, I need to look after my health, because last time when I came back after sick leave for five months I became unwell again and this time I want to protect my health, prioritize my health.
>
> 41 BH So now I think we are up to 295 days since you have been into work, which is a lot and it now looks very likely that this will be extended. And because of that we need to see what happens. Also, [AB] if I understand it then, we will not look for any jobs at the moment for you, is that correct?
>
> 42 [AB] No, there is no point.

179. On 15 October 2020 there was a written outcome following the reconvened meeting on 2 October 2020. In this letter Ms Hovland concluded as follows:

> "From the company's perspective, and bearing in mind that you have already been absent from work for nearly a year, I do not think that it is

reasonable for the company potentially to have to wait for another year to find out if you are able to return to work.

Therefore, in accordance with the Absence Management Policy, this letter is a formal warning that the company may terminate your employment if you remain unable to return to work prior to conclusion of the Employment Tribunal process."

Final stage of incapability process

180. On 30 October 2020 Sinead Pope wrote to the Claimant to invite her to a Final Medical-Related Incapability Meeting.

181. The Claimant wrote to Ms Pope and Ms Hovland on 4 November 2020 as follows:

"Thank you for your correspondence of 30th October 2020, and the meeting currently proposed for 6th November 2020.

I am in the process of confirming my Trade Union representative's availability to attend a meeting on 6th November 2020 and will revert to you as soon as I am able.

In the meantime, and in readiness for the forthcoming meeting, please note:

1. The company repeatedly seeks to maintain that I have said that I am unwilling to return to work. I have never said this. It is not a case of me being unwilling to return to work, but rather a case of being unable to return to work. The medical evidence obtained by, and provided to, the company clearly states that, if I am to be in a position to return to work, appropriate adjustments need to be made, and measures put in place, to allow that to happen, in particular relating to my place of work, my line managerial reporting line, and the role that I will undertake.

2. It has been repeatedly overlooked that the fact and nature of my disability places me at a disadvantage in securing an alternative role, particularly if I am required to apply for alternative roles. The company has failed to set out what measures will be put in place to address that disadvantage and to ensure that I am able to be considered for/posted in to any such role.

3.Elements of my grievance have been upheld on appeal but, to date, the company has failed to provide me with any detail as to what will now been done to address the findings made in my favour and the disadvantages caused by them.

4,Please check the minutes of the meetings with voice recordings and send me the corrected version. There are a number of inconsistencies, for example Line 19 in the minutes: "I don't want to talk about it", should be "I feel positive about it".

5. Please confirm that I will be allowed to record the meeting.

> I would welcome a response to the above in readiness for the proposed meeting, or, at the least, the opportunity to address these matters further at the forthcoming meeting.

Final incapacity meeting

182. On 6 November 2020 the final medical-related incapability meeting took place chaired by Ms Cath Allsop, VP Subsurface, also attended by Stephen Jones, the Claimant's Trade Union Representative and Wyn Smollet (HR).

183. At this stage the Claimant had been continuously absent since 16 September 2019. The medical evidence suggested that it was unlikely that her health would improve until the work-related issues were resolved. It was again clarified during that hearing that this meant resolution of the tribunal hearing.

184. The following exchange occurred between the Claimant and Ms Allsop about the topic of the Claimant being redeployed into another role and on what basis:

> "55 [AB] You should not say to me go and apply for jobs in the internal market because it's not my fault I can't return to my job which I had. This out-with my control and I am now in position I can't return to my job. I shouldn't have to apply for positions in my job. It should be a transfer.
>
> 56 CA Wyn you may want to comment on the recruitment and transfer process in Equinor but we do have an open PIRD process for a reason. But that doesn't mean that people can't be **tagged** or discussed but my challenge here is that we are talking about a year down the line, it's hard to see what we might be able to do at this point in time to be able to assist with that if you are unable to return to work or your ability to return to work is impeded and therefore your ability to be trained might be impeded at this time.
>
> So, to assist with that or your ability return to work we will need to understand the timing of potential assistance that would help to address what you see as a disadvantage.
>
> I think what you are saying is that it your expectation that when you come to this point of redeployment you would like the company to help you become more competitive with some training – is that correct?
>
> 57 [AB] It is about training but for me it should be transfer, you should not say to me I have to apply for positions on internal job market.

185. The reference to PIRD [Periodic Internal Recruitment Deployment] is a reference to a system of internal vacancies being advertised several times during the year with the Respondent organisation at specific times to allow internal movement and progression.

186. The reference to "tagged" is a reference to a practice whereby the PO (i.e. HR) department would identify certain individuals as guaranteed for interview. This would

not lead to a guaranteed transfer but did highlight to the recruiting manager that there are good reasons for this person to be treated as a priority recruit. Examples we were given included potential redundancy or returning from long-term sick. The reason for the tagging would not necessarily be given to the recruiting manager.

187. Later on in the meeting there was the following exchange:

> 61 CA I totally respect that [AB], any job or position should be where you wish to go, we're not going to ship you out that's why we are keen to explore what the scope of those positions are. What I'm hearing is that your preference is UK; you previously expressed that the US would be on interest and I believe that is why Bente looked in the previous PIRD to identify those positions.
>
> Where we have ended up though even if we assessed the current positions you would not be able to return to work because of the medical assessments so what we are realistically looking at is somewhere down the line when you are able to return to work.
>
> So, from my point of view, if I'm really looking at this clearly then this will not be until after the tribunal – is that your understanding?
>
> 62 [AB] Yes, it is my understanding

188. A bit further on:

> "68 CA The first is that you have communicated that you are not able to return to work in any role until the outcome of the tribunal is complete and this is based on medical advice from your GP; occupational health and in some ways from the risk assessment although they did suggest coming back a little bit earlier – is my understanding correct on that
>
> 69 [AB] I think it is correct but if I disagree on some of the points I can come back later because I understand that I have depression, it affects my decision making ability but if I have any comments I will come back.
>
> …
>
> 71 CA The second point is that when it comes to alternative rules that you would consider at that point in time, we should be looking primarily at the UK, but also present potential opportunities in the US at that time. And that, from your point of view, you would like the company to explore that as a re-assignment, rather than an application. And in the event of application, you would like the company to support you in making you competitive for those situations, to cover the time that you've been absent and make sure that's not disadvantaged you is that correct?
>
> 72 [AB] Yes

189. It seems that Ms Allsop noted the Claimant's request to transfer without an interview process, but did not decide on whether or not this would apply, since she understood the Claimant to be saying that she could not return to work until the Tribunal

proceedings had been resolved. Ms Allsop plainly regarded a delay of that length as an insurmountable hurdle and did not fully engage with the question of redeployment without interview.

190. What the Claimant did not say in clear terms was that she would be able to immediately return to work should she be redeployed without any requirement for an internal recruitment process.

Follow up email exchange

191. Later on the evening on 6 November the Claimant followed up this meeting with an email to Ms Allsop and Wyn asking about the "timeframe for submitting documents" discussed.

192. This seems to have caused some confusion. On 9 November Wyn Lorna Smollett, who had been in attendance in the meeting on 6 November followed up with the following query:

> "Can you confirm what documents you are referring to below please as I am unaware that we agreed to send you anything after the meeting? We did agree that I would check what has happened with regards to the outcome and any follow up from your grievance concerning Canada Life which I still plan to do."

193. The Claimant says in her witness statement, and we accept that she was surprised by this response as she was expecting an outcome following this meeting, and this meeting was of some importance given the stage in the incapacity process. Ms Allsop's evidence, which we also accept is that she and her colleague were genuinely confused as to what the Claimant was referring to. She points out that the email following up was in polite terms, which we find it was.

Dismissal

194. By a letter dated 25 November 2020 the Claimant was provided with a written outcome by Ms Allsop, which contained notification of termination of employment. Crucially Ms Allsop concluded and understood the Claimant to be agreeing that she could not return to any job at this stage pending the resolution of the litigation process.

195. As to what was understood about the litigation timescale at that stage, Ms Allsop's understanding was based on a discussion between the Respondent's solicitor and the Claimant's lawyer. It had been agreed between them that her claim was unlikely to be resolved before the end of 2021, and quite possibly well into Spring 2022. (In fact, although this could not have been known at the time, the claim was not submitted until 23 February 2021, notice of the claim not received by the Respondent until 9 June 2021 and the final hearing did not take place until mid-September 2022, with this decision being promulgated in November 2022).

196. The Claimant's effective date of termination was 27 November 2020.

Appeal

197. On 3 December 2020 the Claimant emailed Sinead Pope to appeal against the decision to terminate her employment.

2021

Dismissal appeal hearing

198. The dismissal appeal hearing took place chaired by Hanna Caroline Imig (Wirschke) ["HCW"] on 7 January 2021.

199. In the appeal hearing the Claimant confirmed that her state of health had not changed since she had last spoken to the Respondent. She confirmed that she still had depression and anxiety and that she was still on medication. The following exchanges in that appeal hearing are of relevance [1199-1200]:

> The company has concluded that I am unable to return to an alternative role, which is incorrect. In fact, I have confirmed that I agree with the recommendation of the stress risk assessment carried out by and on behalf of the company, and to abide by its recommendations. I have also confirmed that I am willing to return to work following the conclusion to any ongoing litigated process, notwithstanding what the outcome to any such process might be. It is therefore incorrect to conclude that I will either be unable or unwilling to return
>
> HCW So on this [AB] maybe you can tell me a bit more about your current health status. You mention it has unchanged from previous meeting, so your currently not able to return to work?
>
> [AB] No I'm still depression and anxiety, I'm still on medicine HCW Is there any update when it comes to the time frame that you would be able to return to work?
>
> [AB] I think we already talked about this in previous meetings. There cant be any update because it's the recommendation, I cant return back to work unless the process will be concluded. I would like to add another things, that when I returned last time from 5 months on sick leave, in a few months I ended up on sick leave because of the way I was victimised by the company.

200. The internal appeal against dismissal was concluded in a letter date 10 March 2021 in which Hanna Caroline Imig (Wirschke) dismissed the appeal.

Progression of other members of the team

201. We were shown an organisation chart in reference to which it was identified that all of the members of the Claimant's team in the UK apart from her had achieved a promotion.

Respondent's absence management policy

202. The Respondent's "UK Absence Management Policy" dated July 2018 contains the following:

> Company Sick Pay
>
> The Company will pay basic salary for a period of up to 26 weeks (whether aggregated or consecutive) in any rolling 12 month period where you are absent from work as a result of sickness or injury. Payment is subject to your compliance with the Company's requirements governing the reporting of sickness and injury. Any Company Sick Pay payment will include any entitlement to Statutory Sick Pay. However, if you are receiving benefits separately from the Department of Social Security then basic sick pay from the Company will be reduced accordingly. The Company reserves the right to withhold payment of any Company Sick Pay if, after reasonable investigation, the Company considers that the sick pay scheme is being abused.
>
> 9. Returning to Work From Long-Term Sickness Absence
>
> The Company is committed to helping employees return to work from long-term sickness absence. As part of the medical-related incapability meetings procedure, the Company will, where appropriate and possible, support a return to work by:
>
> (a) Obtaining relevant medical advice;
>
> (b) Making reasonable adjustments to the workplace, working practices and working hours;
>
> (c) Considering redeployment; and/or
>
> (d) Agreeing a return to work programme with everyone affected.
>
> Benefits will remain in place in accordance with your Contract of Employment and subject to the terms of the benefits.
>
> 10. Medical-related Incapability
>
> If you are repeatedly absent from work or absent for an excessive length of time due to sickness or injury, a medical-related incapability review will take place between you and your line manager, and may involve the PL department. The medical-related incapability review will consist of a medical-related incapability meeting followed by, where necessary, further medical-related incapability meetings. It may also involve the Company obtaining a medical report from your medical advisors, Company doctor or occupational health specialist. The aim of these medical-related incapability meetings is to obtain information as to the reasons for your sickness absence and to assess whether and

> when you will be able to return to work, or when attendance is expected to improve to a satisfactory level.

ACAS & presentation of Claim

203. On 22 February 2021 the Claimant notifies ACAS of a claim under early conciliation procedure. An early conciliation certificate was issued the same day.

204. On the following day 23 February 2021 the Claimant submitted her claim to London Central Employment Tribunal.

The Law

JURISDICTION & TIME LIMITS

Continuing act

205. The leading case of whether an act is 'continuing' for the purposes of discrimination is *Hendricks v Commissioner of the Police for the Metropolis* [2003] IRLR 96, CA *per* Mummery LJ at paragraphs 48-49 & 52:

> **48**… the burden is on [the Claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutionalised racism', 'a prevailing way of life', a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination.
>
> **49**… [the Claimant] may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination.
>
> **52** The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'… the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an on-going situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct

> from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

Time limits

206. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the discretion under [what is now] S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'

207. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision. At paragraph 18-19 Leggatt LJ said:

> "it is plain from the language used (such other period as the employment tribunal thinks just and equitable) that 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 would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30] [32], [43], [48]; and Rabone v Pennine Care NHS Trust [2012] UKSC 2, [2012] 2 All ER 381, para [75].
>
> That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

208. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ said:

> "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) the length of, and the reasons for, the delay. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

DISMISSAL – "ordinary" unfair dismissal & protected disclosure dismissal (s.103A)

209. The Employment Rights Act 1996 contains the following provisions:

> 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-
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> …
>
> 47B Protected disclosures.
>
> (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.
>
> 98 General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2)A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

> 103A Protected disclosure.
>
> 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

210. The burden of proving each of the elements of a protected disclosure is on a claimant (*Western Union Payment Services UK Ltd v Anastasiou*, 13 February 2014 per HHJ Eady QC at [44]).

211. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal held that a sharp distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy, given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

212. There is an initial burden of proof on a claimant to show (in effect) a *prima facie* case that she has been subject to a detriment on the grounds that she made a protected disclosure. If so, the burden passes to the not to prove that any alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment. Simply because the respondent fails to prove the reason does not act as a default mechanism so that the claimant succeeds. The ET is concerned with the reason for the treatment and not a quasi-reversal of proof and deemed finding of discrimination i.e. there is no mandatory adverse inference mechanism (*Dahou v Serco Ltd* [2017] IRLR 81, CA).

Whether belief reasonable

213. Whether a belief is reasonable is to be assessed by reference to "what a person in their position would reasonably believe to be wrongdoing": *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 per Judge McMullen QC at [62]. In that case Mr Korashi was a specialist medical consultant and an assessment of what was reasonable needed to be by reference to what someone in that position would reasonably believe.

Public interest

214. The Court of Appeal in *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979 confirmed that public interest does not need to relate to the population at large, but might relate to a subset, in that case a category of managers whose bonus calculation was negatively affected. It seems that it cannot simply relate to the interest of the person making the disclosure.

DISABILITY DISCRIMINATION

FAILURE TO MAKE REASONABLE ADJUSTMENTS

215. In considering reasonable adjustments claims, tribunals are required to have an analytical approach (*Environment Agency v Rowan* [2008] ICR 218). The correct approach is to identify (i) the PCP; (ii) non-disabled comparators, where appropriate, (iii) the nature & extent of substantial disadvantage. This is in order to consider the extent to which taking the step would prevent the effect in relation to which a duty was imposed.

216. In cases of reasonable adjustments the House of Lords confirmed in *Archibald v Fife Council* [2004] ICR 954, Baroness Hale para 47 that the adjustment required for a disabled person necessarily entails an element of more favourable treatment.

217. Regarding PCPs, in *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.

218. In *General Dynamics Information Technology ltd v Carranza* [2015] IRLR 43 the EAT confirmed that the PCP in attendance cases should be defined in terms of the requirement of consistent attendance rather than the attendance procedure itself.

219. In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 the Court of Appeal confirmed that in that case the correct PCP was "the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions". The Court held that the positive duty to make reasonable adjustments is only a part of the protection afforded to disabled employees. The fact that the employer may be under no duty to make positive adjustments for a disabled employee in any particular context does not mean that he can thereafter dismiss an employee, or indeed impose any other sanction, in the same way as he could with respect to a non-disabled employee. The employer is under the related duty in section 15 to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to section 15.

220. There does not have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for the tribunal to find that there would have been a prospect of it being alleviated (*Leeds Teaching Hospital NHS Trust v Foster*) EAT 0552/10.

221. The EHRC Employment Code ("the Code") has examples of matters that a tribunal might take into account (see para 6.28)), which uses the old statutory code from the Disability Discrimination Act 1995. This is merely guidance. The examples are:

    221.1. the extent to which taking the step would prevent the effect in relation to which the duty was imposed (i.e. the effectiveness of the step);

    221.2. the extent to which it was practicable for the employer to take the step.

222. In *O'Hanlon v Comrs for HM Revenue & Customs* [2007] IRLR 404, Hooper LJ approved the approach of the EAT which said that it will be a rare and exceptional case in which the extension of sick pay will be a reasonable adjustment, even when the claimant is asserting that stress about her personal financial situation is exacerbating her condition. The scheme of the reasonable adjustments legislation is to enable disabled people to work with appropriate modification, not to pay them to stay at home and thus potentially provide a disincentive to a return to work.

SECTION 15 OF THE EQUALITY ACT

Unfavourable treatment because of something arising from disability

Justification - proportionate means

223. The case law on justification suggests that proportionate means must be "appropriate" and "necessary". In this context, following the guidance of the Supreme Court in *Chief Constable of West Yorkshire Police v Homer* 2012 ICR 704, SC and *Hardy and Hansons plc v Lax* 2005 ICR 1565, CA "necessary" is to be read as "reasonably necessary".

224. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the relevant proposal, is justified objectively notwithstanding its discriminatory effect. The tribunal has to make its own judgement, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the discriminatory proposal or measure is reasonably necessary. This is stricter than "range of reasonable responses" test and does not allow for a margin of discretion or margin of appreciation. This requires an employment tribunal to take into account the reasonable needs of the employer's business.

225. In the case of *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145 the Court of Appeal found that although the tests for unfair dismissal and the proportionality tests under the justification defence are different the considerations are likely to be similar. Elias LJ said:

> "... So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed: the uncertainty is one of the factors to weigh up when assessing the question of reasonableness".

Conclusions

Credibility

226. As to credibility, although the Tribunal noted the different versions of allegations of sexual harassment by XY, we found that there were various possible reasons for this. There is some evidence supporting that the Claimant had suffered trauma, which might make recollection of those events difficult or accounts of those events

apparently inconsistent. These events were reported over a long period of time, and the nature of the allegations was that the Claimant was translating what been said to her in Russian historically into English at a much later stage. The only relevance of these points, we find, was as to the appropriate order to make as to the identity of XY. This is set out in a different order.

227. In short we did not find that this lead us to particular view on the Claimant's credibility as a witness. We are also conscious of the fact that credibility or reliability on one topic does not necessarily translate into credibility or reliability of a witness on another.

228. The findings as to credibility we made in relation to the Claimant's reporting of the incident of 30 July 2019 we made entirely by reference to the evidence received by the Tribunal relating to that incident and the aftermath of it.

Disputed issues

229. The issues the Tribunal will decide are set out below.

1. **JURISDICTION**

1.1 *Does the Tribunal have jurisdiction to determine the complaints insofar as they relate to alleged acts of discrimination which occurred more than three months prior to the date of presentation of the claim on 23 February 2021 subject to any extension of time by participation in ACAS early conciliation?*

1.2 *In relation to the alleged acts of discrimination, has there been any discriminatory conduct extending over a period for the purpose of s 123(3) of the Equality Act 2010 ("***EqA 2010***")?*

230. The Tribunal did not find any of the Claimant's claims of discrimination were well founded and accordingly there was no discriminatory conduct extending over a period.

1.3 *Would it be just and equitable for the Tribunal to extend time under s 123(1)(b) of the EqA 2010 in relation to any alleged acts of discrimination which are out of time?*

231. The Tribunal did not find any of the Claimant's claims of discrimination were well founded and accordingly there was no need to consider an extension of time on a just and equitable basis.

2. **UNFAIR DISMISSAL**

2.1 *Was the Claimant unfairly dismissed by the Respondent contrary to s 94 and s 98 of the Employment Rights Act 1996 ("***ERA 1996***")?*

2.1.1 *Was there a potentially fair reason for the dismissal?*

232. The Tribunal finds that the reason for dismissal was incapability (long term sickness absence).

2.1.2 *If there was a fair reason for the dismissal, was the decision to dismiss the Claimant substantially and/or procedurally fair in particular:*

(a) *Was dismissal within the range of reasonable responses open to the Respondent? The Claimant relies on the following factual issues:*

(i) *whether the Respondent consulted her regarding the reasons for her absence;*

(ii) *whether the Respondent made reasonable efforts to facilitate her return to work; and*

(iii) *whether the Respondent reasonably believed she was unfit to carry out her job.*

233. The Tribunal has borne in mind that the Respondent's absence management policy contained a section dealing with return to work from long-term sickness absence. That policy provided that where appropriate and possible considering redeployment should take place.

234. In the meetings in which there was discussion of the Claimant returning to another role it was never described to her in terms of redeployment. There was a slightly less structured discussion about timing of her return to work, and an acknowledgement that the Claimant's position was that moving to another role should be on the basis of assignment rather than application.

235. The Tribunal considers that in the context the reference to assignment was synonymous with redeployment i.e. transfer to a new role without the requirement to go through a competitive interview process.

236. A decision was not taken on this because the Claimant indicated that she was not in a position to return to work until the outcome of the Employment Tribunal process. The Respondent considered that it was not possible to consider assignment at that stage.

237. The position of the Respondent was that they could not sustain a further lengthy absence on top of the absence that had already occurred in order to be able to explore with the Claimant whether there should be either an application or an assignment without the need to apply.

238. We note that the Claimant was at all material times represented by a union representative. Neither the Claimant nor her representative were suggesting in these meetings that the Claimant was feeling mentally able to be assigned or redeployed immediately.

239. We find that there was consultation with the Claimant and that the Respondent, in view of the Claimant's position expressed in the capability process meetings reasonably believed that the Claimant was unfit to carry out her job at that stage.

240. As to whether the Respondent made reasonable efforts to facilitate the Claimant's return to work, the Respondent essentially responded to the Claimant's expressed position, that the Tribunal proceedings needed to be resolved first. Given the timescales involved and the likely substantial delay before resolution of the Tribunal proceedings, we find that it was within the range of reasonable responses for the Respondent to consider that it was premature to consider practical steps such as assignment/redeployment, since this was going to be so far in the future.

241. It follows that we do not find that the Claimant was unfairly dismissed.

3. WHISTLEBLOWING

3.1 Disclosures

3.1.1 *Did the Claimant make a disclosure or disclosures of information as follows:*

(a) *In or around 30 July 2019 to early August 2019: a complaint to the Ethics Helpline concerning the conduct of Mr Devor (***the Ethics complaint)***;*

242. We have considered the possibility that the Claimant was simply stating it as she felt it was at the time. We conclude that she went somewhat further than this and materially misrepresented what had been said on 30 July 2019 by Mr Devor as we have set out above in our findings of fact. We conclude that this was raised in bad faith, given that it was not an honest account of what had occurred just a few moments earlier.

243. If we are wrong about that in any event we are not satisfied, the burden being on the Claimant, that she raised this matter in the public interest. We have considered the context more broadly and that the Claimant in subsequent actions and in her claim to the Tribunal plainly considers that she is raising matters of wider importance in relation to sexual harassment of female employees. At the time that this report was raised however, we find that the Claimant's focus was entirely on her own circumstances. The final line about her own safety in the office suggest that this is very much confined to her rather than a wider public interest.

244. It follows that this is not a protected disclosure.

(b) *Grievance of 9 April 2020 concerning the Respondent's PHI arrangements (***the Grievance)***; [***913***]*

245. As to the disclosure of information, we think that this must be a reference to the fact that the Claimant's contractual sick pay had ceased. The Claimant appears to have believed that this was evidence of a policy operated by Canada Life which was discriminatory against the disabled and detrimental against those who have raised a protected act. The Claimant's logic that the operation of the insurer's policy was a breach of legal obligation is perhaps somewhat tenuous. We do not consider that

the Claimant disclosed information which showed that policy was inherently discriminatory. Her email contained argument and conjecture. We cannot say however that there would be no circumstances in which those with protected characteristics might be disadvantaged by the operation of the policy. We have reminded ourselves that a belief in a breach of legal obligation may be wrong but reasonable.

246. Although the Claimant in her email framed this as a broader concern about the effect on those who were disabled or had carried out a protected act, we have considered carefully whether this was raised in the public interest. We find that the circumstances of the complaint and the matters raised are so precisely related to the Claimant's own personal circumstances that we do not consider that she was genuinely raising this in the public interest at all. This was her situation and her complaint about that situation.

247. We do not find that this was a protected disclosure.

(c) *Her 10 June 2020 appeal against the rejection of her grievance of 9 April 2020 (***the Appeal)***;*

248. For similar reasons to the previous alleged protected disclosure, we find that this does not have the essential ingredient of having been genuinely raised in the public interest.

249. We do not find that this was a protected disclosure.

(d) *Her email to Jon Erik Reinhardsen of 18/9/2020 concerning enforcement of the Respondent's Code of Conduct (***the Enforcement email)***. [***1095***]*

250. This complaint contained an additional ingredient "this non-compliance could result in misstatement in SEC reporting".

251. We find, for similar reasoning to those above, that this does not have the essential ingredient of having been raised in the public interest.

252. We do not find that this was a protected disclosure.

(e) *Additionally on 17 July 2019 the Claimant made allegations of unlawful discrimination and harassment being covered up. She complains about Sam Parmar, Martin Devor, and Rob Cross [***715-716***]*

253. This alleged protected disclosure was added by the Claimant's amendment on day 4 of the hearing i.e. 15 Septemer 2022.

254. We find that this protected disclosure, in the reasonable belief of the Claimant tended to show a failure to comply with legal obligation and that her own health and safety had been endangered. We have borne in mind that someone may be reasonable and be wrong.

255. We do not find however that this was raised in the public interest. This complaint was squarely about the Claimant's own circumstances. Although the Claimant asserts within the disclosure "allegations of unlawful discrimination and harassment are routinely covered up", there is no evidence contained within the disclosure about this being wider than the Claimant's own case.

3.2 Automatic Unfair Dismissal (s 103A ERA 1996)

3.2.1 *Was the reason or principal reason for dismissal the fact that the Claimant made a protected disclosure or disclosures?*

256. This claim cannot succeed in view of our findings that none of the disclosures relied upon by the Claimant were qualifying protected disclosures within the meaning of section 43B.

257. The Tribunal accepts the Respondent's case which is that the principal reason for the dismissal was the combination of past and anticipated future absence which was unsustainable.

4. DISCRIMINATION

4.1 Disability

4.1.1 *The parties agree that the Claimant was disabled (anxiety and depression) from 13 January 2020.*

Knowledge

4.1.2 *Did the Respondent know or ought to reasonably have been expected to know of the Claimant's disability?*

258. The evidence of Sinead Pope & Catherine Allsop is that they did not understand that the Claimant was disabled. The Respondent's case generally is that this was reasonable based on the evidence that they had and that the Respondent did not ever have actual knowledge of the Claimant's disability at any time before November 2020 when the decision was taken to dismiss her.

259. The Tribunal does not accept the Respondent's case on knowledge of disability and finds that by **6 May 2020** the Respondent had or ought reasonably to have had knowledge of the Claimant's disability.

260. On that day the Claimant forwarded to Sinead Pope email correspondence with Canada Life [1008], in which she confirmed that her sertraline medication had been doubled to 100 mg per day. The fact of the Claimant being on antidepressants and that a doctor had decided to double the dose on that date, we find was singularly suggestive that she had a mental impairment of more than trivial significance, particularly in view of the medical history already known to the Respondent. We have considered the additional knowledge that the Respondent had, cumulatively, by that date:

260.1. In the OH report dated 16.1.19 [212A] the Claimant had been off for 5 months with work related stress;

260.2. In the OH report dated 10.6.19 [253] the Claimant had been off work for over two weeks with work related stress initially confined to her bed and with a score indicating anxiety and depression. This report made reference to the fact that the Claimant had suffered from "generalised anxiety disorder" for the period February 2016 – November 2016, as described in Dr Ornstein's "excellent report";

260.3. In July 2019 a claim for personal injury, based on Dr Ornstein's report was settled.

260.4. In the OH report dated 11.11.19 [270], the Claimant have been signed off sick since 16 September 2019 with a diagnosis of anxiety and depression. The anxiety state was characterised as moderately severe and depression described as moderate, although the Claimant was not on medication at that stage.

260.5. The Claimant had submitted the following fit notes indicating that she was not fit to work:

260.5.1. 3 March 2020 2 months not fit because of anxiety and depression;

260.5.2. 4 May 2020– 4 weeks not fit because of anxiety and depression.

4.2 **Discrimination arising from disability**

4.2.1 *Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability contrary to s 15 of the EqA 2020?*

4.2.2 *The 'something arising' in consequence of the Claimant's disability is said to be her sickness absence and/or ill health.*

Unfavourable treatment

4.2.3 *The unfavourable treatment for which the Claimant contends is:*

(a) *a requirement for her to attend meetings to discuss the reasons for her absence, the last of which took place on 6 November 2020;*

261. Had the Respondent not given the Claimant a the opportunity to discuss her absence and barriers to returning to work with managers through this multi-staged process simply moved to dismiss she would have been placed at a real disadvantage.

262. The Tribunal finds that the Respondent's capability process was a supportive one, which we find was appropriately and sympathetically dealt with in the later stages by Ms Hovland and Ms Allsop. The Claimant was accompanied and given ample opportunity to explain her position.

263. We do not find that this was unfavourable treatment.

(b) *the withdrawal of her entitlement to pay from 6 February 2020; and*

264. We find that the withdrawal of sick pay was unfavourable treatment, albeit that it was no more than the normal expiry of the contractual right to sick pay.

(c) *the decision to dismiss her and her dismissal on 27 November 2020.*

265. We find that dismissal is in almost all cases unfavourable treatment and was in this case.

Knowledge

4.2.4 *Did the Respondent know or could the Respondent reasonably have been expected to know that the Claimant was disabled?*

266. Our finding in this case is that date of knowledge of disability was 6 May 2020 for reasons set out above.

267. It follows that the Respondent did not have knowledge of disability as at 6 February 2020, the date on which the Claimant's entitlement to sick pay was withdrawn. That part of the section 15 claim cannot succeed.

Justification defence

268. The only element of the section 15 claim that can succeed in view of our findings above, was the dismissal itself, by which time the Respondent had knowledge of the Claimant's disability which we find was unfavourable treatment.

269. We have considered the justification defence in relation to the dismissal.

4.2.5 *Can the Respondent show that any such unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies upon the following:*

(a) *Effectively managing absenteeism;*

(b) *Assisting employees and/or encouraging them to return to work;*

(c) *Work-force planning;*

(d) *Operational efficiency.*

270. We find that (a), (b), (c) and (d) were all legitimate aims.

271. We have looked separately at whether the actions of the Respondent were proportionate means, i.e. whether appropriate and reasonably necessary.

272. The Tribunal accepted the evidence of Respondent witnesses that managers, and in particular Eugene Pereira and Bente Hovland were having to carry out much of

the Claimant's responsibilities. We accepted the evidence that this was causing them to have to work on weekends and evenings.

273. The Claimant in the Tribunal hearing was dismissive of the effect of other people having to cover her role. We found this difficult to understand. The Claimant had a technical role. She was working full-time. Her absence we find necessarily created work for other people. In simple terms, if there were things falling within the Claimant's job description that needed doing, someone else needed to do it during her sick absence. The burden largely fell on Mr Pereira and Ms Hovland.

274. Was it appropriate and reasonably necessary to dismiss the Claimant?

275. Ms Allsop knew that the Claimant had been continuously absent since 16 September 2019. The earliest that the litigation might resolve, based on her reasonable understanding at that time was in the later part of 2021, i.e. very approximately two years later, although it was thought it might be into 2022. That is on any view a very long time for an employer to be expected to keep a role open. We find that the Respondent, acting reasonably, was entitled to conclude that this was too long a timeframe to keep this job open. In the circumstances we find that it was appropriate and reasonably necessary to take decisive action to dismiss the Claimant.

4.3 Failure to comply with duty to make reasonable adjustments

PCPs

4.3.1 *Did the Respondent apply a provision, criterion or practice ("***PCP***")? The PCPs for which the Claimant contends are:*

(a) **PCP 1:** *discounting the advice of its occupational health provider and/or not implementing the provider's recommended measures;*

276. We considered the Claimant's witness statement at paragraph 6.4.1 to assist us in trying to understand this PCP. The Claimant in her witness statement highlights in particular an occupational health report dated 11 November 2019. She then described her allegation that the Respondent failed to implement this.

277. Following the case of **Ishola**, the Tribunal has considered whether this is a PCP at all, or whether these are simply one-off events in the Claimant's claim. The scheme of the reasonable adjustments legislation is to prevent provisions, criteria or practices which are applied generally from having a substantial disadvantage in the case of disabled employees where this disadvantage might be ameliorated by an adjustment.

278. We have concluded that these are not PCPs as such, there is no evidence that they applied more widely than purely to the Claimant, nor that they likely to be policies or practices of wider application.

279. Alleged PCP 1 is not a PCP, but rather a particular event or more precisely an alleged omission in the Claimant's case.

(b) **PCP 2:** *failing and/or delaying in responding to correspondence particularly in relation to the Claimant's sickness absence and measures recommended by the occupational health provider to assist with a return to work;*

280. Again following the case of **Ishola**, we find these are simply one-off events in the Claimant's claim. We have concluded that these are not PCPs as such, and again there is no evidence that they applied more widely than purely to the Claimant, nor that they likely to be policies or practices of wider application.

281. This is not a PCP, but rather an alleged omission in the Claimant's case.

(c) **PCP 3:** *requiring employees on long-term sick leave to attend a meeting to discuss the reasons for their absence and the likelihood of further absences.*

282. This framing of alleged PCP3 is in an amended form, following the intervention of the Tribunal to which the parties agreed. (The original PCP3 described absence "triggers" which the Respondent policy does not contain).

283. The Respondent admits that it had this PCP.

(d) **PCP 4:** *delaying in dealing with grievances and/or not dealing with grievances in a timely fashion or at all and/or failing to comply with the Respondent's grievance policy;*

284. Following Ishola, we do not find that this was a PCP. These were simply alleged failures in the Claimant's case.

(e) **PCP5:** *reducing and/or withdrawing employees' entitlement to sick pay once they hit 26 weeks in rolling 52 weeks in sickness absence. The respondent admits that it had this PCP; [as modified]*

285. This framing of alleged PCP5 is in an amended form, following the intervention of the Tribunal to which the parties agreed.

286. The Respondent admits that it had this PCP.

(f) **PCP 6:** *withdrawing support for and/or not providing active support for employees once their cases have been referred to the Respondent's group income protection insurer, Canada Life;*

287. Following Ishola we do not find that this was a PCP.

288. Even if we are wrong in that conclusion, the Claimant has not on the facts established a failure. The evidence shows in our assessment that the Claimant was supported through the process of applying to Canada Life.

(g) **PCP 7:** *dismissing employees once they reach a certain trigger of sickness absence. Denied the Respondent says not in policy*

289. We do not find that there was a trigger point which led to dismissal. The Respondent's absence management policies do not operate by reference to trigger point.

Substantial disadvantage

290. It follows from our decisions above that only **PCP 3** and **PCP 5** have been established and need to be considered for substantial disadvantage.

> 4.3.2 *The substantial disadvantage relied on by the Claimant is that the following put the Claimant as a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with either an actual or hypothetical comparator who was not disabled:*
>
> (a) *she was more likely to reach a trigger point of absence as contended for at paragraph* 4.3.1(c) *and lead to a reduction in pay (***PCP 3)***; and*

291. We shall deal separately with PCP 3 relating to meetings and PCP 5 relating to sick pay.

292. As to **PCP 3** we have considered the requirement of the Claimant to attend meetings under the Respondent's absence management policy above in the context of the section 15 claim. For similar reasons to those we considered in considering whether this was unfavourable treatment, we do not find that this was a substantial disadvantage in the circumstances where the Respondent operated a supportive policy, and was attempting through each of the absence meetings to encourage the Claimant back to work or at least explore ways by which she could return to work. We do not find that this was a substantial disadvantage to disabled people.

293. As to **PCP 5** and sick pay, we find that the Respondent's policy of paying sick pay for only 26 weeks' sick absence in a rolling 52-week period might cause a substantial disadvantage to some disabled people, who might in the case of some chronic conditions be more likely to have lengthy absences.

294. This did cause a substantial disadvantage to the Claimant herself who did have a lengthy absence that was connected to her disability, albeit we acknowledge Dr Bristow's conclusion that overwhelming reason why she had not returned to work was the current extremely poor relationship she had with her employers and in particular with the HR Department.

> (b) *she was required to take sick leave and/or remain absent on sick leave for longer than should have been necessary which led to a reduction in pay (***PCPs 1 – 2 and 4 – 6)** *and her dismissal (***PCP 7).**

295. We have dealt with PCPs 3 and 5 above. None of the remaining PCPs are established. Accordingly we do not need to consider substantial disadvantage any further.

> 4.3.3 *Did the Respondent know or could the Respondent reasonably have been expected to know both that the Claimant was disabled and that*

she was likely to be placed at a substantial disadvantage in relation to a relevant matter by the PCPs identified at paragraph 0 *above in comparison with persons who are not disabled?*

296. We find that the Respondent had knowledge of the Claimant's disability from 6 May 2020 onward.

297. As to substantial disadvantage, we find that the Respondent knew or must have known that stopping sick pay would cause the Claimant a substantial disadvantage.

Reasonable adjustments

298. The only PCP which we find that the Claimant has established which has also caused a substantial disadvantage is **PCP 5** (i.e. withdrawal of sick pay).

4.3.4 *Did the Respondent take such steps as were reasonable to have to take to avoid any substantial disadvantage the Claimant can prove? The Claimant contends for the following by way of reasonable adjustments.*

(a) **PCP 5:** *extending her entitlement to pay at least until such time as her grievances had been properly addressed and the occupational health provider's advice had been complied with;*

299. This is an attempt blend together adjustments relating to PCP 1 (which failed) and PCP 5. This question about failing to follow occupational health provider advice is more properly considered under the justification defence of the section 15 claim above, which we have done so.

300. We have considered the "pure" PCP 5 adjustment – i.e. whether the employer should have as an adjustment continued to pay after 26 weeks' pay was exhausted under the contractual sick pay scheme.

301. In this case there was a short extension from 7 February 2022 the end of February 2020. This was granted by the email of Mr Pope dated 21 May 2020, and this was by reference to the delay in receiving a verbal response from the insurer Canada Life. Any failure to make reasonable adjustments therefore could only run from 1 March 2020.

302. We have considered whether there should have been a further extension from this point. The Tribunal has taken account of the case of **O'Hanlon**, which makes it clear that the scheme of the Equality Act 2010 is not in general to pay disabled people to remain at home, but rather to make adjustments to facilitate their return into the workplace.

303. In this case where the Claimant's absence was at least as much due to a strained relationship with the Respondent as to her disability, we find that there was even less reason why it would be reasonable to pay the Claimant to remain away from work.

304. It follows that we do not find that there was a failure to make reasonable adjustments.

5. VICTIMISATION

PROTECTED ACTS

5.1.1 *Did the Claimant do a protected act or acts as defined by s 27(2) of the EqA 2010? The Claimant's case is that the following were protected acts. The respondent admits that the Claimant did these acts and that they were protected acts within the meaning of s 27(2) of the EqA 2010.*

(a) *her complaint of sexual discrimination by her former manager, XY; [***550***]*

305. This was to be an allegation of sexual harassment, which is a protected act.

(b) *her 2016 grievance concerning XY's behaviour, and her later appeal against the grievance outcome;*

306. It is clear that during the grievance investigation, and in particular at an investigation meeting with Sam Palmer on 6 July 2016 the Claimant made allegations about the incidents in January 2014, October 2014 and June 2015 which amounted to allegations of sexual harassment.

307. This was a protected act.

308. The grievance appeal submitted on 2 August 2016 refers to the sexual harassment claim. This was also a protected act.

(c) *her February 2019 grievance in which she complained of sex and race discrimination;*

309. In the grievance submitted on 22 February 2019 the Claimant says that she was discriminated against on the basis of "my gender and ethnicity" i.e. Within the terms of the Equality Act her sex and race.

310. This was a protected act.

(d) *her May 2019 grievance in which she complained of sex and race discrimination and of being subjected to detrimental treatment as a result of having made complaints of sex and race discrimination;*

311. The "formal grievance" submitted on 27 May 2019 included reiteration of the earlier allegations of sexual harassment but also that she had suffered subsequent detrimental treatment. This would amount to an allegation of victimisation under the Equality Act.

312. This was a protected act.

(e) *her April 2020 grievance; and*

313. In a formal grievance submitted on 9 April 2020 the Claimant alleged discrimination because of her sex, disability and nationality.

314. This was a protected act.

(f) *her appeal against the outcome of her April 2020 grievance.*

315. On 10 June 2020 the Claimant put in an appeal against the grievance outcome. This document is somewhat discursive, but one of the central themes is that the effect of the operation of the insurance policy operated by Canada Life is discriminatory in effect.

316. This was a protected act.

DETRIMENTAL TREATMENT

5.1.2 *If so, did the Respondent subject the Claimant to a detriment contrary to s 27(1) of the EqA 2010 because of doing the protected act? The Claimant's case being that she was subjected to the following detrimental treatment:*

Refusal to implement June 2019 OH report

(a) *refusing/ failing to act on the recommendations of the Respondent's occupational health provider's report in June 2019;*

317. The occupational health report dated 10 June 2019 recommended "implementation of some fresh policies" around some areas were identified in a UK Works Council Meeting on 5 May 2018, which identified "Areas of Concern around Workplace Culture, Leadership Skills and Examples of Inappropriate Behaviour".

318. In a meeting on 12 August 2019 at which the Claimant, her representative Mr Jones and Sinead Pope were present, Ms Pope agreed that many of the policies being referred to have been drafted some years ago and that it was right to revisit those. The evidence of Ms Pope in her witness statement was that some other colleagues were in the process of carrying out a review of these policies which began in December 2019 led by Jeeti Chahan. She says that that review was expanded to cover all UK policies, but was not concluded until 2022 because of workload generated by the Covid-19 pandemic. We accept this evidence.

319. We do not accept that a delay in reviewing policies, which was a company wide issue at the Respondent, was in any way targeted or personal to the Claimant. We do not see that this was because of any of the protected acts.

320. The Claimant in her witness statement at paragraph 4.1.1 seeks to broaden this allegation out from the recommendations made in the occupational health report of June 2019 to those suggestions made by her trade union representative Stephen Jones.

321. We do not accept that the Respondent was obliged to adopt every suggestion made by Mr Jones in response to such a broad recommendation of "fresh policies" in the OH report. We do however acknowledge that a stress risk assessment was a suggestion which came out of this discussion. That we find was initially actioned by Ms Pope on an office wide level, which was what we find Ms Pope had genuinely understood had been meant by Mr Jones.

322. Contrary to Ms Pope's understanding, Mr Jones had in mind an individual stress risk assessment. It took some time for Ms Pope to appreciate that that what was envisaged by Mr Jones. By September 2018 stress risk assessment personally focused on the Claimant was produced. We accept Ms Pope's evidence that she genuinely believed that a office wide stress risk assessment was called for in the first instance. There was a delay in implementation caused, we find, by a genuine misunderstanding.

323. It is suggested in the Claimant's witness statement that redeployment was something that arose as a result of this occupational health report. We do not read the June 2019 as recommending redeployment. (Although redeployment was referred to in later reports).

324. We do not find that this was detrimental treatment nor do we find that it was because of any of the protected acts.

Failure/delay re: correspondence

(b) *failing and/or delaying in responding to correspondence, particularly where this correspondence related to sickness absence and recommended measures to address the Claimant's sickness absence and to encourage a return to work and to allegations/ complaints of discrimination;*

325. In her witness statement the Claimant (paragraph 4.2) described a series of alleged detriments under this heading, which included: first, delays in correspondence, second a broad theme of being made to "languish" on sick leave and being treated as "out of sight, out of mind", and thirdly ignoring recommendations, including a recommendation of occupational health in November 2019 of redeployment, simply being ignored.

326. It is not entirely clear to the Tribunal exactly when the Respondent or Sinead Pope saw the two occupational health report produced in November 2019. They are addressed to Warren Stephen (Icarus Ltd). The activity that we can see from contemporaneous correspondence at this stage was centred on the Canada Life insurance application. The Claimant was signed off sick for the whole of November and December 2019. The GP did not suggest that she could return to work at this stage with any adjustments or modifications.

327. As to delay, we do not find that the pattern of occasional delays in responding to correspondence suggested to us detrimental treatment. There were occasional delays. Looking at the picture overall and the actions of Ms Pope, we find that she was doing her best to deal with quite a high volume of correspondence of one sort or another relating to the Claimant's absence. For example specific delays referred to in July 2019 right of the start of the holiday period and do not strike us as being particularly noteworthy.

328. There is often a difficult balance to be struck by employers in the appropriate level of contact with employees on long term sick absence. Frequent contact may come across as harassment (in a non-technical sense); infrequent contact may be judged unsupportive.

329. We acknowledge that the level of contact, particularly in the first Covid lockdown in Spring 2020 was insufficient, and that the Claimant felt unsupported. In the experience of the Tribunal as an industrial jury, many organisations were significantly under strain at this time, in particular during the first 2020 lockdown. We accept Sinead Pope's oral evidence that in addition to work she was having to home school domestically. She was plainly very stretched as many were at that time.

330. We do not find that this was detrimental treatment. Even if it was, in any event we do not find that it was because of any of the protected acts.

Letter about behaviour

(c) *Sinead Pope's correspondence to the Claimant on 30 July 2019 raising concerns about the Claimant's behaviour and inviting her to a meeting to discuss those concerns;*

331. It is clear that from the Respondent's point of view they felt that matters were coming to a head on 30 July 2019. There were two letters. Mr Devor went to speak to the Claimant. She put in a complaint as a result of that.

332. We do not take the view that raising concerns about the Claimant's behaviour expressly in a letter and inviting her to discuss these things amounted to detrimental treatment. On the contrary, we find that it was reasonable and appropriate to set out these concerns in writing and give the Claimant the opportunity to discuss rather than allowing the matter to remain unresolved, or trying to deal with this as a disciplinary matter without any prior warning which might be unfair.

333. We do not find that this was detrimental treatment.

Letter about sickness absence

(d) *Sinead Pope's correspondence to the Claimant on 30 July 2019 regarding the Claimant's sickness absence;*

334. It may be doubtful, especially with the benefit of hindsight, whether it was wise to send two separate letters each confronting quite difficult topics on the same day to someone suffering from workplace stress.

335. The Tribunal finds however that the Respondent was entitled to manage what had become a significant sickness absence record. As noted above the timing was may not have been ideal. It is our view that absence might have been managed in this way at an earlier stage and certainly the Respondent would have been entitled to do that based on the absence.

336. We do not find that this was detrimental treatment.

Mr Devor's alleged threats on 30 July

(e) *Martin Devor informing the Claimant on 30 July 2019 that he had used his team to scare her by sending letters to her, that the Respondent was not going to investigate her case, that she*

would have to leave the Respondent's business and that she would regret her decision as she was nothing;

337. The Tribunal does not accept the Claimant's allegations of fact in respect of this allegation, given our findings above. It is surprising that the Claimant has continued to pursue this allegation given the account of Mr Devor and the clear content of the audio tape which supports his account and clearly disproves the Claimant's version of events.

338. This allegation cannot succeed.

Inaction regarding grievances

(f) *concluding that, despite relevant findings, the Claimant's grievance in respect of comments made about Azerbaijan was not being upheld and not recommending any further steps;*

339. We do not accept the premise of this allegation.

340. The allegation in relation to Azerbaijan was upheld in the Claimant's favour. Mr Cross recommended that this should be addressed with the individual involved.

341. This allegation does not succeed.

(g) *concluding in August 2019 that the Claimant's grievance was not upheld and that no further steps were recommended;*

342. It is not correct that the grievance was not upheld. The grievance was upheld in part.

343. It is not correct that no further steps were recommended. Mr Cross recommended that the subject of the inappropriate comments be addressed with the individual that made them.

344. Bearing in mind that the grievance was partly uphold in the Claimant's favour, and based on our assessment of Mr Cross's careful and meticulous investigation, we do not find that the outcome was either detrimental or because of the protected act. Mr Cross was not implicated by any of the allegations raised by the Claimant. He was in that sense independent. We find that he carried out his investigation appropriately and independently.

345. We do not find that there was detrimental treatment as alleged.

Intimation of discussion of termination of employment

(h) *the letter dated 19 August 2019 (headed "RE: Relationship with Team, Leader and Company, 12 August 2019") in which the Claimant says she was warned that if there was no change to the current situation there may have to be a discussion about whether or not her employment should continue;*

346. In circumstances in which the Claimant refused to sit with other members of her team, as described in the letter of 19 August 2019, and her refusal to even attend a

meeting with her direct line manager or participate in mediation it was not an exaggeration to describe this as a fundamental breakdown. It was untenable.

347. It was not inappropriate of the Respondent as a employer to raise the possibility that the employment relationship might not continue. Indeed we find that if the employer had not raised these concerns would be in itself a dereliction of duty. At least by raising these matters, the Claimant had an opportunity to understand the Respondent's position and the opportunity to change her position, or at least understand the possible consequences of continuing to refuse to engage.

348. We do not find that this was a detriment.

Closing down "cover-up" allegation

(i) *closing the Claimant's allegations that discrimination and harassment are routinely covered up by the Respondent without any further action being taken and without an investigation being launched;*

349. The Claimant would not accept the Respondent's conclusion and was requesting that matters already investigated be investigated again. Ultimately the had to be an end point. The Respondent was entitled to draw a line. In our judgment there was no obligation on the Respondent as an employer to keep re-investigating matters already concluded.

350. We do not find that this was a detriment.

Closing down Claimant's allegations re: 30 July 2019

(j) *closing the Claimant's allegations regarding the conduct of her meeting with Martin Devor on 30 July 2019 without any further follow up;*

351. This matter was investigated by individuals who were senior and unconnected with and not implicated by any complaints made by the Claimant.

352. We do not find that this was a detriment and in any event it was not because of protected disclosures.

Withdrawal of pay

(k) *withdrawing the Claimant's pay from 6 February 2020;*

353. The withdrawal of pay was no more or less than the Respondent's standard policy on sick pay in cases of long-term absence, which applied to everyone.

354. We do not find that this was detrimental treatment, nor did we find that it was influenced by the Claimant's protected acts.

Support re: PHI claim

(l) *failing to provide the appropriate support required in furthering the Claimant's application for group income protection insurance payments via the Respondent's insurance provider, Canada Life;*

355. We do not accept the Claimant's case on this allegation.

356. The Claimant was provided with support at both the claim and appeal stage in respect of PHI and Canada Life as detailed above.

357. There was not detrimental treatment.

Letter 15 September 2020

(m) *the letter to the Claimant dated 15 September 2020 [1088] in which the Respondent*

(i) *declined to apologise (as it did not accept it had committed any wrongdoing); [medical report 248]*

(ii) *reaffirmed the decision to withdraw the Claimant's pay and the rationale behind that decision, and*

(iii) *notified her of the decision to convene a further Medical-Related Incapability Meeting.*

358. Taking each of these elements in turn, there was no obligation on the Respondent to apologise. It had investigated various matters on more than one occasion, and did not find the organisation to be at fault such as to make an apology.

359. As to reaffirming the decision to withdraw pay, this was no more than reiterating the contractual position.

360. As to notification of a further incapability meeting, the Tribunal takes the view that with such a lengthy absence this was if anything overdue. The employer was entitled to manage it.

361. We do not find that this was detrimental treatment.

Meeting 20 October 2020

(n) *the conduct and outcome of the meeting on 2 October 2020 in that [1131]*

(i) *the Claimant was required to attend this meeting, contrary to medical advice;*

(ii) *the Respondent alleged during this meeting that the Claimant did not wish to return to work, despite her never having said this;*

(iii) *the Respondent alleged that the Claimant had refused to discuss returning to an alternative position, when she was willing to do this; and,*

(iv) *the Respondent refused to discuss the Claimant's career path and progression with her;*

362. We note that the meeting which took place on 2 October 2020 was focusing on possible solutions, there was a discussion about the Claimant wanting a role in investor relations. There was a discussion about finding a role in another department. Ms Hovland spoke to Claimant about the possibility of working in the US.

363. We do not accept that there was medical advice that she should not attend the meeting. There is a reference in the report dated 28 September 2022 the Claimant's preference for communication in writing. This is not the same thing. We find that this meeting was in accordance with company policy. Furthermore it is clear from the detailed minute of the meeting that the Claimant was able to participate in this meeting and articulate her position. We do not find that the requirement to attend the meeting amounted to a detriment.

364. There is a detailed note of this meeting based on a recording. It is clear that Ms Hovland carefully explored with the Claimant whether or not she would be able to return to work and in what circumstances.

365. It is equally clear Ms Hovland understood that the Claimant was saying that she would not return to work pending resolution of the Employment Tribunal litigation. We do not consider that the Respondent alleged that she did not wish to return to work.

366. Ms Hovland understood that the claimant did not want to consider specific opportunities for redeployment. The exchange on 2 October on page 1133 (lines 41 & 42), we find was reasonably understood by Ms Hovland as meaning that looking for jobs at that stage was pointless.

367. We do not find out that these allegations of detriment are made out on the facts.

<u>Letter 15 October 2022</u>

(o) *the letter to the Claimant dated 15 October 2020 in which the Claimant was informed that*

(i) *if she remained unable to return to work, then the Respondent may terminate her employment; and*

(ii) *from the Respondent's perspective, her grievances had been dealt with;*

368. We do not regard either of these elements as amounting to a detriment. Both elements we find are no more than a factual statement of the stage that had been reached in the absence management process and grievance processes.

369. This allegation does not succeed.

Meeting 6 November 2020

(p) *the conduct and outcome of the meeting on 6 November 2020, namely questioning the Claimant's request for follow up documents after the meeting; and [1163]*

370. We did not find the conduct of the meeting amounted to a detriment. By contrast, we accept Ms Allsop's evidence that the meeting on 6 November was sensitively handled. That is the way it comes across to us through reading the minutes.

371. As to the subsequent email exchange which the Claimant objects to, we find, supported by the evidence of Ms Allsop and the content of the email of 9 November, that this was unremarkable and nothing more than a misunderstanding.

372. We understand from the Claimant's witness statement that she was asking about a minute of the meeting that she had attended on 6 November. Her wording "timeframe for submitting documents" is a curious way to ask about this. The reference to submission of documents suggested a reference to submitting documents for some formal purpose, as might be done for example in the presentation of an Employment Tribunal claim. In fact she was chasing an outcome, or at least the minutes which would be necessary before the outcome. We find that this curious wording set the stage for what was a genuine misunderstanding on the part of Wyn Smollett and Catherine Allsop. We accept that Wyn Smollett's response was courteous and professional and do not see how this is a detriment.

373. This part of the claim fails.

(q) *dismissing the Claimant on 27 November 2020.*

374. We find that the reason for the Claimant's dismissal was the fact that she was on long-term sick absence with no return to work in prospect in a reasonable timescale.

375. In the circumstances and the length of absence past and anticipated as at 27 November 2020 in this case we find that dismissal was unsurprising and does not call for an explanation. That was the entire reason for her dismissal. We entirely accept Ms Allsop's evidence in this respect.

376. We do not find that the protected acts had any part in the reason for the Claimant's dismissal.

Employment Judge Adkin

14 November 2022

Sent to the parties on:

17/11/2022

For the Tribunal Office:

APPENDIX:

LIST OF ISSUES

The Complaints

27. The claimant is making the following complaints:

27.1 Discrimination arising from disability (section 15 EA);

27.2 A failure to make reasonable adjustments (sections 20-21 EA);

27.3 Victimisation (section 27 EA);

27.4 Automatic unfair dismissal (whistleblowing) (section 103A Employment Rights Act 1996 ("ERA"));

The Issues

28. The issues the Tribunal will decide are set out below.

1. **JURISDICTION**

1.1 Does the Tribunal have jurisdiction to determine the complaints insofar as they relate to alleged acts of discrimination which occurred more than three months prior to the date of presentation of the claim on 23 February 2021 subject to any extension of time by participation in ACAS early conciliation?

1.2 In relation to the alleged acts of discrimination, has there been any discriminatory conduct extending over a period for the purpose of s 123(3) of the Equality Act 2010 ("**EqA 2010**")?

1.3 Would it be just and equitable for the Tribunal to extend time under s 123(1)(b) of the EqA 2010 in relation to any alleged acts of discrimination which are out of time?

2. **UNFAIR DISMISSAL**

2.1 Was the Claimant unfairly dismissed by the Respondent contrary to s 94 and s 98 of the Employment Rights Act 1996 ("**ERA 1996**")?

2.1.1 Was there a potentially fair reason for the dismissal? The respondent asserts that the reason for dismissal was incapability (long term sickness absence).

2.1.2 If there was a fair reason for the dismissal, was the decision to dismiss the Claimant substantially and/or procedurally fair in particular:

(a) Was dismissal within the range of reasonable responses open to the Respondent? The Claimant relies on the following factual issues:

(i) whether the Respondent consulted her regarding the reasons for her absence;

(ii) whether the Respondent made reasonable efforts to facilitate her return to work; and

(iii) whether the Respondent reasonably believed she was unfit to carry out her job.

3. **WHISTLEBLOWING**

3.1 **Disclosures**

3.1.1 Did the Claimant make a disclosure or disclosures of information as follows:

(a) In or around 30 July 2019 to early August 2019: a complaint to the Ethics Helpline concerning the conduct of Mr Devor (**the Ethics complaint)**;

(b) Grievance of 9 April 2020 concerning the Respondent's PHI arrangements (**the Grievance)**;

(c) Her 10 June 2020 appeal against the rejection of her grievance of 9 April 2020 (**the Appeal)**; and

(d) Her email to Jon Erik Reinhardsen of 18/9/2020 concerning enforcement of the Respondent's Code of Conduct (**the Enforcement email)**.

3.1.2 If so, did the Claimant reasonably believe that the disclosure(s) tended to show that:

(a) there had been or was likely to be a failure to comply with a legal obligation; or

(b) that the health or safety of any individual has, is or will likely be endangered; or

(c) in respect of the Appeal only ((c) above), information relating to the above was being or was likely to be deliberately concealed.

3.1.3 Did the Claimant reasonably believe that any of the disclosures were in the public interest?

3.1.4 Did the Claimant make the disclosure(s) in good faith?

3.1.5 If the Claimant did not make the disclosure(s) in good faith, is it just and equitable in all the circumstances to reduce any award by up to 25%?

3.2 **Automatic Unfair Dismissal (s 103A ERA 1996)**

3.2.1 Was the reason or principal reason for dismissal the fact that the Claimant made a protected disclosure or disclosures?

4. DISCRIMINATION

4.1 Disability

4.1.1 The parties agree that the Claimant was disabled (anxiety and depression) from 13 January 2020.

4.1.2 Did the Respondent know or ought to reasonably have been expected to know of the Claimant's disability?

4.2 Discrimination arising from disability

4.2.1 Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability contrary to s 15 of the EqA 2020?

4.2.2 The 'something arising' in consequence of the Claimant's disability is said to be her sickness absence and/or ill health.

4.2.3 The unfavourable treatment for which the Claimant contends is:

(a) a requirement for her to attend meetings to discuss the reasons for her absence, the last of which took place on 6 November 2020;

(b) the withdrawal of her entitlement to pay from 6 February 2020; and

(c) the decision to dismiss her and her dismissal on 27 November 2020.

4.2.4 Did the Respondent know or could the Respondent reasonably have been expected to know that the Claimant was disabled?

4.2.5 Can the Respondent show that any such unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies upon the following:

(a) Effectively managing absenteeism;

(b) Assisting employees and/or encouraging them to return to work;

(c) Work-force planning;

(d) Operational efficiency.

4.3 Failure to comply with duty to make reasonable adjustments

4.3.1 Did the Respondent apply a provision, criterion or practice ("**PCP**") that put the Claimant as a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with either an actual or hypothetical comparator who was not disabled? The PCPs for which the Claimant contends are:

(a) **PCP 1:** discounting the advice of its occupational health provider and/or not implementing the provider's recommended measures;

(b) **PCP 2:** failing and/or delaying in responding to correspondence particularly in relation to the Claimant's sickness absence and measures recommended by the occupational health provider to assist with a return to work;

(c) **PCP 3:** requiring employees on long-term sick leave to attend a meeting to discuss the reasons for their absence and the likelihood of further absences once they hit a particular trigger point of absence. The respondent admits that it had this PCP;

(d) **PCP 4:** delaying in dealing with grievances and/or not dealing with grievances in a timely fashion or at all and/or failing to comply with the Respondent's grievance policy;

(e) **PCP 5:** reducing and/or withdrawing employees' entitlement to sick pay once they hit a particular trigger point in sickness absence. The respondent admits that it had this PCP;

(f) **PCP 6:** withdrawing support for and/or not providing active support for employees once their cases have been referred to the Respondent's group income protection insurer, Canada Life;

(g) **PCP 7:** dismissing employees once they reach a certain trigger of sickness absence. Denied

4.3.2 The substantial disadvantage relied on by the Claimant is that:

(a) she was more likely to reach a trigger point of absence as contended for at paragraph 4.3.1(c) and lead to a reduction in pay (**PCP 3)**; and

(b) she was required to take sick leave and/or remain absent on sick leave for longer than should have been necessary which led to a reduction in pay (**PCPs 1 – 2 and 4 – 6)** and her dismissal (**PCP 7).**

4.3.3 Did the Respondent know or could the Respondent reasonably have been expected to know both that the Claimant was disabled and that she was likely to be placed at a substantial disadvantage in relation to a relevant matter by the PCPs identified at paragraph 4.3.1 above in comparison with persons who are not disabled?

4.3.4 Did the Respondent take such steps as were reasonable to have to take to avoid any substantial disadvantage the Claimant can prove? The Claimant contends for the following by way of reasonable adjustments.

(a) **PCP 1:** implementing the measures recommended by the Respondent's occupational health provider;

(b) **PCP 2**: responding to her correspondence in a timely fashion and/or at all and engaging with her to implement the required measures to permit her to return to work;

(c) **PCP 3:** delaying the requirement for a meeting to discuss the reasons for the Claimant's absence from work at least until such time as the Respondent had engaged with the advice of its occupational health provider;

(d) **PCP 4**: dealing with her grievance in a timely fashion and/or at all.

(e) **PCP 5:** extending her entitlement to pay at least until such time as her grievances had been properly addressed and the occupational health provider's advice had been complied with; (f) **PCP 6:** engaging in correspondence with the Respondent's occupational health provider, Canada Life, on the Claimant's behalf; and

(g) **PCP 7:** not dismissing the Claimant.

5. **VICTIMISATION**

5.1.1 Did the Claimant do a protected act or acts as defined by s 27(2) of the EqA 2010? The Claimant's case is that the following were protected acts. The respondent admits that the Claimant did these acts and that they were protected acts within the meaning of s 27(2) of the EqA 2010.

(a) her complaint of sexual discrimination by her former manager, XY;

(b) her 2016 grievance concerning XY's behaviour, and her later appeal against the grievance outcome;

(c) her February 2019 grievance in which she complained of sex and race discrimination;

(d) her May 2019 grievance in which she complained of sex and race discrimination and of being subjected to detrimental treatment as a result of having made complaints of sex and race discrimination;

(e) her April 2020 grievance; and

(f) her appeal against the outcome of her April 2020 grievance.

5.1.2 If so, did the Respondent subject the Claimant to a detriment contrary to s 27(1) of the EqA 2010 because of doing the protected act? The Claimant's case being that she was subjected to the following detrimental treatment:

(a) refusing/ failing to act on the recommendations of the

Respondent's occupational health provider's report in June 2019;

(b) failing and/or delaying in responding to correspondence, particularly where this correspondence related to sickness absence and recommended measures to address the

Claimant's sickness absence and to encourage a return to work and to allegations/ complaints of discrimination;

(c) Sinead Pope's correspondence to the Claimant on 30 July 2019 raising concerns about the Claimant's behaviour and inviting her to a meeting to discuss those concerns;

(d) Sinead Pope's correspondence to the Claimant on 30 July 2019 regarding the Claimant's sickness absence;

(e) Martin Devor informing the Claimant on 30 July 2019 that he had used his team to scare her by sending letters to her, that the Respondent was not going to investigate her case, that she would have to leave the Respondent's business and that she would regret her decision as she was nothing;

(f) concluding that, despite relevant findings, the Claimant's grievance in respect of comments made about Azerbaijan was not being upheld and not recommending any further steps;

(g) concluding in August 2019 that the Claimant's grievance was not upheld and that no further steps were recommended;

(h) the letter dated 19 August 2019 (headed "RE: Relationship with Team, Leader and Company, 12 August 2019") in which the Claimant says she was warned that if there was no change to the current situation there may have to be a discussion about whether or not her employment should continue;

(i) closing the Claimant's allegations that discrimination and harassment are routinely covered up by the Respondent without any further action being taken and without an investigation being launched;

(j) closing the Claimant's allegations regarding the conduct of her meeting with Martin Devor on 30 July 2019 without any further follow up;

(k) withdrawing the Claimant's pay from 6 February 2020;

(l) failing to provide the appropriate support required in furthering the Claimant's application for group income protection insurance payments via the Respondent's insurance provider, Canada Life;

(m) the letter to the Claimant dated 15 September 2020 in which the Respondent

(i) declined to apologise (as it did not accept it had committed any wrongdoing);

(ii) reaffirmed the decision to withdraw the Claimant's pay and the rationale behind that decision, and

(iii) notified her of the decision to convene a further Medical-Related Incapability Meeting.

(n) the conduct and outcome of the meeting on 2 October 2020 in that

(i) the Claimant was required to attend this meeting, contrary to medical advice;

(ii) the Respondent alleged during this meeting that the Claimant did not wish to return to work, despite her never having said this;

(iii) the Respondent alleged that the Claimant had refused to discuss returning to an alternative position, when she was willing to do this; and,

(iv) the Respondent refused to discuss the Claimant's career path and progression with her;

(o) the letter to the Claimant dated 15 October 2020 in which the Claimant was informed that

(i) if she remained unable to return to work, then the Respondent may terminate her employment; and

(ii) from the Respondent's perspective, her grievances had been dealt with;

(p) the conduct and outcome of the meeting on 6 November 2020, namely questioning the Claimant's request for follow up documents after the meeting; and

(q) dismissing the Claimant on 27 November 2020.