EMPLOYMENT TRIBUNALS

Claimant: **Ms S. Punj**
Respondents: **Secretary of State for Work and Pensions**

London Central Remote Hearing (CVP)

Employment Judge Goodman **7,10 –13 January 2022**
Ms J. Cameron **and in chambers 14 January**
Mr D. Carter

Representation
For the Claimant: Mr. David Gray-Jones, counsel
For the Respondent: Ms Laura Prince, counsel

JUDGMENT

1. The unfair dismissal claims do not succeed

2. The Equality Act claims (whether under sections 13, 15, 20 26 or 27) do not succeed.

3. There is no further hearing on 15 August.

REASONS

1. On 27 December 2019 the claimant presented claims under the Employment Rights Act 1996 for unfair dismissal, and under the Equality Act 2010 for victimisation, and for age and disability discrimination, alternatively harassment. The disability discrimination claim comprises a claim of direct discrimination, a section 15 claim of discrimination because of something arising from disability, and a claim of failing to make reasonable adjustment for disability. The harassment claims relate to both disability and age.

2. The agreed list of issues for the tribunal to decide in this hearing is set out in

Appendix One to this judgment. The list refers in turn to various paragraphs of the grounds of claim filed when the claim was presented. These paragraphs are set out in Appendix Two.

3. The claims are about a sequence of events between January and April 2019 (see appendix 2, section A). In those four months, the respondent issued a first warning for sickness absence, rejected her appeal against this decision, in paused it when she lodged a grievance against her line manager, reduced her performance mark at end of year, and tried to prepare a stress risk management plan. Following an end of year performance assessment which marked her down, on 1 May 2019 the claimant resigned her employment, which terminated when her notice expired on 30th of September 2019. At that point she had just (four days earlier) attained the minimum retirement age under the civil service pension scheme, and formally she took early retirement.

4. The claimant suffers anxiety and depression. The respondent admits she is disabled.

Evidence

5. To decide the issues the tribunal heard live evidence from the following witnesses:

   Sangeeta Punj, the claimant, who worked in London
   Beverley Walsh, a former employee of the Department in Leeds, gave evidence about events on 8 November 2018
   John McInally, the claimant's trade union representative (now retired), gave evidence about the attendance management meeting he had attended
   Chanderjit (Channi) Kalsi, Senior Executive Officer, who was the claimant's line manager in the relevant period. She works in Leeds
   Carole Krahe, grade 7, who also works in Leeds. She took over line management of the team in February 2019, and stepped in as the claimant's line manager at the beginning of April 2019, when the claimant filed her grievance about Chanderjit Kalsi
   Elizabeth Crowther, grade 6, working in London. She stepped in as Countersigning manager for Carole Krahe from April 2019
   Sara Mason, Head of Housing Strategy, also in London, investigated the grievance.

6. We read short statements from **Laura Webster**, a colleague of the claimant, about a conversation with the claimant in January 2019 about treatment by her manager, and **Griet Laurent**, a mental health first aider, who directed the claimant to where she could get help.

7. The hearing bundle comprised 1,390 pages in 12 separate PDFs. The separate index (in Word) referred only to the hardcopy page numbers, which according to the index run from 1- 1,179 (with many late inserts within that numbering) but there are also pages 1,180-1,284, not indexed, in bundle 12.

There were neither hyperlinks nor bookmarks. There was no code in the index for finding the internal PDF numbers, or even the bundle number. To find any page referred to by a witness we relied on our own research and, during the hearing, counsel. As the witness statements referred only to the hardcopy pagination, the pre-reading was so laborious, and sometimes we only came to long and relevant material during cross- examination. Although the witnesses and the panel only had electronic copies, counsel for the claimant initially referred only to hardcopy numbers (and even hole punches); later, pdf pagination was also given, though still sometimes several pages out from the hard copy pagination. All this slowed us down.

8. It was disappointing that although the parties had been notified at the end of November 2021 that this was to be a remote hearing, the bundles did not comply in any way either with the Presidential practice direction, or the courts' directions on electronic bundles.

9. To add to our difficulties, given we were working from electronic bundles, the eight-page list of issues does not list the treatment complained of, which instead appears over five pages in the grounds of claim. We also had to go to the grounds of claim document to review the six PCPs for the reasonable adjustments claim, and the six adjustments suggested, and to another part of the grounds of claim to review the list of protected acts. This would not have been as difficult to manage if there had been a single bundle or it had been hyperlinked.

10. The hearing was open to the public. Observers were able to read witness statements and documents bundles during the hearing by emailing the respondent's solicitor, whose address was posted in the chatline.

Conduct of the Hearing

11. The hearing proceeded mostly without technical difficulty. Mr McInally was unable to join by video, and instead used an audio link, with which he said he was comfortable. He said he was unable to read the electronic documents provided to him as the type was too small, and so counsel read out the relevant passage for him before asking a question about it. He had a hard copy of the witness statements. Ms Crowther was suffering from Covid; fortunately her cross-examination was limited to an hour.

12. Live evidence ended on day four. On day five we read written submissions, then heard each side answer points in the others' arguments not already covered. Judgment was reserved. The panel was able to discuss the issues and reach conclusions on the day reserved for discussion, but subsequent listing of long cases has prevented completion of the written reasons before now.

13. August 15 was set for a remedy hearing if required. The claimant was directed to serve a witness statement on post-termination employment with supporting documents by 1 August. As shown in the usefully full schedule and updated counter-schedule of loss, with complex calculations of pension loss,

the other issues for a remedy hearing were matters of calculation and principle, rather than evidence.

Findings of Fact

14. The respondent is a government department responsible for welfare, pensions and child maintenance policy. It is the biggest public service department in the UK.

15. The claimant started work for the Department in April 1986, when she was 21. At the time of the events complained of she was a higher executive officer (HEO) in the Benefit Cap Policy team. This was a team of four people. The claimant and another HEO, Rowena F, worked in Caxton House in London. There was a senior executive officer above them, Charanjit (Channi) Kalsi, who worked in Leeds, and the team leader was David Edson, also in London. When he retired early in 2019 Carole Krahe, in Leeds, took over.

16. The claimant was the longest-serving member of the team, and it was acknowledged that as a result she had vast experience and knowledge.

17. The claimant's husband died very suddenly in January 2016, and she was then absent from work on ill-health grounds for many months, returning to work on a staged basis on 10 October 2016, followed by some accrued some annual leave. An occupational health review in October 2016 reported that she had long-term anxiety and depression. These conditions might give rise to short-term setbacks on an unpredictable basis.

18. After only a few weeks back at work the claimant's brother-in-law died, and she was off work through ill-health again from 14 January to 12 March 2017. In effect she had been away from work for nearly 15 months.

19. In March 2017 she returned to work part-time, four days a week rather than five. On two of those days she was permitted to work from home. The department's policy restricts part-time working on medical grounds, rather than because of a contract, to a period of 13 weeks. Her local managers extended it for the best part of the year despite that restriction. The arrangement became permanent in April 2018 when she opted for permanent part-time working on a four-day week basis. Contractual part-time working is common in the civil service. Occasional flexible working from home is not uncommon.

20. The work of the team consisted of preparing ministerial briefings on the benefit cap, answering replies to MPs' questions on behalf of their constituents ("Treat Official" letters), and providing draft answers to Parliamentary questions. Deadlines are set for all these tasks, some deadlines are very short indeed. Deadlines may be extended by negotiation with other teams within the Department when information is required for briefings, but all other deadlines are set externally, and some of them, particularly Parliamentary questions (PQs), are very short, perhaps same day. By its nature, the workload is unpredictable. During the period in dispute,

there were 10 PQs, though about half were for figures, which were handled by analysts in a separate section. The demand for answers to PQs rises when there are policy changes. All Team members will participate in contributing to and drafting answers and briefings, but it was the task of one of the 2 HEOs to collate and prepare the final draft reply for sign off by the team leader.

21. Rowena F, the other HEO, was brought into the team during the claimant's long absence in 2016. The respondent's evidence was that when the claimant returned to work in March 2017 she was only allocated half the amount of work previously undertaken, to accommodate her anxiety. This was not an agreed adjustment, and it does not appear that HR or the claimant were informed of it. Nor was there any precise information about how much work was allocated to each HEO. We were told that Rowena F resented doing more work, as she saw it, than the claimant, and by the spring of 2019 said she was looking for another job. We accept there was some reduction in the amount of work allocated to the claimant.

Performance

22. Civil servants are subject to annual performance assessment at the year-end in April. There is also a mid-year review which provides an indication of how performance to date is viewed, and what final mark is likely.

23. Performance ratings range from 1 – exceptional – through 2 – good – then 3 – developing – and 4 – poor. The good category (2) includes six descriptions of what will be satisfactory, including "satisfactory outcomes; demonstrated competencies and behaviours to satisfactory standard", to "outcomes just achieved; exceeded competency and behaviour standards". Developing outcomes (3) are described in four ways, including "satisfactory outcome; multiple competence is not demonstrated" and "satisfactory standard; underperforming in some areas". An employee in the developing category (3) will be given a performance improvement plan, which may be formal or informal.

24. We have to resolve a dispute about the claimant's level of performance as of the end of 2018, when the disputed events start. The claimant states she had always achieved a good rating, there were no complaints about her work, and she always met deadlines. The respondents differed. In February 2019, on handover to Carol Krahe, David Edson prepared a statement of background information "pending any future action". He stated that when he became team leader in June 2016, the claimant was still away and had been on sick leave for six months. His predecessor told him there had been "performance issues" previously. In the bundle there is a file note from 20 May 2016, of the meeting to moderate the HEO markings. This shows that she while was to get a good(2) marking, it was to be explained to her that this was because they recognised there had been an improvement after the mid-year review (so October 2015), when she had been told she needed development(3). The claimant's performance was not assessed at all in the next year, 2016/2017, because she had been at work less than 60 days. So there had been an indicative (3) in Octber2015, and a qualified good (2) in April 2016, no mid-

year mark in October 2016, or final mark in April 2017.

25. When she returned to work on a staged basis in March 2017, Mr Edson said, her mood and levels of anxiety changed daily, so the claimant's work requirements were adjusted so as not to expect too much. In November 2017, for the indicative mark it was recorded she was "good – towards the lower end – although as discussed – still not fully returned due to health". In April 2018, at the end of the reporting year 2017/2018, he and colleagues had concluded that she was *not* working at the levels required, but "due to her health conditions, she had been on PTMG (part-time working on medical grounds) throughout, and the fact that we have not discussed standards of performance specifically other than through nurturing and coaching approach, and having adjusted informally her work, we decided to award her a 2 Marking." According to Mr Edson, he had met the claimant informally to explain this, but when he said they had considered a developing (3) mark, she got upset, saying she did not need developing, she was still struggling with the bereavement. She was told they would need to look at performance in the coming year. So in April 2018 the respondent's view seems to have been that the claimant's performance required some improvement, but because of her personal difficulties, and the lack of any communication of a need for improvement she had in fact been rated good.

26. Ms Kalsi became the claimant's line manager in May 2018, soon after the start of the next assessment year. According to Mr Edson, by then the claimant's performance had shown improvement, both in 2017/18 and in 2018/2019, leading him "to occasionally think that perhaps she had turned the corner but these improvements are short-term, hence the performance conversations planned for mid-year in October", which he had mentioned to the claimant. We know from a September 2018 email that Ms Kalsi contacted HR for advice on how to discuss this with the claimant. On 25 October 2019 there was the mid-year review between Ms Kalsi and the claimant. According to Ms Kalsi, she told the claimant she was giving her a good indicative marking, but that to achieve this by the end of the year she would require some development. There was not time to discuss the detail of development then, because other tasks had eaten into the time available, and it was agreed that they would discuss it on 8 November 2018 , following a meeting the claimant was due to attend in Leeds on 7 November 2018, to make a presentation. She was to stay overnight, and they would meet face to face to discuss it the following day.

27. The claimant however denies that there was *any* talk of developing her performance.

28. On the night of the 7/8 November 2018 the claimant describes a sleepless night in the hotel with a stomach upset. The following morning she had a panic attack, and phoned an old work colleague (Beverley Walsh), with whom she was to stay the weekend. Ms Walsh changed her plans to come to collect her. The claimant sent a message to Ms Kalsi that she was off sick. (In her grievance of 4 April 2019 she said that she had rang in sick because she was suffering from a heavy cold, rather than a stomach upset or panic attack).

Ms Kalsi contacted her about arrangements for travelling back to London, not realizing she had planned to return on Sunday, rather than Friday.

29. The claimant was then off sick until 17 December 2019, the fit notes give anxiety and depression as the cause. On her return to work she went to see the occupational health doctor who recorded in his note of 3 January 2019 that the onset of this episode ”came out of the blue”, with “no obvious trigger”.

30. Having heard the evidence of the claimant Miss Walsh and Ms Kalsi, we have concluded that the claimant *did* know there was to be a discussion of her performance on 8 November, and that it was the catalyst for her disabling anxiety attack. She did not acknowledge it to the occupational health doctor because she did not and does not accept that her performance might require development. Our conclusion, notwithstanding that we did not hear from Mr Edson himself, is that the respondent’s evidence on this is to be accepted. They did have concerns (justified or not) about her performance, and had been holding back on addressing these with her because of her health. She did know they wanted to discuss performance concerns.

31. Because there were no proper discussions with the claimant about developing her performance, it is not altogether clear to us what the concerns were. We were told of a lack of attention to detail, with extensive spelling and grammar errors requiring redrafting, and of the claimant not being able to grasp a task which had been explained to her, and which only required extracting information which was already available, but it could also have concerned the claimant not undertaking her fair share of the work. We know that in a January 2019 discussion with her line manger she said she preferred mundane tasks because she found them less stressful.

Return to Work

32. On return to work, the respondent obtained an occupational health report from Dr C. Valentine, dated 3 January 2019, on how to “support her participation in the workplace”. (This, and other occupational health reports, was based on telephone consultations). In his opinion her condition was likely to improve; in general, work was conducive to good mental health. He noted that her commute to work could be stressful, that she was building up to full hours on a staged basis, that she was being given longer to complete tasks, as a reasonable adjustment, and that she was concerned about a potential backlog of emails that would have accumulated in her absence, and about pressure to meet deadlines. He proposed that a backlog of emails accumulated during absence could be filtered by another staff member so that only the essential had to be read on return, and that there could be some protected time for catching up in the return to work phase. Modifications already made could be reviewed as she recovered from her recent ill-health.

33. On the email backlog, the evidence was that from mid-November 2018 the team had stopped copying emails to the claimant, and that on return, she was told simply to delete anything that had arrived while she was away. There is complaint of the delay stopping copying emails to her, but we observe that it

would not have been apparent earlier in November that her absence would last so long.

34. Another adjustment agreed on her return to work was that the claimant would have time off during her working hours to attend counselling sessions called "Healthy Minds" once a week for 12 weeks. She had to stop work for the day at around 12 on a Thursday (a work from home day) to be able to attend the session, so in effect Thursday became a half day.

January 15 Meeting

35 Ms Kalsi arranged a one-to-one telephone discussion with the claimant for 10 a.m. on 15 January 2019. Neither had booked a meeting room, and the claimant says she was unable to find one vacant, so the conversation took place with the claimant in the canteen at Caxton House, with the claimant's agreement, and on the proviso that they would not continue after it started to fill up at lunchtime. Although an informal meeting, Ms Kalsi wanted to tell the client she was going to arrange an attendance management meeting, because of the length of the recent sickness absence. She also wanted to discuss performance, as had been planned for 8 November. In the course of discussion she asked the claimant about her work as a magistrate. The claimant had done this for some years, and had been allowed 18 paid working days, pro rata to her working pattern, but had not sat when she was off sick. She explained she enjoyed the work and proposed to resume.

36 The meeting ended around 12:15 as the canteen started to fill up. At 3:11 p.m. Ms Kalsi sent the claimant a formal letter inviting her to an attendance management meeting in Caxton House on 23 January, at which she had the right to be accompanied by trade union representative. In our finding, contrary to the claimant's assertion, the timing of this letter was not deliberate or unreasonable delay "until the end of the day". Between 12:15 and 3:11 Ms Kalsi had to eat, attend to matters that had come in during their meeting, then check, edit and send the formal letter to the claimant. Like many civil servants the claimant works flexitime within core hours, and the claimant herself was uncertain in evidence when her working day ended - "3.30, 4-ish she said.

37 The claimant's response to this letter was that the union were not sure if there was a representative available on 23 January, so she wanted to postpone the meeting. Ms Kalsi replied she would see if she could get the union to find a rep. In the event it was not postponed, and Mr John McInally of PCS attended with her. The claimant has suggested that Ms Kalsi's response to the postponement request about the union having someone available shows she questioned the truth of what she said, but in our finding the exchange was innocuous.

Attendance Management Meeting and Warning January 2019

38 The respondent's Attendance Management Policy provides that sickness absence over a certain length of time will trigger an invitation to a formal "health and attendance improvement meeting", where the employee has a

right to be accompanied. The stated purpose is for the manager to find out what can be done to achieve satisfactory attendance levels. Reasonable adjustments and other supportive measures should be considered, and at the end of the meeting, there must be consideration of whether a warning is appropriate, but this must not be the main point of the discussion. A warning is not a default outcome, but requires a positive case-specific decision by the line manager. Warnings are appropriate where there is a risk that poor attendance will continue. It adds that for "disabled colleagues an isolated or short/moderate increase in disability related absence would not justify a warning".

39 A first written warning is followed by a six-month review, when absence must be below 50% of the normal trigger point for attendance to be considered satisfactory. After that six months, there is a 12 month 'sustained improvement' period.

40 At the start of the meeting on 23 January Ms Kalsi observed that there had been no formal action on the long sickness absence in 2016, and the recent absence was the first one in 12 months. Based on her working pattern, the claimant's trigger point was seven days. Based on her health condition, she was increasing that to 9 days, but given that the absence had lasted 24 days there had to be a meeting. There was a wide-ranging discussion of how to adjust the work: the claimant mentioned she had trouble attending a 9 am team meeting, Ms Kalsi said there was no problem moving it to 9:30. Ms Kalsi explained she could not take the deadlines away, because that was the nature of the job. The claimant thought it would be easier with an on-site manager, rather than having to have meetings by telephone with a manager in Leeds.

41 The notes of the independent notetaker were not sent to the claimant until 27 January, shortly before she was given a first written warning; the changes the claimant made to the notes were not however significant.

42 The warning itself, dated 29 January 2019, explains that the previous absence was not linked to previous absence, but it could not be ignored, as both were linked to anxiety, stress and depression. Because of the medical evidence, the trigger point for the attendance management procedure was increased to 9 days. Emails could not be filtered on an ongoing basis, as this was not practical in a small team. A recent period of part-time working on medical grounds had ended, and she had confirmed she was OK with normal duties. A further occupational health referral had been made to request other recommendations "to ensure work was not adding to your cognitive disability and to obtain an opinion on the magistrates court work", to ensure that this did not have a further impact on her health and performance at work. Generally, the claimant had confirmed she was satisfied with flexibilities. The monitoring period was explained, as was her right of appeal.

43 The claimant appealed. This was handled by Lewis Child. He met her on 20 March, and reached a decision on 9 April not to overturn the warning. He found Ms Kalsi had taken relevant matters into account. The fact that the

claimant had taken no sickness absence the previous year was not a reason not to issue a warning now. The claimant had agreed there had been reasonable adjustments to manage the workload. He confirmed there was no link between absence management procedures and performance management, as the claimant feared. He acknowledged it was not easy to build a relationship working from split sites. He recommended she rebuild her relationship with Channi Kalsi.

44 His recommendation came too late, because on 4 April the claimant had raised a grievance about Channi Kalsi. We set out next the events that led to the grievance.

The Further Occupational Health Report

45 After the meeting on 23 January 2019, Ms Kalsi got a second occupational report. The report of Ms. H Campbell, a nurse, is dated 28 January 2019. The referral was for an OH opinion on whether "her cognitive health issues prevented her from fully functioning in her job role, and if undertaking a magistrate role would impact on her ability to undertake a role in DWP". The report recorded that the claimant was reporting worse symptoms since the last review, with low mood, anxiety, panic attacks and poor sleep, affecting concentration and memory. These were being treated by medication and counselling. No opinion is expressed on her cognitive ability and her magistrate role. Instead, a stress risk assessment was recommended, with the comment that she would also benefit from reduced workload and additional time to undertake her work.

46 Understandably, Ms Kalsi felt her questions had not been answered, and she told the claimant on 29 January that she wanted to get another occupational health report. Our understanding of the position is that while a manager might be frustrated at the loss of working days of an employee who is taking longer than usual to complete tasks in any event, it was an additional feature that Ms Kalsi, who had not sat as a magistrate herself, considered a magistrate's task to be an important one that involved reading papers quickly, and reaching decisions quickly, and she did not understand how the claimant could be able to undertake work as a magistrate but not to undertake HEO work. She also seems to have been concerned that the claimant's cognitive ability might be depleted by magistrates court work in addition to DWP tasks.

47 The OH consultation was fixed for 14 February. When the claimant got the appointment date on 8 February, she was very upset. She rang David Edson complaining she felt harassed, especially as the last report did not properly record what they had talked about. He reassured her that they were just trying to understand exactly what they could expect from someone in her condition. When it came to the appointment day, the claimant refused to speak to the nurse. She complains that the request for a third report was oppressive, and that the respondent wanted to keep getting reports until they had the answer they wanted.

Meetings to Discuss Stress Risk Assessment and Performance

Improvement

48 Following the discussions on 15 and 23 January, Channi Kalsi had tried to arrange a further meeting, to discuss an informal performance improvement plan (PAL), and to prepare a stress risk assessment. She proposed either the week beginning 21 January, or the following week. She phoned the claimant about this on 24 January; the claimant asked if this could be postponed until after she returned from annual leave on 6 February, and that same day Ms Kalsi wrote saying that the meeting would be postponed to 12 February. It is alleged that the claimant was less favourably treated because Ms Kalsi would not say whether the meeting could be postponed. In our finding the facts are not made out.

49 It is important to note that this letter referred to "the date we can discuss the stress risk assessment and informal PAL."

50 The team had an informal meeting at 9 am, for chat, given that they were working on split sites, and to discuss what work was coming and who would be doing it. It is not minuted. On 11 February, the claimant was running late for the 9 am team meeting and sent a message that the trains were delayed and she will be in by 9.10. She was asked to dial in once she arrived, but it seems she did not get the message, and missed the meeting. She compares her treatment with that of Rowena F, on 7 February, when the meeting was delayed until much later in the morning. We do not have any information on why Rowena was running late, or when and how the meeting time was put back; Ms Kelsi did not remember this at all, and the claimant does not say what happened, only that it was it put back. On the claimant's evidence, she was late because of train cancellations, not because of anything related to her disability, although we have noted that she did mentioned in the 15 January meeting that the start time was difficult. Subsequently the start time was put back to 9.30.

51 On the same day, 11 February, the claimant accidentally received a copy of a Skype message Channi Kalsi sent to another manager. It said: "following a chat with Sangeeta Punj on Friday – I'll give her a quick call now and see how she is and mention today's work too… Mindful don't want to harass her!" The claimant finished the piece of work she was doing but then had a panic attack and went home. She told the investigation she was worried the message had gone to the whole division. Channi Kalsi called the claimant to apologise when she realised what had happened, but the claimant did not want to speak about it. She raised it at the start of the meeting the next day, reassuring her that it had not gone to the whole division, and was a regrettable accident.

52 The meeting arranged on 12 February started late because the claimant put the start time back from 10:30 to 12:30. A meeting room had been booked on this occasion. They began with the individual stress risk assessment, a lengthy form which is to be completed by the individual, then by the line manager, and then the two together. The claimant was unable to complete the form as she was upset, so Ms Kalsi made handwritten notes on the form which she undertook to type up later and send to the claimant for discussion

and review. The claimant alluded to strained relationships and of bullying and harassment increasing her stress, and said in general terms that the attendance and performance issues were stressing her out. According to Ms Kalsi, the meeting ran from 12:30 to 1:55, was interrupted by a team meeting from 2-3, following which they resumed. The Claimant was outwardly calm during the intervening team meeting, but very upset when discussing her stress with Ms Kalsi alone. The claimant described their relationship as strained following the attendance management issues of January. During the one-to one section she took a telephone call from a relative on a private matter, speaking Punjabi (which Ms Kalsi understands) and seemed composed then.

53 They were due to carry on next day, because they had not managed to complete the stress risk assessment, let alone move on to any performance matters.

54 Early next morning the claimant emailed at length setting out her thoughts about the meetings in the process so far from her point of view. The meeting the previous day had been “heavy-handed” in approach. They not reached any conclusion on implementing OH guidance on adjustments. The meetings had lasted so long she could not get the day’s work done. On the misdirected Skype message, Ms Kalsi had not taken any account of her feelings but had instead “pertained to push this meeting in the diary”. She stated “you did not want to harass me and yet your approach was contrary to this” in order to get an apology. She then complained of the “extensive agenda” that Ms Kalsi had in mind for the meeting, when it should have been focused on reasonable adjustments. She had agreed to participate in the stress management conversation. She had got no sleep as a result. She asked that the morning meeting focused on reasonable adjustments to working methods, and was limited to 45 minutes, so she could get on with her workload. She asked for deferral of the third occupational health meeting, saying: “the frequency of these referrals, in addition to lack of support being provided and your bullish/micromanaging approach to managing my work are leaving me highly concerned about my job, anxious, stressed, vulnerable and feeling overall exhausted”.

55 The meeting lasted 45 minutes. They dealt with the rest of the stress risk assessment. The claimant then asked for a break. On return said she could no longer continue, as she was probably having a panic attack. Soon after she left for the day.

56 Next day Ms Kalsi replied to the early-morning message at some length, apologising if the meeting had increased her stress and anxiety, explaining she had wanted to help her. She pointed out that it had been clear that they were to discuss both the stress risk assessment and performance, and she had set aside an hour for each. She recited the measures taken in 2017-18 to reduce workload and hours. She explained she could not filter emails going forward, while she was at work. When the second occupational health report suggested a reduction in work, she had reduced the workload further, and she had only been asked to progress one piece of work during the four weeks she

had been on part-time medical grounds working, with an additional two weeks flexibility, which only involved merging two documents. She had, in her view, exhausted the reasonable adjustments recommended in both the OH reports. The purpose of the third OH report was to get "a clear steer" on what further reductions were reasonable. As for the length of the meeting, it had lasted 2 ½ hours. She did not want it to be rushed. She did not expect her to complete core work when she was in meetings with managers.

57 Although the grounds of claim allege a further meeting on 14 February, this is an error based on a misreading of these emails. There was no third meeting.

58 The claimant was then on annual leave from 16 February to 5 March.

59 As for the stress risk assessment, Ms Kalsi typed it up and sent it to the claimant on 11 March, asking her to review it and add any thoughts or comments she might have on what could be put in place to meet her needs and improve work stress levels.

60 The claimant did not reply, and so on 19 March Ms Kalsi followed it up, asking her to complete it so they could agree the next review date. At the same time she said they needed to meet to discuss an informal PAL (performance improvement plan), and book a date for her end of year review. She asked the claimant if she wanted to have one meeting on both, or separate meetings, one on each. She could be accompanied to both.

61 They had a one-to-one meeting on the 21 March to discuss workload and how she was coping. The claimant said she was restarting the magistrates court sittings and asked to put them in the diary. They also discussed the claimant's corporate work (that is, not related to the team's core work on the benefits cap) as "behaviour champion". Ms Kalsi pointed out that although this role was "fully supported", the management view remained that core work should be given priority over corporate work. In evidence the claimant confirmed that this priority rule applied to everyone.

62 The claimant still did not reply about meetings to discuss the PAL plan, or the stress risk assessment, and so, on 26 March Ms Kalsi wrote again, pointing out time was pressing on. As she had not heard back, she had booked a meeting to discuss the PAL on 3 April at Caxton House. This prompted a reply from the claimant, who said: "you will be aware I have challenged the attendance management written warning. On advice from my union representative I don't think it will be appropriate for us to meet on this issue until the appeal and other matters on my performance rating are resolved".

63 Ms Kalsi decided to press on with or without the claimant's involvement, and replied on 1 April that she was concerned about this advice from the union because attendance management was a separate issue from performance improvement. The stress risk assessment had been recommended by the occupational health nurse, and it was in her interest that it should progress. On performance, she said that she had noticed an improvement in the last few weeks, but this was still short of what was expected. As the claimant

knew, she had been trying to arrange a meeting since late October, but she had not attended any of them. This left her with "no alternative than to implement the PAL immediately". The PAL was meant to set out expectations, and steps to continue to improve standards, to be reviewed on a weekly basis. She enclosed the PAL with dates on it. She did not intend to make things more difficult, and would appreciate her cooperation, and asked her to consider both the stress risk assessment and the PAL. She pointed out that it was to start from 2 April. The claimant had been cleared of all work that day so she had time to read it.

64 The claimant declined, writing on 2 April complaining that the PAL was not at all supportive, just a list of complaints and criticism of what had gone wrong. She and her union rep wanted to meet "to discuss my concerns with the approach being taken". She also said that despite being told she was being taken off work tasks so she could focus on the PAL, she had in fact been given the task with the deadline for 11 AM on 2 April. Ms Krahe called her to speak about it, but had to leave a voicemail. The claimant did not reply. She had had an anxiety attack on the way home and was off sick until 9 April.

Union Meeting Proposal

65 On 6 March 2019 John McInally, the claimant's trade union representative, had written to David Edson, who was just about to retire, complaining of the effect of recent management action on the claimant's stress and, in particular, the stress management meetings on 12 and 13 February. DWP was ticking boxes rather than giving the claimant the support she needed. The union wanted to have a meeting to find a way forward.

66 Mr McInally also wrote to Carole Krahe, who had taken over from David Edson. According to Carole Krahe this email reached while she was in the middle of what she described as a calm meeting with the claimant, so she asked about it, ad was told it related to an earlier discussion and should have been sent previously. Carole Krahe's response to the approach therefore was to say that she was familiar with the issues after speaking to the claimant, stress management procedure had to be moved forward, and it was not helpful for the union representative to advise the claimant not to participate in something recommended by occupational health so that reasonable adjustments could be put in place. As for advising the claimant not to engage on the performance action plan and end of review meeting until her appeal against attendance management had been resolved, they were separate issues, and the claimant had an obligation to engage with performance processes, which would not be negated by discussion between her manager and her union rep.

67 Mr McInally pursued the meeting request. Ms Krahe says that she did not acceded as the *claimant* had never asked her to meet him. She also considered Mr McInally's approach was designed to stall Channi Kalsi's attempts to get the claimant to engage with the stress management plan, informal performance action and the end of year review; in her own view the claimant would benefit from engaging, not least because failing to engage

with performance management or end of year review processes could be considered misconduct. Instead she offered the claimant a one-to-one meeting to discuss concerns, and when that was rejected, had written on 1 April imposing the PAL without discussion.

The Grievance

68 On 4 April, while off sick (she returned on 9 April) the claimant raised a grievance about Channi Kalsi. The grievance includes a timeline of events complained of from November 2018 to 2 April 2019, but in particular five incidents, namely, the meeting on 14 January; exchanges on 17 January about getting a union rep for an attendance management meeting; the meeting on 23 January and being pushed to book a further meeting the performance management; events on 11 February, namely not delaying the team meeting for her, and sending her the Skype message. In answer to a question whether she would consider mediation, she said her union representative had asked to meet her countersigning manager Carole Krahe, but she had refused requests. She now wanted an independent person to look at it. It was also important to have an independent person because Carole Krahe had expressed a view that Ms Kalsi was treating the claimant sympathetically. By way of outcome she wanted a managed move to another team, or change of line management, as her relationship with Channi Kalsi had broken down. She also want Ms Kalsi to be investigated "and action taken against her", so that others would not experience unfair treatment.

69 The claimant said in the grievance letter that she considered her treatment was discrimination because of disability and because of age. Nothing else in the letter relates to age. Investigation showed that the claimant, Ms Kalsi and Ms Krahe were not dissimilar in age. Evidence to the employment tribunal shows the claimant was then 54, Ms Kalsi 50, and Ms Krahe and Rowena F were 55.

70 Because she had lodged a grievance, HR advised that the PAL activity would be paused until it had been concluded. Accordingly Ms Kalsi wrote to the claimant on 9 April saying the meeting arranged for a that day had been cancelled.

71 Sara Mason was appointed to investigate all the grievance. She interviewed Carol Krahe on 30 April, Liz Crowther 16 April, the claimant, with her union rep, on 24 April, and Rowena F on 9 May, as well as the minute taker from the January attendance management meeting. She sent a report to the claimant on 15 May.

72 She did not uphold the grievance. Dealing with the allegations in turn, she found that the occupational health recommendation about filtering emails only covered those accrued while she was away from work, not those that arrived after her return. On the OH recommendation for a stress risk assessment, this had stalled because the claimant wanted to wait for the outcome of her appeal against written warning; it should now resume. She had been given a reduced workload, and additional time to complete tasks. HR had advised the

third occupational health assessment, but the claimant had declined. She thought this should be reconsidered, as here was some merit in focusing on what she could do. Of the enquiry about time off to sit as a magistrate, her own desk research into a document on the Magistrates Association website called 'The work of a magistrate', indicated that it was a role requiring careful weighting of evidence and teamwork to take difficult decisions with far-reaching consequences, and it was reasonable to consider how that role could impact on her when she was struggling with her own work. On the meeting on 15 January, the location was not ideal, there were evidently two different accounts of the discussion, it was not unreasonable to send the follow-up email when she did. On getting trade union representation for the attendance meeting, there were two contradictory accounts, one saying she was struggling to find a rep, the other saying she was trying to help, and she could not make a finding either way. In the complaint about the 'treat official' case at a team meeting, she could not substantiate the claim of bullying there. Having interviewed the notetaker, she did not accept that the notes of the meeting on 23 January were not accurate – the notetaker was outside the chain of management. On issuing the warning before the notes were agreed, Ms Kalsi had sought HR advice on what to do. On the tone of the phone call, and about booking a further meeting, again there were contradictory accounts that she could not resolve. Next, she dealt with team meetings on 7 an 11 February 2019, and the Skype message on 11 February. In her understanding people did sometimes miss the team meeting and there was no issue about this. There was nothing to suggest that she was deliberately excluded. On the Skype message, it was an error, Ms Kalsi tried to apologise, but the claimant would not talk to Ms Kalsi then. She had explained it on 12 February. It was unfortunate, but not malicious, and she had had an apology. On the request to meet the trade union representative, the nature of the meeting was not clear, and suggested that it should be the manager and the trade union representative alone, there was no explicit request for such a meeting till 2 April. She recommended that a three-way meeting take place now if it had not already. On PQs, she understood there have been ten since January, of which seven were allocated to analysts, and only three focused on policy. The volume was not unreasonable, and the response time was set by Parliament, and could not be extended by the Department.

73 The notes of interviews with the managers show the damage to the team caused by the reduction in the claimant's workload and her inability to work effectively, as well as the manager's inability to discuss it with her. Managers had been picking up the claimant's tasks. Ms Kalsi and Miss Krahe were reported both to have been in tears from time to time; Rowena F was looking to leave.

End of Year Performance Assessment

74 On the claimant's return to work on 9 April Carol Krahe replaced Channi Kalsi as her line manager.

75 On 30 April 2019 Carol Krahe conducted the end of year review. It was brief because the impasse over her PAL meant there were no agreed objectives to discuss. The written report shows credit was given for specific tasks the

claimant had undertaken. In the claimant's opinion her performance had been good until she returned from sickness absence at the end of the year, when Ms Kalsi's attitude had changed. Carol Krahe said that her performance was assessed as "developing", a view shared with others. She reminded the claimant that both David Edson and Channi Kalsi had told her the previous year that there were performance concern, and the meeting on 8 November was to discuss this. The claimant replied that had just been a normal one to one meeting. The claimant asked for examples of poor performance, and was told of one PQ which Ms Krahe had asked her to amend but hadn't. At the end of the meeting the claimant said that she was unhappy about the mark. Managers were deliberately trying to trip her up and tip her over the edge, ignoring their own OH referrals.

Resignation

76 The claimant says the meeting with Carol Krahe on 30 April drove her "to the brink of insanity". It was the final straw.

77 On the afternoon of 1 May 2019 she emailed Ms Krahe: "Please accept this letter as official notification of my intent to retire early. I would like to schedule my last date of departure for 30 September 2019". Recent events had compelled her to come to this decision. Bullying and harassment were now the management style. It was impossible to work in such a hostile environment; she had planned to retire at 60. She did wish to continue with her grievance, "and if necessary to a tribunal", and would be consulting an employment lawyer.

78 In evidence the claimant suggests the decision was conditional: she was going to continue working because she could needed salary, and wanted to find out meanwhile what pension she would receive. She also thought working five months' notice would give the respondent time to resolve matters. On 3 May the claimant had a telephone meeting with Carol Krahe, who asked if there was anything to be done to get her to reconsider the decision to retire. The claimant made no suggestions, and says Carol Krahe knew well why she was resigning.

79 Sara Mason's grievance outcome, which the claimant received on 23 May, recommended that the claimant be moved to a new post as she had requested, one that did not involve unmovable deadlines. The current management process (presumably, performance) should be transferred with her.

80 On 31 May the claimant appealed Sara Mason's grievance decision. She had not been helped through a difficult time, she had been bullied, she wanted an independent and impartial investigation of the grievance, and she would not have asked for early retirement if she had been treated supportively.

81 Adam Khan heard the appeal and met her on 13 June. On 20 June he reported. He upheld part of the appeal, on the basis that Sara Mason's decision did not take account of there being no stress management plan in place – stress management policy had not been followed. In other respects,

namely the attendance management decision and appeal, the accusations of arbitrary and capricious decision-making, and failing to make adjustments, he found only that it would have been better if the January meeting had been postponed rather than taking place in the canteen.

Alternative Employment

82 The claimant was sent to a CV writing class in May 2019 and prepared a CV. She was alerted to various posts, But she did not find a suitable alternative post within the department and on 13 August confirmed that she would be retiring as of 1 October 2019.

Relevant Law

Dismissal

83 Where an employee resigns, Section 95 (1)(c) of the Employment Rights Act 1996 provides this may be a dismissal where:

> " the employee terminates the contract under which he is employed (with or without a notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

84 It was made clear in **Western Excavating Ltd v Sharp (1978) IRLR 27**, that the employer's conduct should not simply be unreasonable, but a breach of contract so fundamental that the employee was entitled to treat it as an end. An employee can however establish that unreasonable behaviour by the employer amounts to a breach of the implied duty of trust and confidence. As expressed in **Woods v WM Car Services (Peterborough) Ltd (1981) ICR 666,** the implied contract term is that "the employer will not, without reasonable and proper cause, act in a way which is calculated or likely to seriously damage or destroy the relationship of mutual confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Industrial tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

85 In order to show dismissal, the employee must establish that there was a breach on the part of the employer, and that the breach was serious enough to justify ending the contract. The breach can be a sequence of events, of which the event triggering the resignation is the last straw, if the series of acts cumulatively amounts to a breach of the implied term, and the last straw is not innocuous, and is capable of contributing to the earlier series in the business, even if itself not significant – **London Borough of Waltham Forest v Omilaju (2005) IRLR 35**. The claimant must have resigned in response to the breach, not because of some unrelated reason. Judging whether an employer's conduct is repudiatory to be done on an objective basis, meaning, whether the employment tribunal finds it unreasonable, not whether it was within a range of reasonable responses – **Bournemouth**

University Higher Education Corporation v Buckland (2010) IRLR 445.

86 Section 13 of the Equality Act 2010 provides that it is unlawful to treat someone less favourably than the employer treats or would treat another because of a protected characteristic. The wording means that the treatment of the claimant can be compared with an identified fellow employee – the actual comparator – or a hypothetical comparator, where no individual is identified. Both disability and age are protected characteristics. When someone resigns following a sequence of events and claims that the resignation should be treated as a discriminatory dismissal, yet the last straw was not of itself discriminatory, constructive dismissal should be found to be discriminatory "if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiated breach" the test being whether "the discrimination thus far found sufficiently influenced the overall repudiatory breach" – **Williams v Governing Body of Alderman Davies Church in Wales Primary School (2020) IRLR 589,** and **De Lacey v Wechseln Ltd trading as the Andrew Hill Salon UKAEAT/0038/20.**

Unfair Dismissal

87 Section 98 of the Employment Rights Act provides that if the employer shows that the reason for dismissal was one of the potentially fair reasons set out in section 98 (1), it is for the employment tribunal to assess whether the dismissal was fair or unfair having regard to the reason shown, the size and administrative resources of the employer, and equity and the substantial merits of the case - section 98 (4). In constructive dismissal cases, it can be difficult for an employer to show that the reason for his conduct leading to the employee resignation was fair, as on his case he did not dismiss the employee at all, but it is not impossible: "In a constructive dismissal case, a Respondent would need to show that the conduct which entitled the Claimant to terminate the contract (thereby giving rise to the deemed dismissal by the employer) amounted to a reason that was capable of being fair for the purposes of s.98 *ERA* (see *Berriman v Delabole Slate* (1985) ICR 546" - **Retirement Security Ltd v Wilson UKEAT/0019/19.**

Proving Discrimination

88 Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) but subsection (2) does not apply if A shows that A did not contravene the provision."

89 How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he

did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts required to prove any explanation are in the hands of the respondent.

90 **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867** that the bare fact of the difference in protected characteristic and some less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination. There must be "something more".

91 **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases without actual comparators, tribunals may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120, and Efobji v Royal Mail Ltd 2017 IRLR 956**, reminded tribunals that the respondent's explanation must be "adequate", but that may not be the same thing as "reasonable and sensible". If it is found to be untruthful, that can establish a prima facie case – **Base Childrenswear Ltd v Otshudi (2020) IRR 118.**

Harassment

92 Section 26 of the Equality Act 2010 defines harassment as where :

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

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Section 26(4) explains that: "in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect".

93 As a matter of definition, unfavourable treatment because of a protected characteristic cannot also be harassment related to protected characteristic.

Disability Discrimination

94 Disability can be the protected characteristic for a direct discrimination claim under section 13. There can also be unlawful discrimination under section 15, discrimination arising from disability, where the employer treats a claimant unfavourably "because of something arising in consequence of B's disability", and the employer "cannot show that the treatment is a proportionate means of achieving a legitimate aim".

95 This first part of the section was analysed in **Sheikholeslami v University of Edinburgh (2018) IRLR 1090** as raising two causative issues, firstly, was the unfavourable treatment because of an (identified) something, which means identifying the alleged discriminator's state of mind to find out the reason for the unfavourable treatment, and secondly, did that something arise in consequence of the disability, which is an objective question for the tribunal in the light of the evidence. The link between the unfavourable treatment and the something arising in consequence of disability can be relatively loose, and motive is irrelevant: **Hall v Chief Constable of West Yorkshire (2015) IRLR 893**. As to the second part, if the employer seeks to show that the treatment was a proportionate means of achieving a legitimate aim, he has to show that the treatment was both an appropriate means of achieving it, and reasonably necessary – **Homer v Chief Constable of West Yorkshire (2012) UKSC 15**. It involves a balance of the objective against the means used to achieve it to see that the measure is proportionate to the aim, including whether some lesser measure might have sufficed to achieve the aim **– Burdett v Aviva Employment Law Services UKEAT (2014) 472**; **Naeem v Secretary of State for Justice (2014) ICR 472.**

Reasonable adjustment for disability

96 Under section 20 of the Equality Act an employer has a duty to make reasonable adjustment for disability, of which it is a requirement:

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

97 The phrase "provision, criterion or practice" is "to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer from a disability" – **Lamb v The Business Academy Bexley UKEAT/0226/15.** It is not a one-off occurrence, there must be some element of repetition – **Williams.**

98 The test of whether an adjustment is reasonable is an objective one to be determined by the tribunal. It is enough that the disadvantage could have been alleviated by the adjustment, it does not have to be a certainty - **Smith**

v Churchill Stairlift plc (2006) IRLR 41; Griffiths v Secretary of State for Work and Pensions (2016) IRR 216 (which deals with extending the trigger point for sickness absence policy, and whether it is reasonable to give a warning for absence).

Victimisation

99 Section 27 of the Equality Act 2010 defines victimisation as where:

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

(a) B does a protected act, or

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

and protected act as including "making an allegation (whether or not express) that A or another person has contravened this Act" – s.27(2)(d).

Jurisdiction

100 The Equality Act provides at section 123(1) that proceedings must be brought within the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

101 Where there is "conduct extending over a period", time starts to run at the end of the period. In **Hendricks v Metropolitan Police Commissioner (2003) IRLR 96**, the 'conduct' concerns the substance of the complaints that the respondent "was responsible for an ongoing situation or a continuing state of affairs" involving less favourable treatment, as distinct from "a succession of unconnected or isolated specific acts".

102 On whether it is just and equitable to extend time, in British Coal Corporation v Keeble (1997) IRLR 336, it was suggested that employment tribunals would find the list of relevant factors in the Limitation act illuminating, but in **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA Civ 640**, tribunals were told not to use Keeble as a comprehensive checklist but to focus on the length of delay and the reason for it, and any other factor that might be relevant to why the claim was late. **Ahmed v Ministry of Justice UKEAT/0390/14** explains: "It is for the Claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension. Relevant matters will generally include what are known as the "Keeble" factors."

103 In unfair dismissal claims time, 3 months, runs from the "effective date of termination", in this case 30 September 2019, so the claim presented on 27 December 2019 was in time.

Submissions

104 Both sides provided helpful written submissions on the detail of the factual findings we should make and the inferences we should draw from them, and each then spoke orally in reply to the other's written submission The volume of detail makes it difficult to do them justice in a summary. We have heeded them when discussing the findings and conclusions.

Discussion and Conclusions

105 On age discrimination, we consider the facts shown so bare that there is no prima facie case. All members of the team are in same age group, close to the early retirement age of 55. Nothing in the events complained of has to do with age. At best the claimant says she believes "age may have played a part", and the that the respondent may have had in mind to replace her with someone younger. She mentioned for the first time in her witness statement, and without context, an undated remark from Channi Kalsi asking why she didn't retire, and Carol Krahe asking if she had plans to retire. Neither remark featured in the grievance process, even though age was added to disability in the allegation of discrimination, or in the grounds of claim. According to Carol Krahe the claimant had spoken to David Edson about early retirement in 2018, when he directed her to the online resource to make a calculation of pension due. Knowing that she had considered early retirement would explain why the enquiry might be made. In our finding there is nothing shown from which we could infer that the claimant's age played any part in the treatment of which she complains. That claim is dismissed.

106 We next consider the claim for reasonable adjustments, and start with the provisions, criteria and practice said to need adjustment. The first three (a) to(c), are the attendance management procedure, the short timescale and urgent deadlines for work, and the HEO workload. Clearly these are provisions which might need to be adjusted for someone with a disability that put her at a disadvantage.

107 Clearly a condition that could lead to unpredictable absence, as explained when she returned to work from the long period of absence, put the claimant at a disadvantage which was more than minor or trivial compared to non-disabled employee, even though the respondent argues that there was no comparative disadvantage is the claimant not been away from work for 18 months before November 2018. The respondent took some account of this by increasing the trigger days from seven days to 9, and the real question is whether it should have been extended by another 16 days to 25, so as to avoid the attendance process. In our finding, increasing the trigger point to 25 would not have been a reasonable adjustment when, without a process, periods up to 25 days with them not count at all for the absence management process, and singly or together would substantially disrupt such a small team, might cause even more resentment than that already apparent from Rowena F. It might be possible to say the trigger point should have been increased, say to 10 days, but that would have made no difference in this case, it is largely arbitrary.

108 The second and third are about the nature of the work – short timescales

and urgent deadlines. Undoubtedly, someone suffering anxiety and depression and so less resilient to stress, is at a disadvantage in this work, as the claimant was. However the tribunal finds it hard to accept that making this adjustment, other than over a relatively short period, is reasonable. They had no control over Parliamentary deadlines. They could only remove deadlines by taking the claimant off the work. In fact, even in a quiet period, the claimant was being carried by her colleagues: Rowena F was doing more than her share, and much of the claimant's workload was picked up by the managers. The adjustment was made for several weeks, but is not reasonable to hold that this was sustainable for much longer. The claimant's working time included two days working from home. This working time was reduced by taking off half a day for 20 weeks to attend Healthy Minds, and for doctor's appointments in working hours, and loss of working time would continue when she resumed sitting as a magistrate. The initial occupational health advice was that the claimant would improve and resume normal duties. During this time the respondent did make adjustments in the work she had to do. In the event the only real adjustment to be made long-term was probably to find the claimant job in another team. This was the recommendation made in the grievance outcome, which the respondent sought to implement. It was not something the claimant asked for until she lodged the grievance. It would have been difficult for her managers to raise it until then because of the difficulty in arranging meetings; for example, it might have followed from the stress risk assessment if the claimant had engaged with that.

109 The fourth is a "provision that a Stress Management Plan and/or Stress Risk Assessment would not be completed following an employee's return from sickness absence". We fail to understand how this was a provision, but perhaps what was meant was that it would be completed. The respondent wanted a stress risk assessment carried out because occupational health had recommended it be done before advising on adjustments to workload. The difficulty, which persisted into April 2019, was that the claimant did not want to participate. We could not discern any provision that it would *not* be carried out. The claimant's case on risk assessment was hard to understand and at times (see discussion of allegations of discrimination) contradictory.

110 The next (e) is not to have to deal with accumulated work on return from sickness absence. This is best read as a provision that an employee returning from sick leave had to deal with accumulated work, but we dismiss this reasonable adjustments claim because clearly on the evidence she was not copied into emails after the first week of sickness absence, and on return she was instructed to delete those that had arrived before that. In other words, if there was such a provision, the respondent adjusted it. The claimant's case that her emails should have been filtered out an ongoing basis was not pleaded, and seems based on a misreading of the occupational health report

111 The final provision (f) is a requirement to attend a team meeting at 9 a.m. In our finding, there was no such requirement. The meetings had only recently been started. When the claimant raised the 9 a.m. start as a problem on 24 January, the manager readily agreed to postpone it. Though

the start time was still 9 am by 11 February, there is no indication that there was any reprimand or disapproval. There is also difficulty in showing that the start time put the claimant to disadvantage because of disability. She explained her late arrival as down to trains. Elsewhere there was a suggestion that it related her medication, but she did not give this evidence. Whatever the reason, the respondent made the adjustment.

Disability discrimination, Harassment and Constructive Dismissal

112 As the list of 30 allegations of unfavourable treatment in paragraph 75 of the grounds of claim is common to all these claims, we next consider whether they amount to constructive and unfair dismissal, direct discrimination, harassment, or discrimination arising from disability.

113 With regards to the section 15 claim, the claimant's case is that her 25 day sickness absence was the "something arising from her disability", which the tribunal accepts.

114 The first allegation (a) is about the meeting on 15 January 2019, and is subdivided into five matters: enquiries about being a magistrate, concerns about performance, dismissing the claimant's concerns about mental health support, being required to participate at all, holding it in the canteen, and delaying the email summary until the end of the day. We note that the claimant now been back to work for two weeks (she returned on 19 December, but we discount the Christmas holiday) and it was not unreasonable for a line manager to want to have a one-to-one meeting. The claimant's managers had been wanting to address her performance since the start of the assessment year in May 2018, and the claimant knew that they had been due to discuss it on 8 November, and that it had not taken place because she had gone sick. Asking questions about magistrates' court work was not unreasonable thing for a manager, when done in working time, and not unreasonable when the manager was making adjustments for disability because of anxiety and depression, if she wanted to find out what level of difficulty the claimant was capable of handling. There are later indications that the claimant thought she was being accused of sitting as a magistrate while she was off sick, but we can find nothing in the evidence of either from which this could be understood. The claimant's objection was probably because she understood the subtext of concern about her performance, given that an HEO had to work to deadlines. We do not understand the allegation about dismissing concerns about mental health support. She was being given an afternoon off a week, and the respondents had obtained an occupational health report and proceeded to get another one. On holding it in the canteen, they were sited in separate offices, and each may have assumed the other had booked a room; in the event, the canteen is very large and was a reasonably private space until it started to fill up, when they had agreed to stop. We doubt if the claimant would have objected but for the fact that the content of the meeting (revival of performance concerns, and being told there was to be sickness absence attendance meeting) was unwelcome. On the facts, it was not unreasonable to send the follow-up email three hours later.

115 Next is the exchange on 17 January about trade union representation at the forthcoming sickness absence management meeting. In our view, Ms Kalsi's response was intended to be helpful, no doubt because she wanted to get on with the meeting, and read objectively was not a suggestion that the claimant was making an excuse so as to postpone an unwelcome meeting.

116 The third allegation is that Ms Kalsi was dismissive in a team meeting on 17 January when the claimant was asked to draft a response to a treat official letter, asked for more information and was told to "have a go" as a first draft. On the evidence, everyone was invited to have a go at a first draft. In context it was one item in the weeks work in a very busy office, and this is the only example of brisk treatment. It could only make sense as hostile or unreasonable treatment in the context of similar episodes.

117 The next four allegations (d) to (g) are about the attendance management meeting on 23 January. Given the procedure, there is nothing untoward about calling such a meeting after 25 day absence. On issuing the resulting warning, there was scope for a manager to exercise discretion not to issue a warning after such a meeting, but in our finding it was not unreasonable for a manager to issue a warning. Such a warning is not disciplinary. The purpose of the policy is to make employees aware that their absence matters, and to facilitate discussion about how it can be avoided, if necessary by making adjustments. It was a long absence. Although it came after a long period without sickness absence, and the recent occupational health report said she was in good health, it related to stress and might recur. It was not unreasonable for a manager exercising discretion to worry that if not tackled now, they would be in the same position sooner or later. In a small team, prolonged sickness absence was a burden on colleagues, and capable of causing resentment, and there is evidence that it did. Adjustments had already been made in permitting working from home and a shorter working week. In the context of the section 15 claim, it was a proportionate means of achieving a legitimate aim. Of the complaint that Ms Kalsi next day asked for a meeting to discuss the claimant's performance, there is nothing unreasonable about wanting to tackle outstanding performance issues notified to the claimant back in October 2018, with the end of year coming up on 30 April 2019. On issuing the warning four days after the meeting without waiting for the notes to be approved by the claimant and her trade union, this was a reasonable period to wait, and in any event the corrections when they came were without significance. In conclusion this was not unreasonable treatment, nor less favourable treatment, and though it arose from disability, it was justified. It was not harassment, in that even though the claimant experienced it as hostile, it was not reasonable in the context of a formal process and a long period of absence to view it as such. There is no indication of any hostile or intimidating language in the meeting minutes or emails.

118 Allegation(h) concerns the third occupational health appointment. We can understand how from the claimant's point of view a third referral suggested that the respondent proposed to go on until they got the answer they wanted

to hear, but on the evidence, the reason for this referral was the failure by the nurse preparing the second report to answer the respondent's legitimate questions about what the claimant could do. It was not direct discrimination because of disability. It was because of something arising from disability, but it was justified by needing to know what it was reasonable to expect from the claimant at work so as to make adjustments in the short or long term. Viewed objectively, it was not harassment.

119 Allegation (l) is that the claimant was not informed that a request to postpone the performance management meeting had been granted. On the facts this is not made out.

120 Allegation (j) is at the claimant was given a tight deadline to complete work on 7 February after her return from annual leave. According to her witness statement, she was asked to update some figures on a document by the following day. The claimant's concern was that she was only working that morning, having a therapy session that afternoon. Next day, she spoke to David Edson, as Ms Kalsi did not work that day. She had just received the OH appointment for 14 February, and burst into tears about it. He told her not to worry and not to update the figures on the document. His email that afternoon reporting this episode to Ms Kalsi did not mention the update on figures. Ms Kalsi could not even remember what this task was, but pointed out that it cannot have been big, as she knew the claimant was just back from leave and she herself would not be in the following day. We concluded that there was nothing untoward about the request, it was not unfavourable or less favourable treatment, nor unreasonable conduct. It indicates that the claimant saw Ms Kalsi as hostile to her, but in context we concluded this was not the case.

121 Allegation (k) is that when the claimant was running late for the 9 am team meeting on 11 February, she was told to join when she arrived, and the meeting start was not delayed. It is said that the meeting was postponed to later in the morning for Rowena F on 7 February. It was an informal meeting, part of its purpose was to get the team members in Leeds and London to talk to each other. We accept the evidence that it was treated very flexibly. No one except the claimant can remember that it started late on 7 February. Even the claimant cannot remember why. There is no context to indicate that disability, or absence from work, was the reason for not putting off the meeting. When the claimant said on 23 January the early start was a problem, Ms Kalsi had said it could be moved, though evidently it had not yet been moved. If there was less favourable treatment, there is little or no context in which we can discern the respondents reason, and nothing from which we could conclude that disability was the reason for any difference in treatment.

122 Allegation (l) is about the Skype message sent to the claimant in error on 11 February, and failing to apologise for it. In our finding, it was an error. There was an apology, and having heard Miss Kalsi, we believe it was genuine. On the face of it, it is not unreasonable for managers to talk to HR about an upcoming meeting, and to make a comment which probably

reflects HR warning the manager to be careful to avoid acting in a way that might be construed as harassment. We can understand how on receiving it the claimant might have thought she was being mocked. The claimant submits we should take account of **Moonsar v Five Ways Express Transport Ltd (2005) IRLR 9,** showing that there was no requirement that the message was intended for the claimant. That case concerned male colleagues downloading pornographic content to their screens at work on at least three occasions in the presence of the claimant, which had been held not detrimental to the claimant, and the appeal tribunal found that it must have been detrimental, even if she did not complain at the time, unless there was evidence that she participated. In the present case, if the claimant thought she was being mocked (and most people would have thought it must be an unfortunate accident) she received a prompt apology and explanation. Taken in context, we do not find this was harassment. Nor is it less favourable treatment, or because of sickness absence.

123 Allegation (m) is about the meeting on 12 February 2019 to complete a stress risk assessment, moving on with specific allegations that when the claimant said she had not had any support on her return, Ms Kalsi pointed out that she was being allowed to work from home, and that Ms Kalsi told the claimant her performance was poor. In our finding, the claimant found this discussion difficult, Ms Kalsi's observation was reasonable in context, and they never moved on to discuss performance that day. The meeting next day, 13 February, is the subject of allegation (n), in particular that it was conducted in "an oppressive and high-handed" way, that it continued over four hours, including the team meeting, without a break, and the concerns raised about the claimant's performance. The pleading is confused, because the long meeting was on 12 February, and the 45 minute meeting on 13 February, especially in the light of the claimant's emailed contemporary account between the two. As we read this, Ms Kalsi understood she had a difficult situation to manage. The claimant was not coping, the occupational health nurse had recommended a stress risk assessment to understand whether adjustments could be made to alleviate stress. Evidently discussing the sources of stress was itself stressful, as in the team meeting that intervened she was composed. We suspect this was the claimant's fear of being found wanting in performance. The claimant had not completed the questionnaire before the meeting, and it was not in our view unreasonable for Ms Kalsi to try to discuss it in the course of the meeting and make notes of the claimant's answers. As for performance, this Kalsi was prepared to have two meetings rather than one to cover this, which she had wanted to discuss with the claimant ever since October. In our finding, it was not unreasonable conduct to have this meeting, or to raise the subject for discussion, or to try to get to an end of it after postponements. It was reasonable management action. A hypothetical comparator who was not disabled, but whose performance was lacking, and for whom stress risk assessment had been recommended, would have been treated the same. Ms Kalsi wanted to keep to the topic, but other than that there is nothing to show that it was high-handed or oppressive.

124 Allegation (o) is about continuing the meeting 14 February – we think this

is about the continuing meeting on 13 February. Allegation (p) is about Channi Kalsi's email to the claimant of 14 February, responding to her email of the previous morning. We do not understand what was unfavourable, less favourable or harassing about this, which answered her all her points by point. The alternative would have been not to answer at all, or (the usual advice) to answer in a meeting rather than by email, but meetings were not proving successful.

125 Next there is a complaint of Carol Krahe not meeting the claimant's trade union representative. Trade union representatives are involved when there is disciplinary process or a formal meeting about attendance management. This was not about either, indeed no reason for the meeting was given, and the claimant suggested to Ms Krahe it was no longer necessary. Unless a need for mediation is identified, managers should not need third parties to attend what should be one-to-one meetings with the people they manage. As the managers concluded among themselves, the grievance procedure was the proper way to deal with it, and this is what the claimant did. If Carol Krahe supposed that this was an attempt to avoid tackling performance issues, we think she is right, and it was an attempt to buy time. Not agreeing to a meeting with an unstated agenda was not unreasonable. There is no reason to think anyone else would have been treated differently.

126 Of allegations (r), (t), (u) (v) an (aa), about being given urgent tasks on 19 March, 22 March, 26 March, 29 March and 23 April, we know little of the detail of what these tasks were (TO letters, PQs, completion of submissions) or why they were urgent, but we do know that in general all the work of an HEO in that team involved responding to work with close deadlines, and five such examples over a five-week period is only unreasonable if an adjustment should have been made to accommodate the claimant's limitations. We have already found that removing these tasks altogether was not a reasonable adjustment.

127 Allegation (s) is about Channi Kalsi's email on 21 March reminding the claimant that core work should be prioritised over corporate work. It is a reminder of department policy. It is politely phrased. We do not view this as unreasonable, or harassment, in the context of ongoing concern about the claimant only undertaking about half her previous workload. The tone is reasonable, as is the content.

128 Allegation(w) is about Ms Kalsi starting the PAL process on 2 April. By this point the claimant had stated that she did not intend to engage with it because the appeal against the attendance warning was outstanding. The attendance procedure and the performance procedure are separate processes. The claimant had added that she was not going to engage until other performance issues were out of the way. The claimant was declaring she was not going to engage in the PAL process. Challenged in this way, it is not unreasonable for a manager to go ahead. This had nothing to do with disability, or sickness absence. Nor is it unreasonable conduct when, in our finding, the claimant knew well from conversations starting the previous year that managers wanted to discuss performance with her. Their concerns were

not spurious or because of her sickness absence in November to December 2018, as submitted on the claimant's behalf.

129 Allegation (y) concerns the failure of the claimant's appeal against a written warning for attendance. It is pointed out that Lewis Childs, who decided the appeal, has not given evidence, and that the timing, just after the grievance had been presented, is "significant". Lewis Childs's decision is fully reasoned. Of course it is possible that he was asked to get it done because the claimant had now presented a grievance, but that does not mean he would have decided the appeal any differently had she not presented in the grievance, and it was still done within three weeks of meeting the claimant, which is not slow by public service standards. We could not conclude this was unreasonable treatment, less favourable treatment because of disability, or treatment because of something arising from disability which could not be justified. It was not harassment.

130 Allegation (z) is about Carol Krahe asking the claimant to complete the stress management plan prepared by Ms Kalsi. As with the earlier allegation about the stress management risk assessment, this was something recommended by the occupational health nurse to enable managers to identify what could be done to reduce stress. We cannot see how this is harassment, unfavourable treatment, or less favourable treatment because of disability. The claimant was being asked to review and contribute to it, or approve it as a statement of what she had said was causing stress. When questioned about the assertion in her witness statement that the claimant was asking Carl Craig to update the risk assessment, she accepted this was wrong. In that same section the claimant says that she lived she had participated fully with the stress risk assessment, which does not line up with her failure to respond to emails asking her to approve the draft. In allegation (BB) there is a complaint that the stress risk management plan was not completed before resignation, contrary to the assertion and said that the plan had already been completed by Ms Kalsi. The tribunal is not clear what the claimant's case is about the risk assessment. Had the claimant approved this Kalsi's draft based on their conversations, it would be possible to move forward with adjustments aimed at alleviating her stress.

131 Allegation (cc) returns to the recommendations in the occupational health reports. It is asserted that they did not implement the recommendation to filter emails to ensure she was not under pressure on her return from sickness absence. In our finding, she was not required to answer any emails that reached her during her sickness absence, and the report made no recommendation about ongoing filtering. Next, the tribunal observes that her workload had been reduced, to about half its normal level. Her managers were trying to explore, by means of the stress risk assessment and the conversations around it, what they could do, but the claimant was unhelpful. Finally, it is asserted there was a recommendation that she be given additional time to complete tasks, and this not be given urgent deadlines. Dr Valentine in fact recorded that she had been given longer to complete tasks, and suggested that in the long term, modifications to her working pattern should be reviewed over time as she recovers from her recent ill-health. The

This was not possible in that job, and carrying the claimant was evidently putting the team under strain. When the claimant asked in her grievance to be moved, the respondent took the suggestion seriously and moved promptly to implement it, though it was not possible to do that before her notice expired. We do not accept that the respondent took no action on occupational health recommendations.

132 The final complaint (dd) is about giving being given a developing mark on 30 April 2019. In our view the respondent had concerns about performance which predated the sickness absence at the end of 2018, and in our finding, that absence was precipitated by an attempt to discuss performance. We cannot see that the respondents managers had any alternative but to persist in the absence of any medical advice that discussion of performance concerns should be avoided.

133 If we step back from the detail and view the allegations as a whole, it seemed to us that the performance issue underlies the claimant's behaviour and her perception of her manager's action. This issue predated her sickness absence at the end of 2018 and as we have said, probably caused it. Until then the claimant's ill health and personal circumstances had been treated with unusual sympathy and respect. The determination by David Edson, passed on to Ms Kalsi, that her performance was lacking, now she had been back at work for some time, and had to be tackled, was not unreasonable. Nor is it unreasonable for a manager to persist in attempts to discuss performance when the employee does not want to, if those attempts are courteous even if they are firm. The claimant's behaviour in the face of meetings arranged demonstrates that she very much wanted to avoid discussion of performance, even to assert that there was nothing wrong. The fact that she resigned because of the end of year assessment, when the grievance investigation was still ongoing, suggests that it was criticism of performance, rather than the difficult relationship with Ms Kalsi, that lay at the core. The difficult relationship with Ms Kalsi was because she had expressed a need to improve her performance. This is not to say the claimant was idle or unwilling, rather than finding the work difficult, and when she was able to work, she did well. With respect to the employer's conduct and whether it amounted to breach of the term of mutual confidence and trust, our assessment is that there was proper cause for wanting to address performance in the usual way. It did not amount to constructive dismissal.

Victimisation

134 The first of the protected acts alleged in paragraph 83 of the grounds of claim (and we propose to take this list, rather than just the two protected acts in paragraph 95 which are those incorporated the list of issues) is a statement by the claimant in a meeting of 14th January that she was disabled. There was a meeting on 15th January, but not that we are aware, on 14th January. The claimant's evidence is that when Ms Kalsi said she wanted to discuss her performance, the claimant replied that mental health issues were covered by the equality act, and that Ms Kalsi was dismissive (the witness statement in fact says Ms Kalsi rolled her eyes, but the claimant wisely amended this at the hearing, as it was a telephone call). Ms Kalsi

does not call the remark at all. It is perfectly possible that the claimant said it. Given that it purported to be a rebuttal of the need to discuss performance, it is not surprising that Ms Kalsi determined to press on with discussing performance at some stage. In our finding, was Kalsi want to discuss performance workload and non-core work duties because she had been entrusted by David Edson with the job of addressing the claimant's lack of performance, not because the claimant mentioned the Equality Act.

135 The next protected at is the attendance management meeting on 23rd of January 2019 when her trade union representative mentioned reasonable adjustments. A careful reading of the more or less verbatim notes of that meeting indicates that it was Ms Kalsi who mentioned the equality act (in the context of the decision to increase the trigger point from seven days to 9 because of anxiety), Mr McInally who approved of that, and that they then moved on to an extensive discussion of work and adjustments, in which the words "reasonable adjustment" occur in a way which is unlikely to stood out or caused upset because that was what they already discussing. In our finding this remark in no way influenced a subsequent conduct on the part of the respondent.

136 The third protected act is that the claimant mentioned equality act in her long email to Ms Kalsi on 13th of February 2019 about the previous day's meeting. We could not find the reference the Equality Act but only a complaint that "the meeting was not focused on the priority at hand i.e. the reasonable adjustments that you will commit to in line with good practice…" and instead was turning into discussion of performance management. The respondent had been considering reasonable adjustments ever since the claimant returned to work (and had already made some in 2017) so it seems unlikely that this reference in a very long email made any contribution to the respondents conduct in general and Ms Kalsi is in particular.

137 The fourth protected act is the grievance of itself of 4 April 2019, which alleged discrimination because of age and disability, and undoubtedly upset Ms Kalsi, and Ms Krahe. The claimant argues that it was because of this that Ms Krahe decided to plough on with the end of year assessment. We do not accept this. The claimant's managers had individually and collectively decided as long ago as May 2018 that her performance must be addressed. When the claimant would not come to meetings to discuss it Ms Kalsi sent her a PAL plan on 1 April regardless. In our finding, there would have been an end of year assessment reflecting the respondent's existing view that her performance was only "developing" even without a grievance alleging discrimination.

138 The fifth and last protected act is about a submission made at the grievance meeting on 24 April. Reading the transcript of the meeting, any reference we could find a statement by the claimant, in the context of lack of support, and three occupational health referrals, that "the disability equality act has not been followed. It has been horrendous from start to finish and I have been made to feel useless". We very much doubt that this complaint, in the context of a long and courteous meeting resulting in a detailed and fact

specific finding on the grievance had any influence on Ms Krahe's decision to go ahead with an end of year assessment on 30 April, or Ms Mason's decision about the grievance.

139 In conclusion, the claimant has not been able to establish any of her claims.

140 Having reached his conclusions, it is not necessary for us to consider the jurisdiction point. The last act complained of is 30 April and on that basis the Equality Act claims are out of time. The claimant was even then talking about going to an employment tribunal, so she had taken advice, or was considering taking advice, and could or should have been advised to go to start early conciliation and present a claim within three months. As to whether it is just and equitable to extend time, the fact that the unfair dismissal claim covered the same material over the same dates, and was in time, means that when balancing prejudice between the parties, it probably favoured the claimant.

Employment Judge Goodman

Date: 15th March 2022

JUDGMENT and REASONS SENT to the PARTIES ON

. 16/03/2022...

FOR THE TRIBUNAL OFFICE

APPENDIX ONE

LIST OF ISSUES

A Unfair Dismissal

1. Did the Claimant resign in response to a fundamental breach of contract on the part of the Respondent? The breach relied on is a breach of the implied duty of trust and confidence. In particular:

(a) Did the Respondent conduct itself in the way alleged at para 75 of the Grounds of Complaint;

(b) If so did that conduct amount to a breach of the implied duty of trust and conduct;

(c) Was the Claimant entitled to treat the allegation at para 75(dd) (the Claimant being given a mark of "developing" at the EOY meeting on 30 April 2019) as the "last straw";

(d) In the event that the Respondent was in fundamental breach of contract did the Claimant nonetheless affirm the contract of Employment by delay or other conduct inconsistent with acceptance of the breach?

2. In the event that the Claimant is found to be constructively dismissed was that dismissal fair ?

3. In the event that the Claimant is successful in her complaint what remedy is she entitled to and should any adjustments be made to the award to reflect:

(a) mitigation;

(b) Polkey;

(c) contribution?

Disability Discrimination - Jurisdiction

4. The Respondent accepts that the Claimant was disabled and that it had knowledge of disability during all periods relevant to the claim.

5. Are any of the acts or omissions complained of, which do not form part of conduct extending over a period, the end of which is in time, out of time? If so is it just and equitable for the Tribunal to extend the time limit to allow the complaint in respect of the relevant act or omission to be determined?

Disability Discrimination - Direct Disability Discrimination

6. Was the Claimant treated less favourably because of the protected characteristic of disability by being subjected to detriments and constructively dismissed? The detriments alleged are set out at paragraph 75 of the Grounds of Complaint.

7. In particular:

(a) Has the Claimant proven facts from which an employment tribunal could decide, in the absence of an adequate explanation, that she was subjected to detriments and dismissed because of the protected characteristic of disability?

(b) Who is the appropriate comparator? The Claimant relies on Rowena F and other employees who held Behaviour Champion roles as actual comparators in relation to the complaints at paragraph 75(k) and (s) respectively, and further and/or alternatively relies on a hypothetical comparator in relation to these and the remaining complaints;

c) In the event of the Claimant proving facts from which an employment tribunal could decide, in the absence of an adequate explanation, that she was subjected to detriments and dismissed because of the protected characteristic of disability, can the Respondent prove that the Claimant's dismissal was in no sense whatsoever influenced by the protected characteristic of disability?

Discrimination Arising from Disability

8. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability by subjecting her to detriments and dismissing her? The "something arising in consequence of disability" relied on is the Claimant's sickness absence. The detriments alleged are set out at paragraph 75 of the Grounds of Complaint.

9. Has the Claimant proven facts from which an employment tribunal could decide, in the absence of an adequate explanation, that she was subjected to detriments and dismissed because of something arising in consequence of disability?

10. In the event of the Claimant proving facts from which an employment tribunal could decide, in the absence of an adequate explanation, that she was

subjected to detriments and dismissed because of something arising in consequence of disability, can the Respondent prove that the Claimant's dismissal was in no sense whatsoever influenced by this?

11. If not can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Harassment

12. Did the Respondent subject the Claimant to harassment related to the protected characteristic of disability? The alleged harassment is set out at paragraph 75. In particular:

(a) Has the Claimant proven facts from which an employment tribunal could decide, in the absence of an adequate explanation, that she was subjected to unwanted conduct related to disability which had the purpose or effect of:

i. violating her dignity; or
ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

b) In the event of the Claimant proving such facts, can the Respondent prove that the Claimant's treatment was in no sense whatsoever influenced by disability?

13. If the Claimant was subjected to the disability related harassment alleged at paragraph 75 did her dismissal amount to an act of disability discrimination?

Failure to Make Reasonable Adjustments

14. Did the Respondent apply the PCPs alleged at paragraph 86 of the Grounds of Complaint?

15. If yes did they place the Claimant as a disabled person at a substantial disadvantage in comparison with a non-disabled employee? The substantial

disadvantages relied on are set out in paragraph 87.

16. If yes was the Respondent in breach of its duty to take such steps as it was reasonable for it to have to take to avoid the substantial disadvantage? The Claimant alleges that the measures set out at paragraph 88 were reasonable adjustments which should have been made by the Respondent.

Victimisation

17. Did the Claimant carry out protected acts? The protected acts relied on are set out in paragraph 83 of the Grounds of Complaint.

18. If yes, did the Respondent subject the Claimant to detriments and dismiss her because of the protected acts? The detriments alleged are at paragraph 75.

Age Discrimination - Jurisdiction

19. Are any of the acts or omissions complained of, which do not form part of conduct extending over a period, the end of which is in time, out of time? If so is it just and equitable for the Tribunal to extend the time limit to allow the complaint in respect of the relevant act or omission to be determined?

Direct Age Discrimination

20. Was the Claimant treated less because of the protected characteristic of disability by being subjected to detriments and constructively dismissed? The detriments alleged are set out at paragraph 75 of the Grounds of Complaint.

21. In particular:
Note: subparagraphs (a) to (c) are missing from the agreed list

(d) Has the Claimant proven facts from which an employment tribunal could decide, in the absence of an adequate explanation, that she was subjected to detriments and dismissed because of the protected characteristic of age?

e) Who is the appropriate comparator? The Claimant relies on Rowena F and other employees who held Behaviour Champion roles as actual comparators in relation to the complaints at paragraph 75(k) and (s) respectively and further and/or alternatively relies on a hypothetical comparator in relation to these and the remaining complaints;

f) In the event of the Claimant proving facts from which an employment tribunal could decide, in the absence of an adequate explanation, that she was subjected to detriments and dismissed because of the protected characteristic of age, can the Respondent prove that the Claimant's dismissal was in no sense whatsoever influenced by the protected characteristic of disability?

(g) If not can the Respondent show that the less favourable treatment was a proportionate means of achieving a legitimate aim?

Age Discrimination - Harassment

22.Did the Respondent subject the Claimant to harassment related to the protected characteristic of age? The alleged harassment is set out at paragraph 75. In particular:
Note: subparagraphs (a) and (b) are missing from the agreed list

(c) Has the Claimant proven facts from which an employment tribunal could decide, in the absence of an adequate explanation, that she was subjected to unwanted conduct related to age which had the purpose or effect of:

i. violating her dignity; or
ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

(d) In the event of the Claimant proving such facts, can the Respondent prove that the Claimant's treatment was in no sense whatsoever influenced by age?

23.If the Claimant was subjected to the age related harassment alleged at paragraph 75 did her dismissal amount to an act of age discrimination?

Victimisation

24. Did the Claimant carry out protected acts? The protected acts relied on are set out in paragraph 95 of the Grounds of Complaint.

25. If yes, did the Respondent subject the Claimant to detriments and dismiss her because of the protected acts? The detriments alleged are at paragraph 75.

APPENDIX TWO

PASSAGES FROM GROUNDS OF CLAIM REFERRED TO IN LIST OF ISSUES

A. Treatment alleged as discrimination, harassment and breach of implied duty of trust and confidence - Grounds of Claim - Paragraph 75

75. The Claimant relies on the following acts and/or omissions as individually or cumulatively amounting to a breach of the implied duty of trust and confidence:

a) Channi Kalsi's conduct of the meeting of 15 January 2019 including:

i. The comments made by Channi Kalsi about the Claimant's role as a magistrate;
ii. Channi Kalsi raising concerns about the Claimant's performance;
Iii. Channi Kalsi dismissing the Claimant's concerns about support for her mental health issues;
iv. Channi Kalsi requiring the Claimant to participate in the meeting in the Respondent's canteen rather than a private meeting room;
v. Channi Kalsi delaying sending an email about the meeting on 15 January 2019 until the end of the day

b) On 17 January 2019 Channi Kalsi questioning the veracity of the Claimant's statement that she did not have a trade union representative available for the proposed Attendance Management meeting on 23 January 2019;

c) On 17 January 2019 Channi Kalsi not providing the client with the information needed to draft a response to a Treat Official letter and treating the Claimant in a dismissive manner when she requested further information;

d) Channi Kalsi requiring the Claimant to attend a meeting under the Respondent's Attendance Management Procedure on 23 January 2019;

e) Channi Kalsi notifying the Claimant after the Attendance Management Meeting on 23 January 2019 that she wanted the Claimant to attend a further meeting to discuss performance management, and making a further such request the following day;

f) Channi Kalsi issuing a First Written Warning under the Attendance Management Procedure on 29 January 2019;

g) Channi Kalsi issuing the First Written Warning before the notes of the Attendance Management meeting were approved by the Claimant and her trade union representative;

h) Channi Kalsi informing the Claimant on 29 January 2019 that she required the Claimant to attend a further OH appointment (the third since the Claimant's return from sickness absence), the proposed appointment on 14 February 2019 being notified to the Claimant by the Respondent's HR department on 08 February 2019;

i) Channi Kalsi failing to inform the Claimant whether the Respondent's HR department had approved the Claimant's request for a

postponement of the proposed performance management meeting;

j) The Claimant being given a tight deadline to complete work on 07 February 2019 on her return from annual leave;

k) Channi Kalsi not delaying a meeting on 11 February 2019 when the Claimant was running late, when a meeting had been delayed for a colleague on 07 February 2019;

I) Channi Kalsi sending the Skype message intended for a colleague of the Claimant to the Claimant on 11 February 2019 and failing to apologise for this within a reasonable period;

m) Channi Kalsi's meeting with the Claimant on 12 February 2019 and in particular:

i. Channi Kalsi pointing out that the Claimant was allowed to work from home when the Claimant expressed the view that she had not had any support since her return from sickness absence

ii. Channi Kalsi informing the Claimant that her performance was poor.

n) Channi Kalsi's meeting with the Claimant on 13 February 2019 and in particular:

i. Channi Kalsi conducting the meeting in an oppressive and heavy-handed way;
Ii. Channi Kalsi insisting on the meeting continuing for over four hours (including an intervening team meeting) without a break;
iii. Channi Kalsi raising concerns over the Claimant's performance.

o) Channi Kalsi continuing the meeting on 14 February 2019, and raising concerns over the Claimant's performance in this meeting;

p) Channi Kalsi's email to the Claimant of 14 February 2019;

q) Carol Krahe refusing to meet with the Claimant's trade union representative to discuss the Claimant's case, despite repeated requests for such a meeting, between 06 March 2019 and 03 April 2019;

r) Channi Kalsi giving the Claimant an urgent task to complete without offering appropriate advice on 19 March 2019;

s) Channi Kalsi sending an email questioning the Claimant's corporate champion role on 21 March 2019;

t) The Claimant being allocated urgent PQs to deal with on 22 March 2019, which put her under stress;

u) Channi Kalsi and Carol Krahe allocating the Claimant urgent tasks on 22 and 26 March 2019;

v) Carol Krahe giving the Claimant urgent work with a tight deadline on 29 March 2019, when apparently there was no need for the work to be carried out;

w) Channi Kalsi commencing the PAL process in relation to the Claimant on 02 April 2019;

x) Carol Krahe requesting a meeting with the Claimant without her trade union representative present on 02 April 2019;

y) The Claimant's appeal against the First Written Warning being dismissed on 09 April 2019;

z) On 16 April 2019 Carol Krahe informing Sangeeta that she needed to compete the Stress Management Plan already completed by Channi

Kalsi;

aa) The Claimant being given urgent work with a short deadline on 23 April 2019;

bb)The Respondent's failure to complete a stress management plan for the Claimant prior to her resignation;

cc) The Respondent's failure to implement the recommendations in the OH reports prior to the Claimant's resignation, and in particular:

i. The recommendation that the Claimant's emails be filtered to ensure that she was not put under pressure on her return from sickness absence;
ii. The recommendation that the Claimant's workload be reduced;
iii. The recommendation that the Claimant be given additional time to complete tasks and/or not be given tasks with urgent deadlines.

dd)The Claimant being given a marking of "developing" at the EOY meeting on 30 April 2019.

B. Provisions Criteria and Practices (PCPs) Relied on in Reasonable Adjustments Claim – paragraph 86

(a) The provisions of its Attendance Management Procedure;
(b) A requirement that the Claimant deal with pieces of work within short timescales and to urgent deadlines;
(c) A requirement that the Claimant carry out the normal workload of an HEO;
(d) A provision that a Stress Management Plan and/or Stress Risk Assessment would not be completed following an employee's return from sickness absence;
(e) A provision that on return from sickness absence employees would have to deal with the work which had accumulated, including emails, during their sickness absence;

(f) A requirement that the Claimant attend regular team meetings at 9am.

C. Substantial Disadvantage -The Claimant suffered the following substantial disadvantages as a result of the application of each PCP :

(a) An increased likelihood that the Claimant would suffer from sickness absence, thus reaching sickness absence triggers (para 86(a));

(b) Increased difficulty dealing with work within a short timescale and to an urgent deadline, and an increased vulnerability to stress and anxiety caused by these requirements (para 86(b));

(c) Increased difficulty in dealing with the normal workload of an HEO and increased vulnerability to stress and anxiety caused by this (para 86(c));

(d) An increased vulnerability to stress and anxiety at work (para 86(d));

(e) Increased difficulty dealing with this build up of work and increased vulnerability to stress and anxiety as a result of this (para 86(e));

(f) Increased difficulty in attending the meeting in time due to fatigue caused by her condition and the medication used to treat it (para 86(f)).

D. Protected Acts – Victimisation Claim

Note: this is taken from paragraph 83, although the list of issues refers to paragraph 95 which covers only (d) and (e)

(a) The Claimant's statement that she was protected by the Equality Act 2010 as a disabled person in her meeting with Channi Kalsi on 14 January 2019;

(b) The submissions made on behalf of the Claimant that the Respondent was under a duty to make reasonable adjustments in the attendance management meeting on 23 January 2019;

(c) The Claimant's email to Channi Kalsi of 13 February 2019;

(d) The Claimant's grievance submitted on 04 April 2019;

(e) The submissions made by or on behalf of the Claimant in the grievance meeting on 24 April 2019**.**