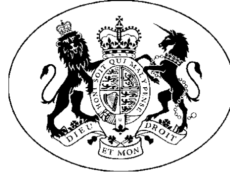

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss A Irwin	**v**	Experian Limited

Heard: in Nottingham and via CVP

On: 31 October 2022, 1st, 2nd, 3rd, 7th, 8th and 9th November 2022 and, in chambers, on 20 December 2022.

Before: Employment Judge Ayre sitting with members
Ms L Lowe
Mr K Rose

Representatives:

Claimant: Ms E Banton, counsel
Respondent: Ms S Firth, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claim for constructive unfair dismissal fails and is dismissed.

2. The claim for discrimination arising from disability fails and is dismissed.

3. The claim that the respondent failed to make reasonable adjustments fails and is dismissed.

4. The claim for disability related harassment fails and is dismissed.

5. The claim for age related harassment fails and is dismissed.

6. The claim for harassment related to sex fails and is dismissed.

7. The claim for victimisation fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent from 4 January 2016 until 28 February 2020 when her employment terminated by reason of her resignation.

2. On 12 June 2020 the claimant issued proceedings in the Employment Tribunal following a period of Early Conciliation that started on 29 April 2020 and ended on 15 May 2020. The claim form includes complaints of constructive unfair dismissal, age, sex and disability discrimination. The claim, in essence, is about the way in which the claimant alleges that she was treated at work when experiencing symptoms of the perimenopause and the menopause.

3. There have been a number of preliminary hearings in this case. At an open preliminary hearing on 11 March 2022 Employment Judge P Britton found that the claimant meets the legal test of disability.

4. A further open preliminary hearing took place on 4 August 2022. At that hearing Employment Judge Britton allowed the claimant's application to amend the claim and the respondent's application to amend the response and dismissed the respondent's application that certain elements of the claim should be struck out. The complaint of direct disability discrimination was dismissed on withdrawal and case management orders were made to prepare the case for final hearing.

The Proceedings

5. At the final hearing there was an agreed bundle of documents running to 911 pages and an ancillary bundle running to 21 pages. At the start of the hearing the claimant sought to introduce a number of additional documents to the bundle, including unredacted copies of some documents which were already in the bundle in a redacted version.

6. Ms Firth was given time to take instructions on the additional documents and, having done so, indicated that the respondent did not object to the new documents being introduced. They were therefore added to the bundle at the start of the hearing. Further documents were added to the bundle by consent at the start of the third and fifth days of the hearing.

7. On the sixth day of the hearing the respondent sought to introduce an additional 25 pages of documents. Those documents were extracts from the respondent's IT systems showing steps that had been taken to reinstate the claimant's access to the respondent's IT systems on her return from long term sickness absence in January 2020. Ms

Banton did not object or agree to the introduction of these additional documents and described the claimant's position in relation to them as 'neutral'.

8. Having considered the new documents, it was the unanimous decision of the Tribunal that they should be introduced into evidence. Although it was regrettable that they had not been disclosed earlier, they are relevant to one of the issues in the claim, namely whether the respondent blocked the claimant's access to the IT system. The claimant did not object to their introduction.

9. We heard evidence from the claimant and, for the respondent, from:

    a. Jo Creasy, Service Strategy & Design Director;
    b. Andrew Richman, Head of Service Commercial Design;
    c. Stephen Brady, former Senior Employee Relations and Governance Manager;
    d. Yasmina Henini, Employment Relations Advisor;
    e. Rachel Nolan, Director, HR Business Partnering; and
    f. Paul Speirs, Managing Director of Consumer Information Services and Analytics.

10. Both counsel produced written skeleton arguments, for which we are grateful, and supplemented those with oral submissions. Ms Banton also submitted a written Opening Note.

11. At the start of the hearing, we discussed the question of adjustments for the claimant. We made the following adjustments, at her request: -

    a. Additional breaks whenever the claimant needed them;
    b. Permission for the claimant to take notes whilst giving evidence, to help her overcome brain fog, memory issues and loss of train of thought; and
    c. Permission for the claimant to refer, when giving evidence, to a document which cross-referred to documents in the bundle. That document was provided to all parties and added to the bundle.

12. The hearing took place in person, with the exception of three days which were a hybrid hearing and the final day in chambers when the panel met via Cloud Video Platform.

The Issues

13. In advance of the hearing the parties submitted a List of Issues. We spent some time at the start of the hearing discussing the issues and the final list of issues to be decided is as follows:

Constructive Unfair dismissal

14. Did the respondent do the following things:

    a. Subject the claimant to a performance improvement plan between 14 May 2019 and 23 September 2019?

b. Criticise the claimant for her performance between 14 May 2019 and 31 January 2020?

c. Misuse the performance management review system on 13 May 2019 by making unsupported allegations regarding the claimant's work to, in effect, force her to resign and diminish the claimant's allegations associated with her grievance?

d. Subject the claimant to unfair working practices on 13 May 2019 by putting her on a Performance Improvement Plan?

e. Subject the claimant to discrimination on the grounds of disability, gender and/or age on 13 May 2019?

f. Fail to provide the claimant with the necessary support to enable her to do her job, taking account of her menopause condition and related symptoms, between 28 June 2018 and 24 September 2019?

g. Change the claimant's role without consultation on her return to work on 6 January 2020 in an effort to force the claimant to resign?

h. Effectively demote the claimant on her return to work on 6 January 2020 by failing to allocate to her any work-related tasks and blocking her access to the IT system?

i. Reject the claimant's grievance on 29 January 2020?

j. Between October 2019 and January 2020 deal with the grievance in an unreasonable manner by:

    i. S Brady and Y Henini pressuring the claimant to progress her grievance whilst she was off sick;
    ii. Excessive correspondence and telling the claimant to answer questions;
    iii. Delaying in dealing with the grievance between 6 and 31 January 2020; and
    iv. Disregarding relevant evidence provided by the claimant?

k. Victimise the claimant on 24 September 2019 by treating her in an even worse manner after she lodged her grievance by:

    i. Continuing to communicate with her whilst she was on sick leave despite her asking them not to; and
    ii. Telling the claimant in December 2019 that her performance did not compare to her grade, remind her that she was one of the highest paid Grade Ds, and tell her that she was 'round peg square hole'?

15. Did any of the above breach the implied term of trust and confidence? The Tribunal will need to decide:

a. Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

b. Whether it had reasonable and proper cause for doing so.

16. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

17. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that she chose to keep the contract alive even after the breach.

Time limits

18. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 30 January 2020 may not have been brought in time.

19. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

b. If not, was there conduct extending over a period?

c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

i. Why were the complaints not made to the Tribunal in time?
ii. In any event, is it just and equitable in all the circumstances to extend time?

Discrimination arising from disability (Equality Act 2010 section 15)

20. Did the respondent treat the claimant unfavourably by:

i. Beginning an informal performance management review in May 2019?

ii. Beginning a formal performance management review in September 2019?

iii. Not providing the claimant with any Q4 work objectives / goals in January 2020?

iv. Not allocating the claimant work on her return from sick leave in January 2020.

v. Blocking the claimant's access to the IT system between September 2019 and January 2020?

21. Did the following things arise in consequence of the claimant's disability:

i. brain fog, reduced ability to concentrate and to cope with stress (relied upon in relation to allegations 1 and 2)?

ii. The claimant's sickness absence (allegations 3 and 5); and

iii. the claimant's sickness absence necessitating a return to work (allegation 4)?

22. Was the unfavourable treatment because of any of those things?

23. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

i. Ensuring the SS&D team were able to meet their goals, client deliverables and service levels, and improvement of the claimant's performance, in relation to allegations 1 and 2;

ii. Supporting the claimant on her return to work and ensuring she did not feel overwhelmed in light of the reason for her absence (allegation 3);

iii. Ensuring the claimant was not overwhelmed on her return to work in light of the reason for her absence, had relevant goals to the work she was doing, and contact with Andrew Richman and Jo Creasy was limited as requested (allegation 4);

iv. Keeping the respondent's, its colleagues' and any third party information, data and sensitive data protected and secure due to the nature of the business (allegation 5).

24. The Tribunal will decide in particular:

i. was the treatment an appropriate and reasonably necessary way to achieve those aims;

ii. could something less discriminatory have been done instead;

iii. how should the needs of the claimant and the respondent be balanced?

b. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

25. Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability?

26. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

a. Requiring the claimant to engage in the grievance and appeal process whilst signed off sick?

b. Requiring the claimant to meet the usual performance management standards?

c. Requiring the claimant to meet objectives and deal with an increased workload within deadlines?

d. A requirement to engage in prolonged informal performance management process followed by a formal process of performance management straight after?

e. A requirement to be in the office throughout the grievance process and to have contact with witnesses during the course of the grievance?

27. The claimant also relies upon a sixth PCP of refusing to allow employees to make their own recordings of meetings. The respondent admits that it had that PCP.

28. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

a. The claimant had difficulties co-ordinating, articulating and recalling responses to questions, providing evidence in line with the respondent's timelines and had work induced sick leave?

b. The claimant was unable to meet the usual performance standards because of the effects of her menopausal symptoms and was subjected to informal and formal performance management?

c. The claimant was unable to meet "work arrangements" because of the impact of her menopause symptoms?

d. The back to back performance management processes increased the claimant's anxiety and exacerbated her menopausal symptoms leading to a period of sickness absence?

e. The claimant's disability made her particularly vulnerable to feelings of stress and anxiety caused by interactions with those that she had complained about in her grievance?

f. As a result of the claimant's menopausal symptoms, including anxiety, forgetfulness, and difficulty concentrating, she found it particularly difficult to recall questions or recall where follow up action was required without access to a verbatim recording?

29. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantages?

30. What steps could have been taken to avoid the disadvantage? The claimant suggests:

a. Placing the grievance process on hold until the claimant felt well enough to engage.

b. Adjusting the claimant's objectives so that the expectations of the claimant's performance were reduced to a manageable level.

c. Disapplying the usual triggers for performance management.

d. Providing meaningful support from her line management by giving timely and constructive feedback with specific examples and suggestions to improve performance.

e. Undertaking a work assessment and determining what the best working pattern for the claimant would have been when the disability was disclosed and adjusting the claimant's working pattern by reducing her hours and workload.

f. Reducing the length of time that the informal process was applied for.

g. Not escalating the performance management process to a formal stage.

h. Providing flexible working or staggered working options to limit contact with witnesses.

i. Allowing the claimant to make her own audio recording or providing a video recording.

31. Was it reasonable for the respondent to have to take those steps and when?

32. Did the respondent fail to take those steps?

Harassment related to disability and/or age and/or sex (Equality Act 2010 section 26)

33. Did the respondent do the following things:

    a. Fail to provide the claimant with positive feedback or recognition from line managers relating to the claimant's successes and not relaying positive feedback when it was shared with them, focusing on negative feedback instead, between October 2018 and January 2020?

    b. Subject the claimant to an unfair performance review and a rating of 2 (inconsistent performer) without examples or objectives in May 2019?

    c. Advise the claimant that she would be placed on a formal performance plan in July 2019, despite being 'in a good place' and meeting Q2 dominant goals?

    d. Implement a new office seating plan in September 2019, leaving the claimant alone on a separate unconnected desk?

    e. Send abrupt messages to the claimant in September 2019 whilst she was on sick leave, requiring her to attend weekly check ins.?

    f. On 18 September 2019 make a comment that 'Jo will pick that apart' just before the claimant was about to deliver a presentation?

    g. Between October and September 2019 effectively demote the claimant by reallocating her projects to junior / more inexperienced members of staff without any consultation, justification or explanation?

    h. In January 2020 fail to allocate meaningful work to the claimant on her return to work following sick leave, whilst assigning core objectives to the rest of the team?

34. If so, was that unwanted conduct?

35. Did the allegations at paragraph 33 above, save that at paragraph 33€ relate to disability and/ or age and/or sex?

36. Did the allegation at paragraph 33(e) above relate to disability?

37. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

38. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (Equality Act 2010 section 27)

39. The respondent admits that the claimant did a protected act when she raised a grievance on 14 October 2019.

40. Did the respondent do the following things:

   a. Continue to communicate with the claimant in October 2019 when she was on sick leave, despite the claimant advising that the volume of communication was exacerbating her stress?

   b. Devalue the claimant in December 2019 by stating that her performance did not compare to her grade, remind her that she was one of the highest paid Grade Ds, suggesting that she was a 'round peg square hole' and that her line manager was required to spend more time managing her than other colleagues?

   c. In January 2020 fail to agree an allocation of team objectives despite being invited to a meeting in Nottingham to allocate objectives, and despite all other team members being allocated objectives despite being unqualified and inexperienced?

   d. Fail to allocate the claimant meaningful work upon her return from sick leave on 6 January 2020, thereby further excluding her?

   e. Fail to prepare for the claimant's return from sickness?

   f. Give the impression through its treatment of the claimant that it did not want her to return to work, and discourage her from believing that she had a future as an employee?

   g. On 6 January 2020 block the claimant's access to all levels of the respondent's IT system upon her return from sick leave, in breach of the respondent's discipline and Appeal policy, resulting in the claimant being without access to critical IT resources and support for weeks?

   h. From 31 January 2020 delay in responding to a data subject access request, fail to deliver to the specifications within the request, and unjustifiably redact documents and send duplicate copies?

   i. Delay in responding to the grievance appeal and require unnecessary and excessive paperwork before dealing with the appeal between 31 January 2020 and 21 April 2020?

41. By doing so, did it subject the claimant to detriment?

42. If so, was it because the claimant did a protected act?

Findings of Fact

43. The claimant was employed by the respondent from 4 January 2016 until 28 February 2020 when her employment terminated by reason of

her resignation. The claimant initially joined the respondent as an IT business consultant at a grade D level on a salary of £47,500 a year.

44. The claimant was recruited to the respondent's business by Jo Creasy, Service, Strategy and Design Director. The claimant initially worked for Melissa Dean, another manager within the respondent's business. In December 2016 however she transferred back to the team that was led by Jo Creasy and became a Service Designer. Her terms and conditions and salary remained unchanged.

45. The claimant reported to Jo Creasy until December 2018 when Andrew Richman joined the business as Head of Service, Commercial and Design. He became the claimant's line manager and remained her line manager until the termination of the claimant's employment, although for a period from January 26 2020 onwards the claimant was given a temporary line manager, Doug Jenner.

46. The claimant was based in the respondent's offices in Southport although she was able to work from home as and when she wished to, subject to attending the office for meetings. Jo Creasy was based in the respondent's offices in Nottingham. Mr Richman was also based in Southport.

47. The claimant was employed on a full time basis and initially worked five days a week. Her normal working hours were 37.5 hours per week, and she had flexibility as to her start and finish times. In practice she often worked more than 37.5 hours per week. In June 2018 the claimant raised concerns with Jo Creasy about the number of hours that she was working. Jo Creasy made suggestions as to how the claimant could reduce her working hours.

48. In September 2018 Jo Creasy met with the claimant to conduct her midyear performance review. The question of the claimant's working hours was discussed during this meeting and the claimant told Ms Creasy that she was considering exploring the possibility of working condensed hours over four days to help her to get a better work life balance. Jo Creasy encouraged the claimant to make a flexible working request.

49. On 1 November 2018 the claimant sent a flexible working application to Jo Creasy and to Rachel Nolan in HR. She asked to change her working pattern so that she would work her full-time hours over four days from Monday to Thursday and would not be required to work on Fridays. The reason that she gave for her request was that she was looking to improve her work life balance. She said in the application that she found it difficult to find a logical close to her daily activity and hoped that by giving herself a day when she did not have to work, she would achieve a better balance. She said that she was already working more than 15 hours' overtime a week and put the reason for this down to her own lack of discipline.

50. There was no mention in the flexible working application of the claimant's menopause or any suggestion that there were any health issues which were causing the claimant to make the application.

Rather the application gives the impression that the claimant's inability to organise her own working time and her lack of self-discipline were the reasons she wanted to condense her hours.

51. Jo Creasy approved the claimant's flexible working request and on 11 November 2018 sent an email to the claimant telling her that she was comfortable with approving the change in working pattern. On 5 December 2018 a letter was sent to the claimant confirming that from 1 January 2019 she would work 9.38 hours on Monday, Tuesday, Wednesday and Thursday and would not be required to work on Fridays.

52. This condensed working pattern remained in place through to the termination of the claimant's employment.

53. The respondent operates a performance management system under which members of staff are set goals at the start of the performance year and then assessed both against the achievement of those goals and the manner or way in which they have achieved them. Employees are given a score or performance rating at the end of each performance year. Performance ratings are initially allocated by an employee's line manager. After the initial allocation however, there is a process of calibration whereby colleagues including HR and more senior managers review the scores to ensure that they are consistent.

54. The performance scores run from a one which indicates a low performer to a five which is a high performer. During the course of her employment the claimant was given ratings of three which indicates that she was a successful contributor in her role, and two which indicates that she was considered to be an inconsistent contributor.

55. The normal course of events is for employees to be given a rating both halfway through the performance year, in September, and then a final rating in March at the end of the performance year. The claimant did not receive a performance rating in March 2016 because she was new to the role. In September 2016 she was rated a two, i.e inconsistent contributor. In March 2017, September 2017, March 2018 and September 2018 she was rated as a three. In March 2019 she was rated as a two.

56. The claimant was rated as a two by Melissa Dean in September 2016. From then until the end of 2018 the claimant's performance was rated by Jo Creasy. Ms Creasy consistently rated her as a three. She did however have some concerns about some aspects of the claimant's performance. Those concerns included ones about the claimant's timekeeping, prioritisation and organisational skills. Some of the concerns that Jo Creasy had about the claimant's performance had also been shared by Melissa Dean, the claimant's previous line manager.

57. In 2017 the team in which the claimant worked began a major project called the 'Experian Service Plan' project or ESP. The claimant was responsible for the service design of deals and projects in Phase 1 of

ESP. She delivered this work well but there were concerns about her timekeeping and organisational skills in relation to the project.

58. Later, Phase 2 of the ESP project began. The claimant wanted to lead this phase and it was agreed that she would do so but with support. A colleague Joanne Ashworth was brought in to help the claimant in some areas of the project. Jo Creasy also decided to remove the claimant from her business-as-usual role which involved working on product and sales service design, to enable her to focus on Phase 2 of ESP.

59. There was a two-month delay in implementing phase 2 of the project, which Ms Creasy had to report to more senior management within the business. These delays were due in part to excessively detailed planning by the claimant and the claimant's naturally helpful style which caused her to help her colleagues out a lot, including training new members of staff, rather than focusing on the project itself.

60. When conducting the claimant's end of year performance review and awarding her a performance rating in March 2018 Jo Creasy considered that the claimant was a low or borderline three. Ms Creasy had concerns that the claimant was demonstrating similar behaviours to ones which she had demonstrated previously, including not always focusing on her core tasks, allowing herself to be distracted and not delivering work on time. There were however a number of areas that the claimant was very good at and for this reason Ms Creasy decided to award her a three rating.

61. Ms Creasy met the claimant on 8 March 2018 to carry out the end of year review. During that meeting Ms Creasy gave the claimant both positive feedback and set out some areas for improvement. Following the meeting Ms Creasy wrote to the claimant by email. In that email she summarised what she described as highlights that had contributed to the claimant's three rating. The highlights were that the claimant had worked really hard and had demonstrated passion, collaboration, creative and methodical thinking and had made a successful contribution in some areas including in commercial support.

62. Ms Creasy also explained to the claimant that interventions had been required to support the claimant after she had been disheartened by feedback received on two projects. She also commented that the claimant may have gone too far with her detailed planning on Phase 2 of ESP and that she would have liked her to be further forward in the project. Ms Creasy told the claimant that there was a risk of the claimant getting dragged back into business-as-usual work which had caused the project to slip. She told the claimant that there were some behaviours that could derail her performance, namely her timekeeping, organisation and verbose communication in emails and in meetings.

63. In early 2018 the claimant began experiencing symptoms which she subsequently realised were symptoms either of the perimenopause or the menopause. The claimant was aged 48 in June 2018 and at that point she began to think that her symptoms may be linked to the

menopause or the perimenopause rather than to any of her pre-existing health conditions.

64. The symptoms that the claimant experienced with the peri-menopause and the menopause varied over time. They had a substantial adverse impact on the claimant's ability to carry out normal day-to-day activities. The Tribunal has already found that the claimant was at the material time disabled as a result of these symptoms.

65. From early to mid-2018 onward, the claimant began discussing her menopause with her colleagues. The discussions that she had about the subject were light-hearted and informal. She would comment on occasion about having a 'brain fog day' and she had a teapot on her desk at work from which she drank Chinese herbal tea to help relieve her symptoms.

66. We find that Jo Creasy was aware that the claimant was going through either the perimenopause or the menopause from sometime in 2018 when the claimant made a comment to her about experiencing brain fog.

67. We also find however that the claimant did not give any indication prior to raising her grievance on 15 October 2019 that her symptoms were having any impact upon her performance at work. The claimant struck us as being somebody who was very professional and who took a great deal of pride in her work and in her appearance. Understandably she did not want to give any indication that her health may be affecting her performance. We make no criticism of her for that, as her behaviour was in our view understandable. The consequence of that however was that it was not obvious to the respondent that there was any link between the claimant's performance at work and her perimenopausal and menopausal symptoms. It was not until she raised her grievance in October 2019 that the claimant expressly made that link.

68. On 25 June 2018 the claimant and Ms Creasy had a one-to-one meeting. During that meeting Ms Creasy expressed concerns about the claimant's performance and commented that she was not seeing much improvement. The claimant told Ms Creasy that she was working long hours and that she was struggling. Ms Creasy was concerned both about the claimant's performance at work and about her well-being given the excessive number of hours that the claimant was working. The claimant did not give Ms Creasy any indication that her performance was affected by the symptoms that she was experiencing.

69. Following the meeting on 25 June Ms Creasy sent an email to the claimant. In the email Ms Creasy expressed concerns about the claimant's health and well-being and made some suggestions to help the claimant to improve her performance and to support her. She suggested a number of areas for the claimant to focus on including not letting work overtake her evenings and nights, time management and time protection, delegation and escalation management.

70. Ms Creasy also referred to having tried to take the business-as-usual work away from the claimant so that she could focus on her core tasks. At the hearing the claimant suggested that this email was Ms Creasy 'turning the tables on her' and was not helpful. This does not appear however to have been how she reacted at the time. In evidence before us was an email reply that the claimant sent to Ms Creasy after she received Ms Creasy's suggestions. In that reply the claimant thanked Ms Creasy for her suggestions and referred to feeling more in control. She ended the email by commenting that Ms Creasy should not worry. We find this email to be a more accurate reflection of the claimant's feelings at the time as it is a contemporaneous document.

71. The claimant sent a further email to Ms Creasy on 11 July setting out some more thoughts that she had about her areas of development. There was nothing in these emails mentioning the menopause or any menopausal symptoms nor any suggestion that either the claimant's performance was being impacted by her menopausal symptoms or that the claimant was in any way unhappy with the approach that Ms Creasy was taking to managing her.

72. At one point during 2018 when the claimant was working in the Nottingham office for a day she began talking with some female colleagues about the menopause. One of the colleagues, Cathy England, told the claimant that she was setting up a menopause network and the claimant offered to support her. Cathy England was working on a draft menopause policy and the claimant offered to help her with this.

73. The claimant subsequently told Jo Creasy in a one-to-one meeting about the menopause network and the menopause policy and after that meeting Ms Creasy sent the claimant an email attaching the draft policy and asking the claimant if she would be interested in reading a guidance document that HR had issued to employee representatives on the subject.

74. The email attaching the menopause policy was not before us in evidence.

75. There was in our view nothing untoward in the fact that the respondent was unable to find the email sent to the claimant by Ms Creasy attaching a copy of the menopause policy. The respondent has implemented an email retention policy as part of which emails are deleted automatically after six months unless they have been specifically saved to a personal or general drive by an employee. We accept that the reason the email could not be found was because at the time the claimant asked for it, it had already been deleted. There was in our view no evidence to suggest that the email had been deliberately deleted and indeed Ms Creasy said in her evidence that she wished she still did have a copy of the email.

76. We do not accept the claimant's suggestion that during June 2018 she specifically suggested to Ms Creasy that her performance was affected by her menopause. Nor was there anything in her behaviour or her general conduct in the office to put the respondent on notice that the

menopausal symptoms the claimant was experiencing were having an impact on her performance.

77. The claimant and Ms Creasy had a very positive and friendly relationship. The claimant said in her evidence that things started to turn in the latter half of 2018. It was clear to us however from Ms Creasy's evidence that she continued to rate and respect the claimant throughout the period through to the termination of her employment.

78. The claimant said in her evidence that Ms Creasy had threatened her with a two rating if she did not deliver the ESP project on time. We find that Ms Creasy did tell the claimant that her performance was such that she was at risk of receiving a two rating. That was not however meant as a threat, but rather as a signpost to the claimant that she needed to improve her performance if she was to maintain her three rating.

79. It was clear to us that the claimant took a great deal of pride in her performance and wanted to perform well. She considered herself to be at least a three performer, and at times suggested that her performance was worthy of a four rating. It was in our view entirely appropriate for Ms Creasy, as the claimant's line manager, to tell the claimant that her performance was not on track and not at the level that the claimant thought it was, so that she had time to improve it before the rating was given. This was good management not threatening behaviour.

80. In December 2018 Andrew Richman joined the respondent and became responsible for managing the claimant's team. He became the claimant's line manager and he reported to Jo Creasy. Shortly after he joined the respondent Ms Creasy gave Mr Richman a handover in relation to the claimant and other members of the team that he would be managing. During the handover Ms Creasy told Mr Richman that there were positives about the claimant's work, but that she did have some performance concerns. She highlighted the claimant's verbose communication style, her approach to work and the fact that she did not appear able to get commitment from stakeholders. Ms Creasy told Mr Richman to make up his own mind about the claimant's performance and that there were no formal performance plans in place. There was no mention during the handover meeting of the claimant's menopause.

81. Over the course of the next few weeks Mr Richman observed the claimant's work in practice. He also held regular one-to-one meetings with her to discuss work related issues. In January 2019 the claimant's new working pattern came into effect and she no longer worked on Fridays. This meant that colleagues in the team had to cover for her whilst she was not in.

82. In late January 2019 Mr Richman carried out a review of the performance of everybody in his team. He identified that there were some issues with the claimant's performance. The claimant was at the time the most senior member of his team in terms of experience. Mr Richman told Ms Creasy that he had some concerns about the overall quality of the work delivered by the claimant, and in particular

regarding her communication style and the impact of her communication. He had recently observed her in deal governance review meetings talking a lot about details rather than providing a succinct statement of outputs and any remaining issues. He had formed the view that this caused confusion to the audience and resulted in key points in the service design being ignored.

83. On 1 February 2019 there was a meeting of the senior management team at which the team's performance was discussed. Concerns were expressed at that meeting about the claimant's performance. She was not however the only member of the team whose performance was causing concerns. Others within the team had also been flagged as low performers.

84. On 13 February 2019 Mr Richman had a one-to-one meeting with the claimant. Mr Richman expressed some concerns during the meeting about the claimant's performance and set her some informal development goals. Those development goals included that the claimant should focus on her communication style to ensure that her delivery had impact, that she should check her work for mistakes so that it did not have to be redone by other people, and that she should manage her time and keep track of the volume of her work to avoid some of it being completed late.

85. We accept Mr Richman's evidence that during this meeting the claimant did not indicate that there were any external factors or health reasons which were causing any performance issues. Likewise, however Mr Richman did not ask the claimant whether there were any factors affecting her performance, and it would have been best management practice for him to do so.

86. The claimant told us in her evidence that she had not discussed her menopausal symptoms with Mr Richman but that she was 'sure' he was aware of them. Mr Richman's evidence was that the claimant told him in a one-to-one meeting that she had menopausal or perimenopausal symptoms and that she may need to attend medical appointments, but that she did not tell him what her symptoms were or suggest to him that her performance was being affected by these symptoms. Mr Richman's evidence was also that there was nothing in the behaviour of the claimant that he observed that put him on notice that her performance could be linked in any way to perimenopausal or menopausal symptoms. We accept Mr Richman's evidence on these issues. We found him to be a thoughtful and credible witness.

87. We also accept Mr Richman's evidence that he did not recall any general conversations about menopause or the claimant's menopausal symptoms in the office. He did recall seeing the Chinese teapot but that did not alert him to the fact that the claimant's performance may be affected by menopause. There are many reasons why someone may choose to drink Chinese or indeed any other type of tea in the workplace.

88. Following the meeting on 13 February 2019 Mr Richman wrote to the claimant setting out what he referred to as a 'further development plan'

and in essence telling her what she needed to do to improve her performance.

89. On 2 May 2019 Mr Richman carried out the claimant's formal end of year review. In preparation for that review the claimant had prepared a document setting out her own view of her performance. The claimant assessed her own performance as meriting a three rating. In the summary of her personal assessment however, she identified three highlights of her performance: her contribution to sales, Phase 2 of ESP achievements, and people values.

90. The claimant also identified five 'lows': control and prioritisation, time management, workload, stress, and ability to keep up with administrative tasks. This indicates to us that the claimant had some insight into her own areas of underperformance, even if she was not willing to accept that her performance merited a 2 rating.

91. There is no mention in the document that she produced of menopause or menopausal symptoms.

92. During the meeting on 2 May Mr Richman told the claimant that he had rated her a two because he had concerns about some areas of her performance. In particular he was concerned that the claimant was taking on the work of others and working outside of the remit of her role which was having an impact on her ability to deliver her own goals. He was also concerned that she was not communicating with impact either verbally in presentations or via email and had concerns about her objective planning and delivery of both high quality work and short term tangible output. He decided to place the claimant on a performance improvement plan for a period of six weeks.

93. The claimant fundamentally disagreed with Mr Richman's assessment of her performance. She considered that she had achieved all of her objectives and that her performance merited a three or a four rating. She complained that she had not been given any specific examples of where she had not achieved objectives. She denied that she was not communicating with impact as she considered communication to have been her strength. She said that she had had no option but to take on additional work because she had been left without a direct line of report and attached to help support the wider team. She also said that she had delivered her objectives and added value and that she had indeed exceeded her revenue growth target. She complained that no examples had been given as to how she worked inefficiently.

94. In evidence to the Tribunal she said that the review of her performance was unfair because of her menopause symptoms. She did not however say that to the respondent at the time.

95. Mr Richman told us in evidence that he had given the claimant specific examples of where she had not performed. He accepted that she had met the objectives that had been set for her that year, but his concerns were about the way in which they had been delivered.

96. One of the roles of a manager is to assess an employee's performance. It is not uncommon for managers and employees to have different views about the employee's performance. Our role as a Tribunal is to consider whether the assessment of the claimant's performance in this case was discriminatory or, for the purposes of the constructive dismissal claim, amounted to a breach of the implied duty of trust and confidence. We find that it was neither. The criticisms that Mr Richman made about the claimant's performance were ones which, to some degree, the claimant recognised in the summary that she had prepared for the review. They were also ones that had been discussed with the claimant previously. The respondent had in our view no reason to believe at that stage that the claimant's performance was being affected by her perimenopausal or menopausal symptoms.

97. Mr Richman prepared a draft performance plan which he sent to the claimant after the meeting. The plan set out key areas that the claimant needed to improve in and stated that the claimant needed to move from working hard to working smart. The plan also provided for the claimant and Mr Richman to hold weekly meetings to review progress against the objectives and to enable the claimant to ask for support. The plan set out a number of detailed performance objectives, success measures and gave a review date of the end of June 2019.

98. The plan did not specifically say whether it was formal or informal. We find that Mr Richman did not make clear to the claimant that this was intended to be an informal performance management process. It was therefore understandable that the claimant considered it to be part of a formal performance management process.

99. On 6 June 2019 Mr Richman met with the claimant to review her progress. He told her that he had started to see some improvement, in particular in her communication and presenting skills, but that they were still not at the level required and that there were some areas in which she had not improved at all, such as planning and delivering of accountabilities.

100. Mr Richman continued to have regular 1-2-1 meetings with the claimant during June and July 2019 at which her performance was discussed. The claimant did not indicate during any of those meetings that her performance was impacted by the menopause.

101. Mr Richman was absent from work due to holiday and ill health between the end of July and early September 2019. When he returned to work in September, he reviewed a report that the claimant had written whilst he was away. The quality of the report was poor, and Mr Richman spent three days re-writing it. Mr Richman also received feedback from other managers that the claimant's performance continued to be inconsistent.

102. On 18 September 2019 the claimant gave a presentation to the Service Strategy and Design team. Mr Richman arranged a practice run in advance of the presentation. During the practice run he gave the claimant feedback and raised concerns about her delivery. He told the claimant words to the effect that "Jo will pick that apart" and then

helped her to re-write her section of the presentation as he was concerned that it would not go down well with Jo Creasy. There was nothing untoward in this – providing feedback in this manner was an entirely appropriate thing for a manager to do.

103. The following day Mr Richman met with the claimant to carry out her mid year performance review. He told her that he still had concerns about her performance and that he wanted to start a formal performance management process. He wrote to her on 3 October 2019 to confirm what had been discussed on the 19th. The email he sent to the claimant on 3 October provided detailed feedback on the goals that the claimant had been set and also contained specific areas for the claimant to work on. For example, Mr Richman wrote in the email that:

"*…CSM reporting is not at a level it needs to be. The report does not provide a view that can be used…The report was re-written by myself…*

The development plan has not progressed…

My view is that you have slipped back with your communication style since the initial progress we made…

Your performance was under an informal PIP due to inconsistent performance with clear objectives and actions. We met regularly on a weekly basis to review and feedback on pieces of work, and began to see an improvement…

Your performance throughout Q2 is inconsistent and not at the level it needs to be at. This is despite receiving a lot of support through:

- *Weekly 121s*
- *Informal PIP with goals and objectives*
- *Support from peers*

Your performance will be managed under the formal Performance Management process. This process will run for 6 weeks.

104. We find this email to be well written. It set out clearly what the claimant needed to focus on, how long the formal performance management process would last, how regularly they would meet to review performance, and what they would discuss.

105. The claimant alleged that she was not given any positive feedback or recognition from her line managers, and that they focussed instead on negative feedback, failing to pass on positive feedback when it was shared with them. We find that was not the case. It was clear that both Ms Creasy and Mr Richman considered there to be positive aspects to the claimant's performance and they gave her both positive and negative feedback.

106. On 24 September 2019 the claimant began a period of sickness absence which lasted until 6 January 2020. She submitted fit notes

which stated the reason for absence as being stress, anxiety and hypertension.

107. Whilst the claimant was off sick some people in the office moved desks. The claimant alleged that this had been done deliberately to isolate her from the team. We find that was not the case. It is not uncommon within workplaces for people to move desks occasionally, and there was no evidence before us to suggest that the desk moves were targeted at the claimant in any way.

108. When the claimant returned from sick leave and raised the question of the desk move, she was immediately offered the opportunity to move to a different desk. She chose not to, preferring to stay at her existing desk.

109. Whilst she was off sick the claimant raised a grievance. On 15 October she sent a grievance letter to Stephen Brady, Senior Employee Relations and Governance Manager. In the grievance she complained that she was being ostracised and forced to resign and suggested that her ill health was wholly due to a lack of support and recognition of her medical condition.

110. She alleged that she was being bullied, harassed, victimised, intimidated and excluded. There was no mention of perimenopause or menopause in the grievance letter.

111. Attached to the grievance was a detailed table of evidence in support of her grievance. The table runs to 11 pages. On page 3 of the table, when dealing with the presentation she had given on 18 September 2019 and the feedback from Andrew Richman, she commented that: "*My health was already suffering as a result of the treatment towards me by the company, together with menopausal symptoms which were in evidence during my speech. This made me feel intimidated and embarrassed, resulting in a below par performance brought on by health issues, not capability issues. The organisation is aware I have experienced a number of hot flushes during presentations and meetings, and colleagues and management have been aware of my perimenopausal condition more than 12 months which has had a significant impact on my ability to carry out day to day activities…there is a clear lack of support with regards to my health condition which has impacted on my ability to perform…I feel this treatment towards me has both ageist and sexist undertones…*" That was the only mention of menopause and the only suggestion that the claimant's performance was affected by perimenopausal and/or menopausal symptoms.

112. Mr Brady wrote to the claimant to acknowledge receipt of her grievance the very same day and, at the request of the claimant, forwarded a copy of the grievance to Rachel Nolan, HR Business Partner.

113. Ms Nolan subsequently told Mr Brady that the claimant had told her she did not want to have any contact with Mr Richman during her sickness absence and it was agreed that Rachel Nolan would become the claimant's point of contract whilst the grievance process was

ongoing. The claimant alleged that whilst she was off sick Mr Richman sent her 'abrupt' messages. There was no evidence of that however before the Tribunal, and we find that it did not happen.

114. On 18 October Yasmina Henini in HR wrote to the claimant inviting her to a grievance meeting. The claimant replied on 21 October saying that she did not feel well enough to attend a grievance meeting. Ms Henini suggested doing the grievance meeting via WebEx as an adjustment or sending the claimant questions for her to answer.

115. On 25 October the claimant wrote to Stephen Brady and Yasmina Henini stating that "*from hereon I do not wish to communicate by email. I am finding that this form of communication is very stressful, and is not assisting in my recovery or wellbeing in any way. Please ensure any future correspondence is sent by letter, and I will do similar*".

116. The claimant also said that she did not want to attend a WebEx meeting, but that if questions were sent to her by post, she would respond within a reasonable timeframe, subject to her health.

117. Mr Brady replied that he would ensure that any future communication was by letter.

118. On 7 November 2019 Mr Brady wrote to the claimant by post sending her copies of policy documents that she had asked for together with questions about her grievance for her to answer.

119. On 15 November the claimant replied by email to Mr Brady's letter of 7 November. In the email she said that: "*Whilst I appreciate you wish to hold a grievance meeting and investigate those concerns raised by me, I am not well enough at this time to go through the documents you have sent to me. I felt that I had explained this in my previous letter, and it is disappointing to receive your letters which are in essence, harassing me at this time.*

I do not feel it is reasonable to request to pursue my grievance whilst I am physically and mentally unfit to assist… I do not feel any response to the grievance at this time would be of value given my health….I am not able to think clearly at this time, and I think perhaps this is also due to the harassing nature of the emails and treatment towards me…"

120. There was no evidence before us, other than the bare assertion of the claimant, that Mr Brady was harassing the claimant. All of his communications with her were entirely appropriate and did not, in our view, contain anything inappropriate or which could objectively be said to be harassment of the claimant.

121. The claimant had asked for copies of various documents. Sending her copies of documents she had requested was not harassment.

122. Mr Brady discussed the claimant's email with Rachel Nolan and agreed that, in light of the comments made by the claimant, the grievance would be put on hold. On 22 November MR Brady wrote a

letter to the claimant responding to her email and suggesting that the grievance be put on hold until she felt able to take an active role in it.

123. In the letter of 22 November Mr Brady repeated some of the questions that had been included with his previous letter and which related to the claimant's health and sickness absence. In particular he asked her if she would be happy to be referred to occupational health, and what adjustments she needed to support her during her absence and on her to return to work. He told her that Rachel Nolan would keep in touch with her during her absence and that going forward contact would be fortnightly. He sent her details of Lifeworks, a confidential support and guidance service used by the respondent.

124. The claimant replied to Mr Brady's letter by an email that she sent to him on 6 December 2019. In her email she thanked him for agreeing to put the grievance on hold until her health improved, and indicated that she agreed to continue to keep in touch with Rachel Nolan on a fortnightly basis. She also provided answers to the health and wellbeing questions that Mr Brady had asked.

125. In response to the question about what adjustments she needed to support her during her absence or returning to work, she wrote: "*(During absence) Time and space to recover from a build-up of stress. Correspondence and contact that is reasonable and not likely to cause additional stress. (Return to work) Removal/distance from the individuals causing me stress, and a mindful approach to the management of the grievance process."*

126. In response to a question about what treatment she was receiving, she referred to having had acupuncture and Chinese herbal medicine earlier in the year. She did not say that that treatment was for menopausal symptoms and appeared to link the treatment to her high blood pressure. She said that she wanted to understand the purpose of the proposed referral to occupational health before deciding whether to agree to it.

127. Mr Brady sent a brief email to the claimant on 6 December acknowledging receipt of her email and stating that he would come back to her by post as agreed. The claimant thanked him for his prompt response.

128. On 24 December 2019 the claimant wrote to Mr Brady and Ms Nolan by email. One of the questions she asked in her email was for a plan to deal with her grievance, so that she could discuss it with her trade union representative.

129. Mr Brady replied to the claimant explaining that they could start the grievance hearing with her in the week commencing 6th January 2020 or week commencing 13 January 2020 if the claimant could let him know when she and her union representative were available.

130. On 9 January 2020, the claimant asked if the Webex grievance meeting could be recorded "for sharing". She said that she had been advised to request this by her trade union. She did not mention the

menopause or suggest that she needed a recording as an adjustment for any health issues she was experiencing.

131. Yasmina Henini asked the claimant to explain why she wanted to record the grievance meeting, in an email dated 9 January 2020. The claimant did not reply to that email or provide any more reasons as to why she wanted to record the meeting.

132. In her claim to the Tribunal the claimant alleged that she wanted to record the meeting because, as a result of her menopausal symptoms, including anxiety, forgetfulness, and difficulty concentrating, she found it particularly difficult to recall questions or recall where follow up action was required without access to a verbatim recording. That was not the reason given by the claimant for wanting to record the meeting at the time. Rather, when asked why she wanted to record the meeting, she said that her trade union had advised her to ask for a recording, so that it could be shared.

133. The claimant returned to work on 6 January 2020. The grievance meeting was arranged for 13 January 2020. The meeting was chaired by Debbie Wickstead, who had been appointed as Investigating Manager. The claimant attended the meeting with a trade union representative Kathy England. There was a detailed discussion about the claimant's grievance during the meeting and notes were taken by Yasmina Henini. Those notes were subsequently shared with the claimant.

134. The day after meeting with the claimant Ms Wickstead interviewed Jo Creasy and Andrew Richman. The claimant also provided further evidence to Ms Wickstead that day. It was only when they were interviewed by Ms Wickstead on 14 January 2020 that Jo Creasy and Andrew Richman became aware of the content of the claimant's grievance. Until that date neither of them knew any of the details contained in the grievance.

135. Over the course of the next few days the claimant, Jo Creasy and Andrew Richman provided further information to Ms Wickstead. The claimant sent emails with additional information about her grievance to Ms Wickstead on 14 January and 23 January.

136. On 24 January Ms Henini wrote to the claimant to tell her that Ms Wickstead had concluded her investigations and inviting her to a meeting to take place on 28 January 2020. The day before the meeting was due to take place the claimant asked for it to be held virtually rather than face to face, and this was arranged. The claimant also provided further evidence in support of her grievance on 27 January.

137. On 28 January a meeting took place between the claimant and Ms Wickstead at which Ms Wickstead informed the claimant of her conclusions on the grievance. The claimant attended the meeting alone and indicated that she was happy to proceed without a representative present. Ms Wickstead confirmed her decision on the grievance in writing in a letter dated 29 January 2020.

138. In summary, Ms Wickstead concluded that there was no evidence to suggest that either Jo Creasy or Andrew Richman had bullied, harassed, victimised, intimidated, or excluded the claimant.

139. Ms Wickstead did not uphold any of the claimant's grievance. She did not find Andrew Richman's performance management of the claimant to be unfair. She did however make a number of recommendations as part of her conclusions. These included that:

a. Andrew Richman should document all weekly 1-2-1s;
b. There should be mediation between the claimant and Mr Richman to support them working together;
c. There should be a phased return to the claimant reporting to Mr Richman; and
d. A stress risk assessment should be completed for the claimant to ensure that she was receiving the correct support.

140. Ms Wickstead enclosed with the grievance outcome a very detailed table summarising her investigation findings and outcome, together with a list of 34 documents that she had reviewed as part of the grievance.

141. On 31 January 2020, after receiving the grievance outcome letter, the claimant resigned by email to Mr Richman. In the email she gave four weeks' notice and stated that her reasons for leaving were that she had lost trust and confidence in the organisation, was unhappy with the grievance outcome, felt the outcome was prejudged and that the grievance process was not fair, reasonable or independent.

142. The claimant also, on 31 January, appealed against the grievance outcome. The grounds for her appeal, as set out in her appeal letter were that: "*I am unhappy with the outcome that has been reached, and do not believe the process was either fair, reasonable nor conducted in an independent manner. In addition, it is my belief the outcome was prejudged due to the Company's actions upon my return to work from long term sickness absence.*"

143. The appeal was passed to Paul Spiers to deal with as he had had no previous dealings with the claimant. An appeal hearing was arranged for 11 February 2020 but postponed at the claimant's request due to the unavailability of the claimant's representative, and because the claimant wanted more time to prepare.

144. The meeting was re-arranged for 24 February, but the claimant asked for a second postponement. This was agreed to, and the grievance meeting was re-arranged for 28 February. The day before it was due to take place the claimant wrote to Mr Spiers providing some more information about her grounds of appeal.

145. The appeal hearing took place on 28 February. The claimant was accompanied at the meeting by Dave Roberts from Unite. Mr Brady attended as note taker and HR support. During the meeting the claimant was given the opportunity to put forward her grounds of

appeal and to provide more information about them. She told Mr Spiers that she had evidence which she had not yet sent to him, and Mr Spiers indicated that he would be happy to review that evidence.

146. After the appeal meeting, Mr Spiers met with Debbie Wickstead and put some questions to her. On 1 March the claimant sent to Mr Spiers a 13 page document containing more information in support of her appeal. Mr Spiers interviewed Ms Wickstead again on 6 March to put to her some additional questions based upon the new information received from the claimant.

147. On 12 March Mr Brady wrote to the claimant to provide her with an update on her appeal, explaining that Ms Wickstead had already been interviewed and that a further 3 individuals would be interviewed over the following weeks.

148. The claimant wrote to Mr Brady and Mr Spiers on 24 March asking for confirmation that she would receive a written outcome by the end of March. Mr Spiers was on holiday at the time so Mr Brady responded.

149. On 23 March 2020 the country went into national lockdown due to the Coronavirus pandemic. Mr Spiers was responsible for managing the closure of three of the respondent's offices and the transition to home working of over 300 employees. This was a very busy time for him and others.

150. Mr Spiers interviewed the remaining witnesses on 30 March and 3 April and then reviewed all of the evidence. He decided he wanted more information from the claimant and put together a questionnaire for the claimant to answer. Mr Brady sent the questionnaire to the claimant by email on 2 April. She did not reply.

151. During his interview with Mr Spiers, Mr Richman used the expression 'round peg square hole'. He did this to explain to Mr Spiers why he had discussed alternative roles with the claimant as part of his discussions with her about her performance. His view is that where any employee is not performing in a particular role it is worth considering whether an alternative role may be a better fit for them. He made this comment to Mr Spiers. He did not make it to the claimant. Nor did he tell her that her performance deid not compare to her grade, or that she was one of the highest paid Grade Ds.

152. Mr Spiers sent the questions to the claimant again with a letter dated 9 April updating her on progress with the grievance and asking her to provide feedback on the questions by 15 April. He also invited her to a meeting on 21 April to provide feedback on the appeal.

153. On 17th April the claimant wrote to Mr Spiers stating, amongst other things, that she would not be attending the meeting on 21 April and did not believe her grievance or appeal had been investigated seriously.

154. It is clear from the evidence before us that both the grievance and the appeal were investigated in detail and that a considerable amount of time was spent in dealing with them. The claimant was upset

because the conclusions reached were not in her favour. She did not however say in evidence what she believes should have been investigated more thoroughly.

155. On 30 April Mr Spiers wrote to the claimant informing her of his conclusions on her appeal. The appeal outcome letter was accompanied by a detailed table summarising the investigation that had been done at the appeal stage and his conclusions.

156. Mr Spiers did not uphold any of the claimant's grounds of appeal. He concluded, in summary that:

a. The business made considerable effort to support the claimant on her return to work following her sickness absence and did not ostracise her or fail to provide her with a meaningful role;

b. There had not, contrary to the claimant's assertions, been 'multiple breaches' of the respondent's own policies;

c. Debbie Wickstead had investigated the grievance thoroughly, fairly and reasonably;

d. There was, as a result, no need to re-investigate the claimant's complaints about Jo Creasy and Andrew Richman; and

e. There had not been an unfair performance review, intimidation, bullying or harassment by Andrew Richman.

157. When an employee is off sick, the respondent's normal approach is for their line manager to remain in regular contact with them. Andrew Richman initially tried to keep in contact with the claimant weekly by telephone. On 10 October however, the claimant wrote to Mr Richman and Ms Creasy stating that the weekly contact was adding to her stress.

158. Mr Richman had left messages for the claimant when he had tried to contact her by telephone, and she had not answered the phone. The claimant alleged that in one of the messages he had been inappropriate in his manner. Mr Richman strongly denied this, and we prefer his evidence on this issue. There was no evidence before us of any inappropriate behaviour by Mr Richman towards the claimant.

159. The respondent has an Attendance Management Process which states that where an employee has been off sick for more than four weeks, their manager and/or HR will contact them, to arrange an initial attendance review and wellbeing meeting. The purpose of this meeting is to discuss the employee's absence, the reasons for it, the support the respondent can offer and the likely timescales for a return to work. The policy also states that further Attendance Review and Wellbeing Meetings will normally take place after every four weeks.

160. The claimant asked that Mr Richman should not be involved in keeping in touch with her, shortly after she began her sickness absence. Rachel Nolan took over responsibility for keeping in touch

with the claimant by 15 October, and Mr Richman had no further contact with the claimant during her sickness absence.

161. Rachel Nolan spoke to the claimant on 15 October and followed up with an email to her the next day. As the claimant had previously said that she was finding weekly contact stressful, Ms Nolan suggested that they catch up every two weeks to discuss the claimant's wellbeing. The claimant did not object to that, nor did she say that she did not want any contact. On the contrary, she agreed to Ms Nolan's suggestion of fortnightly contact.

162. The claimant alleged that the respondent 'continued to communicate with her whilst she was on sick leave despite her asking them not to'. We find that the claimant did not tell the claimant she wanted no communication whilst on sick leave. She did ask for the communication to be adapted (for example that Mr Richman should not be involved, that the contact should be less frequent, and that no more emails should be sent) and the respondent adapted its communications to meet the claimant's requests.

163. As the claimant had been off work for four weeks, she had triggered formal absence management processes under the respondent's Attendance Management Process. Ms Nolan and Mr Brady agreed that Mr Brady would deal with the attendance management process.

164. On 23 October Mr Brady wrote to the claimant inviting her to an absence review and wellbeing meeting. He offered her the option of attending the meeting virtually or answering questions by email. On 25 October the claimant wrote to say that she no longer wished to communicate via email.

165. The claimant suggested that the reason she was invited to attend the review meeting was because she had raised a grievance. We find that was not the case. She was invited to the meeting because that was the respondent's normal policy when employees are off sick for four weeks or more.

166. The absence review meeting did not take place at any point during the claimant's sickness absence. Late in December 2019 the claimant indicated that she would be well enough to return to work in early January 2020 and the focus then moved to supporting her back to work.

167. Mr Brady did send the claimant questions about her absence and about a possible referral to occupational health, which the claimant supplied written responses to.

168. On 18 December 2019 the claimant submitted a fit note certifying her as unfit to work until 5 January 2020. The next day the claimant and Ms Nolan had a catch-up call. During that call the claimant indicated that she thought she woulde be fit to come back to work when her current fit note expired but would be uncomfortable returning to reporting to Andrew Richman and Jo Creasy.

169. The fit notes that the claimant sent in to her employer during her sickness absence gave stress, anxiety and depression as the reasons for absence. They did not mention menopause or perimenopause.

170. Ms Nolan told the claimant that she understood the claimant's concerns and would make alternative arrangements for her. Ms Nolan arranged for the claimant to report to a different manager, Doug Jenner, so that she would not have to report to or have much contact with either Jo Creasy or Andrew Richman.

171. On 2 January 2020 Ms Nolan wrote to the claimant about the arrangements for her return to work. She told the claimant that she would have an interim line manager, Doug Jenner, but that it would be difficult to ensure no contact at all with Andrew Richman or Jo Creasy.

172. Ms Nolan warned the claimant that she may have technical difficulties logging on and with access to the respondent's systems, as the respondent's policy is that, for security reasons, whenever an employee is absent (for any reason) for a period of time, they are locked out of the respondent's systems. This is due to data protection and security reasons, and was also a result of a recent software update.

173. Whilst the claimant was off sick, she was locked out of the respondent's systems in line with the respondent's normal policy. We find that the claimant's account was disabled due to her long term sickness absence. On 2 January 2020 Andrew Richman contacted IT support and asked for the claimant's account, which had been disabled, to be reactivated. He gave his approval and authorisation for the reactivation. The claimant's access was subsequently reactivated and there was no evidence before us to suggest that she had been prevented from fulfilling her duties by the temporary lock out.

174. The claimant returned to work on 6 January 2020 and reported to Doug Jenner, who in turn kept Rachel Nolan updated on how things were going for the claimant. She had limited contact with Andrew Richman and Jo Creasy.

175. In preparation for the claimant's return to work Andrew Richman and Doug Jenner had discussed what work the claimant could be given to do. They wanted to ensure that the work was meaningful but did not overwhelm the claimant as she had just been off with stress. On 3 January 2020 Mr Richman sent a proposed work plan for the claimant to Mr Jenner by email. The email demonstrates that consideration was given to finding appropriate work for the claimant to do when she returned to work. The work plan included working on high profile contracts and projects.

176. Whilst the claimant was on sick leave, in early December 2019, Mr Richman began defining objectives for the team for the fourth quarter of the respondent's year. The projects that the claimant had been working on had largely completed, so her objectives would depend on the work that she did when she came back to work. When the claimant came back from work there were meetings with the claimant

at which goals were discussed. Mr Richman told the claimant that as she had not long returned from sick leave he was happy for her objectives to be vague at this point, as he did not want to put any added pressure on her. We did however set some 'placeholder' goals for her.

177. On her return to work the claimant was supported by Doug Jenner and was given reasonable work to carry out. She was initially asked to work on an urgent deal, but this work then dried up. After that she was provided with further work and was set goals that were in our view appropriate. The work allocated to the claimant included asking her to review the products delivered in phases 1 and 2 of the ESP project.

178. On 3 January in preparation for the claimant's return to work, Mr Richman asked Mr Jenner to set some goals for the claimant. A team meeting took place on 6 January at which team goals were discussed. The claimant chose not to attend that meeting. There were subsequent meetings at which goals were also discussed, which the claimant did attend. Mr Richman told the claimant that, because she had only recently returned from long term sick leave, he was happy for her objectives to be vague at this point because he did not want to put any additional pressure on her. Some placeholder goals were however set for her.

179. There was no evidence before us of any attempt to undermine the claimant on her return to work. We find that the respondent genuinely wanted the claimant to come back into the team and to make a meaningful contribution. There was no attempt to get rid of her. It was clear that both Ms Creasy and Mr Richman valued and liked the claimant, despite the reasonable concerns that they had about some aspects of her performance.

180. As far as was possible, given that the claimant returned to work in a team that was managed by Mr Richman and Ms Creasy, the respondent limited the amount of contact that she had with them. On one occasion after returning to work the claimant chose to drive to a meeting in Nottingham with Mr Richman in his car. This was her choice and not imposed on her by the respondent.

181. On 31 January 2020 the claimant submitted a subject access request. Stephen Brady was the respondent's Data Champion and involved in responding to her request. The claimant asked for copies of all data held about her going back to the start of her employment. Her request was very wide.

182. Mr Brady wrote to the claimant on 31 January acknowledging receipt of her subject access request. He asked her for further information about her request, with a view to narrowing the scope of the request. The claimant replied to Mr Brady on 11 February 2020 indicating that she was not willing to limit her subject access request.

183. On 19 February 2020 Mr Brady wrote again to the claimant indicating that, as she did not wish to narrow the scope of her subject access request, the respondent would need to extend the deadline for

the provision of the information in line with the respondent's data protection policy. By that stage the respondent had already found 24,000 documents, and had not completed its searches. It subsequently found more than 13 million documents.

184. The claimant wrote to the respondent on 1 March stating that she considered the extension of time for responding to her subject access request to be unreasonable. Mr Brady replied to the claimant stating that, in his view, the extension of time was reasonable, and advising her that 13.2 million results had been found during the search. Mr Brady again asked the claimant to narrow her request as it would not have been reasonable for the respondent to go through 13.2 million documents. Mr Brady suggested ways in which the claimant could narrow her subject access request but still obtain the documents that she was looking for.

185. The claimant replied to Mr Brady on 24 March stating that she had made a complaint to the Information Commissioner's Office. Mr Brady wrote to the claimant again on 26 March explaining that, as she had refused to narrow the scope of her subject access request, the respondent had taken the decision to do so, and that the information would be provided to the claimant by 30 April.

186. The claimant did not reply to this email, and on 30 April 2020 Ms Henini sent the results of the subject access request to the claimant. 380 documents were provided to the claimant in response to her subject access request.

187. The claimant first took legal advice in May 2019, and thereafter she also took advice from the trade union Unite. She began applying for jobs outside the respondent in September 2019 and applied for a number of jobs between September 2019 and her resignation in January 2020.

The Law

Constructive unfair dismissal

188. Where an employee resigns, as the claimant in this case did, she can still claim unfair dismissal if she can establish that her resignation falls within section 95(1)(c) of the Employment Rights Act 1996, which provides that:

"*(1) For the purposes of this Part an employee is dismissed by his employer if….*
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

189. The questions that the Tribunal needs to consider in a constructive dismissal claim in which, as in this case, the claimant alleges that the respondent breached the implied term of trust and confidence, are:

a. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;
b. Did the respondent have reasonable and proper cause for doing so;
c. Did the claimant resign in response to the breach of contract by the respondent; and
d. Did the claimant affirm the contract before resigning?

190. It is well established that a course of conduct by an employer can, when looked at as a whole, amount to a fundamental breach of contract even if the 'last straw' incident which prompts the employee to resign is not in itself a breach of contract (***Lewis v Motorworld Garages Ltd [1986] 157 CA***).

Time limits – discrimination claims

191. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination may not be brought after the end of:

> "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or…*
> *(a) Such other period as the employment tribunal thinks just and equitable.*

192. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(a) Failure to do something is to be treated as occurring when the person in question decided on it.*"

193. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e. an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time: ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434.***

194. Factors that are relevant when considering whether to extend time include:

a. The length of and reasons for the delay in presenting the claim;
b. The extent to which the cogency of the evidence is likely to be affected by the delay;

c. The extent to which the respondent cooperated with any requests for information;
d. How quickly the claimant acted when she knew of the facts giving rise to the claim; and
e. The steps taken by the claimant to obtain professional advice once she knew of the possibility of taking action.

195. In ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*** the court held that in order to prove that there was a continuing act of discrimination which extended over a period of time, the claimant has to prove firstly that the acts of discrimination are linked to each other and secondly that they are evidence of a continuing discriminatory state of affairs.

Discrimination arising from disability

196. Section 15 of the Equality Act 2010 provides that:

"*(1) A person (A) discriminates against a disabled person (B) if –*
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

197. In a claim under section 15, no comparator is required, and the claimant is merely required to show that she has suffered unfavourable treatment and that the reason for that treatment was something arising because of her disability.

198. In ***Secretary of State for Justice and another v Dunn EAT 0234/16*** the then president of the EAT, Mrs Justice Simler, identified four elements that must be made out for a claimant to succeed in a complaint under section 15:

a. There must be unfavourable treatment;
b. There must be something that arises in consequence of the claimant's disability;
c. The unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability; and
d. The respondent must be unable to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

Reasonable adjustments

199. Section 20 of the Equality Act 2010 states as follows:-

"(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A*

(2) The duty comprises the following three requirements.

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

200. Section 21 of the Equality Act 2010 provides that:-

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

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"

201. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in ***Environment Agency v Rowan [2008] ICR 218*** and in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, both approved by the Court of Appeal in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734***.

202. Part 3 of Schedule 8 to the Equality Act 2010 ("Work: Reasonable Adjustments") provides, at paragraph 20 ("Lack of knowledge of disability, etc") that:

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage…"

203. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

a. What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

b. How does that PCP/ physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

e. Is the claim brought within time?

204. Paragraph 6.28 of the EHRC Code of Practice on Employment (2011) sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

a. The extent to which it is likely that the adjustment will be effective;

b. The financial and other costs of making the adjustment;

c. The extent of any disruption caused;

d. The extent of the employer's financial resources;

e. The availability of financial or other assistance such as Access to Work; and

f. The type and size of the employer.

205. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law.

206. It is almost always a good idea for the respondent to consult the claimant about what adjustments might be appropriate. A failure to consult the claimant makes it more likely that the employer might fail in its duty to make reasonable adjustments.

Knowledge of disability

207. By virtue of section 15(2) and Part 3 of Schedule 8 to the Equality Act 2010 actual or constructive knowledge of disability is required in complaints of discrimination arising from disability and of failure to make reasonable adjustments. An employer will not be liable if it did not know and could not reasonably have been expected to know of the claimant's disability.

208. An employer can not however 'turn a blind eye' to evidence of disability and the EHRC employment Code provides that employers must do all they can reasonably be expected to do to find out whether an employee is disabled. Paragraph 5.15 of the Code states that:

"*An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy…*"

209. That said, failure to enquire about a possible disability is not, in itself, sufficient to give a respondent constructive knowledge of the claimant's disability.

210. In ***A Ltd v Z [2020] ICR 199 EAT*** the claimant was dismissed for repeated sickness absences and poor timekeeping. She had put her absences down to physical impairments, rather than the true cause which was depression, schizophrenia, stress and low mood which amounted to a disability. The respondent had some knowledge that the claimant may have mental health issues but did not make any enquires about them. The EAT held that the Tribunal was wrong to find that the employer had constructive knowledge of the claimant's disability because it failed to take account of what the employer might reasonably have been expected to find out if it had made enquiries. In the tribunal's view, the claimant would have continued to hide information about her mental health difficulties and insisted that she could work normally.

211. When considering knowledge for the purposes of a reasonable adjustments claim, the Tribunal should consider:

a. Did the employer know that the employee was disabled and that her disability was liable to disadvantage her substantially; and
b. If not, ought the employer to have known both that the employee was disabled and that her disability was likely to put her at a substantial disadvantage?

Harassment

212. Harassment is defined in section 26 of the Equality Act as follows:

"*(1) A person (A) harasses another (B) if –*
(b) A engages in unwanted conduct related to a relevant protected characteristic, and
(c) The conduct has the purpose or effect of –
1. Violating B's dignity, or
2. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b),each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect…"

213. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

a. Was the conduct complained of unwanted:
b. Was it related to a protected characteristic; and
c. Did it have the purpose or effect set out in section 26(1)(b).

(Richmond Pharmacology v Dhaliwal [2009] ICR 724).

214. The two stage burden of proof set out in section 136 Equality Act (see below) applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place in the absence of an alternative explanation by the employer.

215. In ***Hartley v Foreign and Commonwealth Office Services [2016] ICR D17*** the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (***Warby v Wunda Group plc EAT 0434/11***).

Victimisation

216. Section 27 of the Equality Act states as follows:

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

217. Although Tribunals must not make too much of the burden of proof provisions (***Martin v Devonshires Solicitors [2011] ICR 352***), in a victimisation claim it is for the claimant to establish that she has done a protected act and has suffered a detriment. There needs to be some evidence from which the Tribunal could infer a causal link between the protected act and the detriment, for example, the detriment occurs soon after the protected act, or others were not treated in the same way.

218. It has been suggested by commentators that the three stage test for establishing victimisation under the pre-Equality Act legislation, endorsed by Baroness Hale in ***Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841***

can be adapted for the Equality Act so that it involves the following questions:

a. Did the alleged victimisation arise in any of the prohibited circumstances set out in section 27?
b. If so, did the respondent subject the claimant to the alleged detriment(s)?
c. If so, was the reason the claimant was subjected to the detriments that the claimant had done, or might do, a protected act?

219. Following the decision of the House of Lords in ***Nagarajan v London Regional Transport [1999] ICR 877*** it is not necessary in a victimisation case for the Tribunal to find that the employer's actions were consciously motivated by the claimant's protected act. Victimisation may occur if the discriminator was subconsciously affected by the protected act, and it had a 'significant influence' on his or her treatment of the claimant. An employer can be liable for an act of victimisation even where the motives for the treatment of the claimant are benign.

Submissions

220. The submissions of each party are summarised briefly below. The fact that a point made in submissions has not been mentioned below does not mean that it has not been considered.

Claimant

221. Ms Banton submitted, on behalf of the claimant, that it was a striking feature of this case that none of the respondent's witnesses were trained in discrimination, and they were, she suggested, not disability aware. Although the respondent had policies, only lip service was paid to them.

222. Ms Banton argues that there was a collective failure to engage and act on what was obvious regarding the claimant, and that an employer does not 'defeat' the Equality Act 2010 by failing to engage.

223. The Tribunal should, she says, take judicial notice of the impact of menopausal symptoms, but she recognised that everyone would experience the menopause differently.

224. In relation to the harassment claim, Ms Banton submitted that a mixed objective and subjective test should be applied, and that the overall picture should be considered. She referred us to the cases of ***Driskel v Peninsular Business Services Ltd [2000] IRLR 151*** and ***Shamoon v Chief Constable of the Royal Ulster constabulary [2003] UKHL***. A detriment, she submits, exists if a reasonable worker would or might take the view that the treatment accorded to her had in all the circumstances been to her detriment, and it is not necessary to demonstrate some physical or economic consequence.

225. On the victimisation claim, Ms Banton submitted that the claimant has to show that the protected act influenced the alleged discriminator in her/his treatment of the claimant (***Aziz v Trinity Taxis Ltd [1988] ICR 534****)* and the discriminator did not need to be 'consciously motivated' by the protected act (***Nagarajan v London Regional Transport [1999] ICR 877***).

226. Ms Banton referred the Tribunal to the EHRC Employment Code of Practice, and to examples of reasonable adjustments contained within the code. She also referred us to the cases of ***Fareham College Corporation v Walters [2009] IRLR 991***, ***Croft Vets Ltd and others v Butcher EAT [2012] 0430/12*** and ***Linsley v Revenue and Customs Commissioners [2019] IRLR 604***.

227. On the question of time limits, Ms Banton submitted that conduct continuing over a period is treated as done at the end of the period, and that where there are a number of incidents occurring over a period of time, they may form part of a continuing act or continuing state of affairs.

228. In considering whether to extend time, the Tribunal should have regard to the fact that the time limits are very short, and whilst extensions of time should be the exception, the Tribunal has a broad discretion to extend time when there is a good reason. This is not a case, Ms Banton argues, in which a technical matter should defeat good claims which must be considered in their totality. The claimant's claims are interconnected and not time sensitive.

229. Ms Banton submitted that the respondent had actual or constructive knowledge of the claimant's disability from "*about 2018*". The claimant was exhibiting symptoms and discussing the menopause openly in the office, and her use of Chinese tea and acupuncture was well known. Ms Creasy sent the menopause policy to the claimant knowing that she was suffering symptoms.

230. Ms Banton also submitted that constructive knowledge will be fixed on an employer where it has failed to take reasonable steps to discover an employee's disability status, and that the claimant's excessive working hours and the symptoms she was displaying should have been a red flag signaling that she was not coping and needed support. The comments made in support of her grievance were ignored and not acted upon when she returned to work.

231. On the constructive dismissal claim, Ms Banton referred to the case of ***London Borough of Waltham Forest v Fomu Omilaju [204] EWCA (Civ) 1493*** as authority for the principle that the last action of the employer which leads to the employee leaving need not itself be a breach of contract. The test for the Tribunal, she says, is whether the claimant resigned as a result of an act that by itself amounts to, or a series of acts that cumulatively amount to, a breach of the implied term of trust and confidence. A breach of the duty to make reasonable adjustments is "*almost bound*" to be a breach of the implied term of trust and confidence (***Greenhof v Barnsley Metropolitan Borough Council [2006] IRLR 98***).

232. In Ms Banton's submission, the claimant was an honest, open and consistent witness whose evidence should be preferred where there is a conflict between her evidence and that of the respondent's witnesses who were very guarded about their knowledge of disability and lacked credibility at times.

233. The respondent was, she says, not warranted in subjecting the claimant to performance management, and subjected the claimant to oppressive communication. The claimant was not, objectively, performing at a rating of 2 and was set up to fail.

Respondent

234. Ms Firth submitted that the claimant had performance issues which pre-dated the onset of the perimenopause. The claimant had a tendency, she said to "rewrite history" and was, with hindsight, expecting the respondent to make connections between her perimenopausal / menopausal symptoms and her performance that she had not even made in her own mind at the time.

235. Her claim is, Ms Firth submitted, predicated on the respondent assuming that the claimant wanted adjustments just because she was perimenopausal and/or menopausal. Had the respondent done so it would have been in danger of discriminating against the claimant because every woman experiences the menopause differently.

236. Parts of the claimant's case are, in Ms Firth's submissions, implausible, for example the allegation that blocking her IT access was an act of victimisation. Her case is also contradictory in many places. For example, she suggests that a reasonable adjustment would be a reduction in her workload, and yet when tasks were given to others she perceived it as a demotion.

237. On the question of time limits, Ms Firth submitted that all of the discrimination claims are out of time with the exception of the victimisation claim relating to the grievance appeal.

238. Ms Firth argues that the respondent did not have actual or constructive knowledge of the claimant's disability. She referred the Tribunal to the case of ***Gallacher v Abellio ScotRail Limited UKEATS/0027/19/SS*** in which the EAT upheld a Tribunal's conclusion that an employer did not have constructive knowledge that the employee's menopausal symptoms amounted to a disability. Although the employer in that case had knowledge or some information about the claimant's disability, neither party knew or could reasonably have been expected to know that she was disabled. The EAT upheld this conclusion, in part because the Tribunal had reached a clear conclusion of fact that whilst some information about her health was provided by the claimant, there was "*none of the detail required as to substantial disadvantage, the effects on her day-to-day activities or the longevity of those effects so as to satisfy the requirements of Section 6".* The EAT also found that the Tribunal was entitled, in the circumstances, to conclude that a referral to occupational health "*would*

have been unlikely to change the state of knowledge so as to give rise to constructive knowledge being present on the part of the Respondent."

239. In the present case, Ms Firth submits, the claimant herself was unaware that she was menopausal for some of the time, under reported her symptoms and did not consider herself to be at any disadvantage. The claimant did not start to make the link in her own mind that some of the symptoms she was experiencing may be linked to menopause until late in 2018. The respondent can not be expected to make links that the claimant herself did not make.

240. Ms Firth also submits that the claimant had not asked for any adjustments to take account of her perimenopausal and/or menopausal symptoms until the grievance. She did not connect her performance issues to the menopause at the time, and indeed did not accept that she was an inconsistent performer. She thought she should have been rated a 3 or 4.

241. In relation to the reasonable adjustments claim, Ms Firth referred us to the cases of ***Ishola v Transport for London [2020] EWCA Civ 112***, as authority for the proposition that the phrase 'provision, criterion or practice' could not be interpreted as covering all one-off decisions made by employers during the course of dealings with particular employees.

242. It is necessary, Ms Firth says, to identify a non-disabled comparator to determine whether the PCP puts the claimant at a disadvantage because of the disability (***Grifiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265***).

243. Most of the PCPs relied upon by the claimant are, in the respondent's submissions, one-off decisions specific to the claimant and are therefore not PCPs. The respondent did not have knowledge of the substantial disadvantage relied upon by the claimant and, in relation to many of the allegations, the claimant has not demonstrated any substantial disadvantage.

244. On the question of harassment, Ms Firth submitted that when deciding whether conduct had the relevant effect within section 26 of the Equality Act 2010, account should be taken of both the employee's perception (a subjective test) and whether it was reasonable for the conduct to have that effect (an objective test), as well as the other circumstances of the case.

245. Ms Firth also argues that it would not be reasonable in this case to conclude that the conduct had the required effect because the claimant was hypersensitive. In addition, the claimant had failed to explain how the conduct complained of related to sex, age or disability.

246. The victimisation claim should also fail, Ms Firth submits. The claimant has failed to establish any causal link between raising her grievance and the behaviour complained about. Jo Creasy and

Andrew Richman did not know what the claimant's grievance was about until their grievance interviews on 14 January 2020.

247. In relation to the claimant's claim for constructive dismissal, Ms Firth submitted that the respondent did not commit a repudiatory breach of the claimant's contract. The law does not, she says, require an employer to resolve every grievance in the claimant's favour, but rather to undertake a prompt and reasonable investigation of grievances raised. The claimant resigned because of a false belief that she was being managed out and not in response to the alleged repudiatory breaches of her contract.

Conclusions

248. The following conclusions are reached unanimously, after the Tribunal considered carefully the evidence before it, the legal principles summarised above, the oral submissions of both parties and the written skeleton arguments.

Constructive Unfair dismissal

249. We have considered first of all whether the respondent did breach the implied term of trust and confidence as alleged by the claimant. The claimant alleges 11 breaches of the implied term, and we set out below our findings on each of the alleged breaches.

250. We find that the respondent did subject the claimant to a performance improvement plan between 14 May 2019 and 23 September 2019. Mr Richman had discussed his concerns about the claimant's performance with her in the period leading up to and at the annual performance review meeting on 2 May. He drew up a performance plan and sent it to the claimant. Thereafter he met with the claimant regularly to give her feedback and discuss progress against the plan.

251. On the evidence before us we find that Mr Richman was justified in putting the claimant on a performance improvement plan. Since becoming her line manager several months previously he had formed his own view of her performance, which was that it was lacking in some areas. His views were similar to those held by the claimant's previous line manager, Jo Creasy and were based on his observations of the work that the claimant carried out.

252. We also find that the respondent made some criticisms of the claimant's performance between 14 May 2019 and 3 October 2019, but not between 4 October 2019 and 31 January 2020. Mr Richman gave the claimant feedback on her performance which indicated that her performance in some areas was not what was required and needed improvement. The respondent had good reason for giving this feedback, and indeed the claimant had recognised some of her shortfallings in the 'lows' section of the document she prepared for her end of year performance review.

253. The claimant interpreted the comments made as criticisms of her performance, because she was particularly sensitive to negative feedback. We find however that Mr Richman genuinely wanted the claimant's performance to improve, and that his criticism of her performance was justified.

254. There was no criticism of or comments on the claimant's performance whilst she was off sick except for the email sent by Andrew Richman on 3 October confirming what they had recently discussed. The performance management process was put on hold during her sickness absence and on her return to work.

255. We find that the respondent did not misuse the performance management review system on 13 May 2019 by making unsupported allegations regarding the claimant's work to, in effect, force her to resign and diminish the claimant's allegations associated with her grievance.

256. Mr Richman had genuine concerns on good grounds about the claimant's performance, and his motivation in initiating the performance management process was to help the claimant to improve her performance. We accept his and Ms Creasy's evidence that they liked the claimant and did not want her to leave.

257. It was unfortunate that Mr Richman did not make it clear in May 2019 that the performance improvement plan was informal and that he did not specifically ask her whether there was any underlying reason why she was not performing. It is perhaps understandable however given that the claimant did not accept that her performance was inconsistent or needed improving, despite the fact that she had recognised five performance 'lows' in her self-assessment of her performance. In any event, it cannot in our view be said that these failings amount to a misuse of the process.

258. We also find that Mr Richman did not subject the claimant to unfair working practices on 13 May 2019 by putting her on a Performance Improvement Plan. The plan was, as we have found above, an appropriate step for him to take. It was not a disciplinary process, but rather a way of trying to improve her performance. We accept that Mr Richman's motives were genuine and well intentioned.

259. In addition, his performance rating of the claimant was moderated by colleagues. He was also performance managing others in his team. She was not the only one, so was not being targeted in any way.

260. We find the claimant's allegation that Mr Richman subjected her to discrimination on the grounds of disability, gender and/or age on 13 May 2019 vague and unspecific. There was no evidence before us to suggest that Mr Richman's decision to put the claimant on a performance improvement plan was motivated at all, whether consciously or subconsciously, by disability, gender or age. On the contrary, the evidence before us suggested that Mr Richman had good, non-discriminatory grounds for putting the claimant on a performance

improvement plan, namely genuine concerns about her performance which were shared by others, specifically Ms Creasy. The claimant has not discharged the burden of proof in relation to this allegation.

261. We also find that Mr Richman did not fail to provide the claimant with the necessary support to enable her to do her job between June 2018 and September 2019, taking account of her menopause condition and related symptoms. Mr Richman held weekly 121 meetings with the claimant and encouraged her to get help in communication and presentation skills from a colleague, Stuart Hannan.

262. We also find that considerable steps were taken by the respondent to assist and support the claimant.

263. The claimant was encouraged by Jo Creasy to make a flexible working request to change her hours to compressed hours, and this was approved and implemented. She could work from home when she wanted. Jo Creasy made a number of suggestions to help her manage her workload, including removing business as usual work from her.

264. Doug Jenner was appointed by Jo Creasy as her mentor. Joanne Ashworth was offered as support with the ESP project. The claimant was asked to spend less time training and mentoring a colleague Raymond Paxton, and Raymond was asked to reduce his dependency on the claimant. The claimant was given clear feedback on her performance and on the areas she needed to improve in.

265. Throughout the period between June 2018 and September 2019 the respondent did not know, and could not reasonably have been expected to know, that the claimant was experiencing perimenopausal or menopausal symptoms that were affecting her performance at work. The claimant was a proud woman who did not suggest to any of her managers that her performance issues may be linked to the perimenopause or menopause until she raised her grievance in October 2019. Rather, the claimant denied that there were genuine performance issues, and argued that she should have been given a performance rating of 3 or 4.

266. When the claimant returned to work after her period of sickness absence some changes were made to the work that she was carrying out. The reasons for this were firstly that the claimant wanted to limit her contact with Andrew Richman and Jo Creasy, so the respondent sought to find work that did not involve working closely with them. Secondly, because the respondent did not want to overload her on her return to work.

267. It is clear from the email sent by Mr Richman to Doug Jenner before the claimant came back to work, that careful thought was given to allocating the claimant meaningful work that she could do when she returned. She was allocated responsibility for some important and high profile clients and projects. These are not the actions of an employer that wanted rid of the claimant.

268. There was, we find, no attempt whatsoever to force the claimant to resign. On the contrary, the respondent was trying to support the claimant to return to work by allocating her reasonable duties. The changes that were made reflected the fact that she'd been off with stress, and they did not want to overwhelm her on her return, and that she had asked not to have contact with Andrew Richman and Jo Creasy, which placed further restrictions on what she could do, and finally the work available in the business at the time.

269. In light of our conclusions about the claimant's return to work, we have no hesitation in finding that the claimant was not effectively demoted when she returned to work on 6 January 2020 and that the respondent did not fail to allocate any work-related tasks to her.

270. We find that the claimant was locked out of the IT system whilst she was off sick, but this was a result of the respondent's policy of blocking access for all absent employees. It was not targeted at her, and the claimant had no reason to believe that it was. The claimant was warned in advance that she might be locked out by Rachel Nolan who was aware of the policy, and when it did happen her managers did what they could to resolve it quickly.

271. Whilst the claimant's grievance was not upheld, it was in our view thoroughly and properly investigated within a reasonable timescale. The grievance hearer concluded, on the evidence before her at the time, not to uphold the grievance. This was in our view a conclusion that she was entitled to make based upon the results of the investigation that she had carried out. The grievance outcome letter that she sent to the claimant and the table she produced demonstrate the thoroughness and seriousness with which she treated the grievance.

272. We do not uphold the claimant's allegations that between October 2019 and January 2020 the respondent dealt with the grievance in an unreasonable manner. We find that Mr Brady and Ms Henini did not put pressure on the claimant to progress her grievance whilst she was off sick. They gave her the option of progressing the grievance, but when she chose not to take that option, no pressure was put on her.

273. After the claimant said for the very first time that she wasn't well enough to deal with the grievance, they agreed to put it on hold and did not put any pressure on her to progress it whilst off sick.

274. It cannot be said in our view that the respondent engaged in excessive correspondence with the claimant about the grievance or forced her to answer questions. There was a reasonable amount of correspondence about the grievance, but not an excessive amount. The claimant raised a very lengthy and detailed grievance. Questions were put to her about the grievance, but she was not required to answer them, and they were offered as an alternative to the claimant attending a grievance meeting because the claimant said she was not able to attend a meeting.

275. The claimant alleged that the respondent delayed in dealing with her grievance between 6 and 31 January 2020. This is a period of just 25 days – 3 and a half weeks. By objective standards that is not an excessive amount of time to deal with a grievance and provide a comprehensive outcome. This is particularly so given the number and severity of the allegations raised by the claimant, which needed properly investigating.

276. The grievance hearing took place on 13th January, which was the first available date after the claimant returned to work on 6th that was convenient for the claimant and her trade union representative. The grievance hearing was arranged within a reasonable period. The investigation was then carried out and the claimant was provided with an outcome verbally in a meeting on 28 January 2020 – just 15 days after the grievance meeting. The outcome was then confirmed in writing 3 days later.

277. We have no hesitation in finding that the grievance was concluded promptly and thoroughly, within a reasonable time frame.

278. The claimant also alleged that relevant evidence that she provided during the grievance process was disregarded. She was not clear however as to what evidence she believed had been disregarded. Debbie Wickstead had set out in writing the evidence that she had taken into account, which was considerable. It seemed to us that the real criticism the claimant was making was that Debbie Wickstead had formed a different view on the evidence to the view that the claimant held. There was no evidence before us to suggest that Debbie Wickstead's conclusions were unreasonable or not supported by the evidence. This allegation must therefore fail.

279. The final alleged breach of contract relied upon by the claimant in support of her constructive dismissal claim is the allegation that the respondent victimised the claimant on 24 September 2019 by treating her in an even worse manner after she lodged her grievance by:

a. Continuing to communicate with her whilst she was on sick leave despite her asking them not to; and

b. Telling her in December 2019 that her performance did not compare to her grade, remind her that she was one of the highest paid Grade Ds, and tell her that she was a 'round peg square hole'?

280. We find, on the evidence before us, that these alleged events did not happen. The respondent could not have victimised the claimant on 24 September for raising a grievance, because she did not raise the grievance until the following month. Even if the claimant intended in fact to refer to a later date, we find that she was not victimised for raising a grievance.

281. As we have found above, the communication with the claimant about the grievance was reasonable and when the claimant asked for

no more emails, the respondent began communicating with her by post. Rachel Nolan also agreed with the claimant that they would speak every two weeks. The claimant agreed to that and made no objection at the time.

282. The claimant was off sick throughout December 2019 so Andrew Richman could not have made the alleged comments that month. Mr Richman did use the words 'round peg square hole' during his grievance appeal interview with Paul Spiers, but this took place after the claimant had resigned and he did not make those comments to the claimant.

283. We find that the respondent's actions towards the claimant as set out above, far from being a breach of the implied term of trust and confidence, were reasonable and well thought through. We find that nothing that the respondent did amounted to a breach of the implied term of trust and confidence. All of the respondent's witnesses came across well and Jo Creasy in particular was very fond of the claimant. Andrew Richman also was a credible witness who was able to justify the action that he took.

284. It cannot be said, on the evidence before us, that the respondent's behaviour was calculated or likely to destroy or seriously damage trust and confidence. The respondent was entitled to take steps to manage the claimant's performance and did so in a reasonable manner. Similarly, the respondent was entitled to take steps to investigate the claimant's grievance and did so in a reasonable manner. It cannot be a breach of contract for an employer not to uphold an employee's grievance when the grievance has been thoroughly investigated and the employer's conclusions are backed up by evidence, as was the case here.

285. The claimant was not dismissed within the meaning of section 95r(1)(c) of the Employment Rights Act 1996. Her complaint of constructive unfair dismissal therefore fails and is dismissed.

Discrimination arising from disability (Equality Act 2010 section 15)

286. The claimant makes five allegations of unfavourable treatment by the respondent as part of her complaint under section 15 of the Equality Act 2010.

287. The first is that the respondent treated her unfavourably by beginning an informal performance management review in May 2019. The respondent concedes that this was unfavourable treatment.

288. The second allegation relates to the commencement of a formal performance management review in September 2019. The respondent also concedes that this was unfavourable treatment.

289. The third allegation is that the claimant was not provided with any work objectives / goals for Quarter 4 of the performance year when she returned to work in January 2020. We find that the respondent did provide the claimant with some goals, but that it kept them flexible with

a view to being supportive of her. This was not unfavourable treatment The respondent had a plan in place for the claimant's return to work, and for supporting her. It is, in the experience of the Tribunal, common practice to adjust goals and be more flexible when an employee is returning from long term sickness absence and is often considered to be good management practice.

290. The fourth allegation of unfavourable treatment is that the respondent did not allocate the claimant work on her return from sick leave in January 2020. For the reasons set out above we find that the claimant was allocated work when she returned from sick leave, and that the work allocated was meaningful. This allegation of unfavourable treatment therefore fails.

291. The fifth allegation of unfavourable treatment was that the claimant's access to the IT system was blocked. We find that her access to the IT system was removed, and that this did amount to unfavourable treatment.

292. As a result of our conclusions above, the third and fourth allegations of discrimination arising from disability fail and are dismissed.

293. We have then considered, in relation to the first, second and fifth allegations, whether the following things arose in consequence of the claimant's disability:

a. Brain fog, reduced ability to concentrate and to copy with stress (relied upon in relation to the first and second allegations of unfavourable treatment). We accept that all of these things arose because of the claimant's disability. They are all well recognised symptoms of the menopause and perimenopause and we accept the claimant's evidence that she experienced all of them.

b. The claimant's sickness absence (relied upon in relation to the fifth allegation of unfavourable treatment). There was no medical evidence before us to suggest that the claimant's sickness absence was as a result of her menopausal symptoms. The fit notes that she sent in to her employer stated stress, anxiety and depression as the reasons for absence. The claimant did not link her absence to menopause at the time or indeed during the Tribunal hearing. We therefore find that the claimant's sickness absence did not arise in consequence of her disability.

294. The fifth allegation of discrimination arising from disability therefore fails also because it cannot be said that the claimant's access to the IT system was blocked because of something that arose in consequence of her disability.

295. The remaining allegations of discrimination arising from disability are the first and second allegations, both of which relate to the performance management process that was started by the respondent.

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296. We accept that the claimant's menopausal symptoms could potentially have had an impact on her performance. She was overworking and not focussing on the right things. We accept that hot flushes affected her ability to do presentations. That was just one aspect of her performance, however. Other criticisms of her performance were not linked to the menopause.

Knowledge of disability

297. The evidence before us suggested that the claimant herself made no link between her performance and her menopause until she raised the grievance in October 2019. If the link between performance and menopause wasn't clear to her, how could it have been clear to the respondent? The mere fact that the claimant had made the odd comment to Jo Creasy about brain fog was not in our view sufficient to put the respondent on notice that the claimant's performance issues may have been linked to her menopause. Similarly, when she told Andrew Richman that she was going through the menopause shortly after he became her line manager, she did not suggest that her performance was affected at all by the menopause.

298. The fact that the claimant drank Chinese tea at work and had acupuncture was not enough to alert the respondent to the fact that she was experiencing menopausal symptoms. There are plenty of reasons why someone may drink Chinese tea or have acupuncture, most of which are not related to the menopause or perimenopause. Every woman experiences the menopause differently, some will have very few if any symptoms and others will have severe symptoms which are disabling.

299. Mr Richman and the claimant had a number of discussions about the claimant's performance. At no point during any of those discussions did the claimant suggest that her performance was affected by menopause. She had ample opportunity to raise the issue but did not. There are a number of possible explanations for this. Firstly, that the claimant did not believe that she was underperforming, and therefore did not have to explain her performance. Secondly, that she had not yet made the link herself between her menopausal symptoms and her performance. Thirdly that she chose not to mention the menopause.

300. Whichever of those reasons apply, it cannot be said in our view that the respondent had either actual or constructive knowledge of the claimant's disability until she raised her grievance in October 2019. Whilst we recognise that it is incumbent on an employer to enquire into a possible disability, and neither Ms Creasy nor Mr Richman asked the claimant whether she had any health issues that could be affecting her performance. They should have done so. Failure to enquire about a potential disability is not however in itself sufficient to give the respondent constructive knowledge of the claimant's disability.

301. We find that, even if the respondent had asked the claimant whether she had any underlying health issues that could be affecting her performance, or had referred her to occupational health, that would

not have resulted in the respondent having knowledge either that the claimant had a disability, or that the disability placed her at a substantial disadvantage. The claimant is, to her credit, a very proud person. She did not want to accept that there were issues with her performance or disclose that she believed they could be menopause related – even if she did hold that belief prior to October 2019. If she had been asked therefore, we find that she would not have said her performance was affected by menopause, with the exception of her presentation skills being affected by hot flushes. It is possible that she would not have agreed to an occupational health assessment, given that she declined a referral when one was offered during her sickness absence.

302. The medical evidence before us contained very little reference to menopause. It is therefore likely in our view that had specific questions been asked of the claimant or of occupational health about the impact of the menopause or peri-menopause, prior to October 2019, the claimant would not have disclosed sufficient information to give the respondent actual or constructive knowledge that she was disabled by reason of menopausal symptoms.

303. In light of our findings on the question of knowledge, the remaining complaints under section 15 of the Equality Act 2010 must fail.

304. We have however also considered, in the alternative, whether the respondent has successfully made out the 'justification' defence in relation to the first and second allegations of discrimination arising from disability. To put it another way, was the treatment a proportionate means of achieving a legitimate aim?

305. The respondent says that the aims it was pursuing when managing the claimant's performance, both formally and informally, were ensuring that the team were able to meet their goals, client deliverables and service levels, and improvement of the claimant's performance.

306. We have no hesitation in finding that these aims were legitimate. It is entirely reasonable for an employer to want to have a team which is performing well, and to help individual members of the team whose performance is not where it should be, to improve their performance.

307. We have then gone on to consider whether the treatment of the claimant as set out in the first and second allegations of discrimination arising from disability was an appropriate and reasonably necessary way to achieve the respondent's aims. This involves considering whether something less discriminatory could have been done instead, and how the needs of the claimant and the respondent should be balanced.

308. Both the informal and formal performance management processes were in our view reasonably necessary. Before starting the processes both Jo Creasy and Andrew Richman took steps to try and help the claimant to improve her performance. Jo Creasy made a number of suggestions to the claimant in the detailed email that she sent her, and

also supported the claimant to change her working hours. The claimant was given detailed feedback on her performance, and what she needed to focus on, and this did not work. As a result, it was necessary to move to the informal and then the formal performance management processes.

309. It is difficult to see how the respondent could have done it differently or in a 'less discriminatory' manner. The claimant was not given any formal warnings about her performance, the process was very gradual. It was designed to support her and give her time to improve. The respondent put the process on hold when she became unwell and did not resume it when she returned to work.

310. We therefore find that the formal and informal performance management reviews and processes were a proportionate means of achieving the respondent's legitimate aims.

311. The claim for discrimination arising from disability therefore fails and is dismissed.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

312. In light of our findings above that the respondent did not have knowledge of the claimant's disability until she raised her grievance in October 2019, the allegations that the respondent failed to make reasonable adjustments prior to that date fail.

313. We have nonetheless considered whether the respondent did apply the PCPs relied upon by the claimant.

314. The first PCP relied upon was requiring the claimant to engage in the grievance and appeal process whilst she was signed off sick. It is abundantly clear from the evidence before us that the respondent did not apply that PCP. The grievance process was put on hold whilst the claimant was off sick at her request, and the grievance meeting did not take place until one week after she returned to work. The appeal process took place after the claimant had resigned and not whilst she was off sick.

315. The second PCP relied upon by the claimant was 'requiring' her to meet the usual performance management standards. It is not clear what the claimant is referring to by 'usual' performance standards, but it is accepted that the respondent did expect the claimant to meet a standard of performance and required the claimant to improve her performance. We therefore accept on balance that the respondent did apply this PCP – but only before it had knowledge of the claimant's disability and that the claimant considered her disability to be having an impact on some aspects of her performance.

316. The third PCP identified by the claimant was requiring the claimant to meet objectives and deal with an increased workload within deadlines. There was no evidence before us of the claimant being required to deal with an increased workload. To the contrary, business as usual work was taken off her, and she was provided with

additional support and a mentor. Rather than the respondent increasing her workload, she was responsible for her own workload and at times increased that workload by doing things which she had been told not to do, such as training others. We accept that the claimant was expected to meet deadlines – there is nothing unusual about that. There were however occasions, such as in relation to the ESP Project, when she did not meet those deadlines.

317. On balance we find that the respondent did not apply this PCP and, in the alternative, that if it did apply it, it was before the respondent had knowledge of the claimant's disability.

318. The fourth PCP was identified by the claimant as being a requirement to engage in prolonged informal performance management process followed by a formal process of performance management straight after. The informal performance management process was not, in our view, prolonged. It began in May 2019, and nothing happened between the end of July and the start of September because Andrew Richman was away.

319. It is best practice, for an employer, when undertaking either a formal or an informal performance management process, to give the employee time to improve. The respondent did just that, and the length of the performance improvement period was, in our view, reasonable. The formal process only started in late September just before the claimant went off sick and was then put on hold.

320. We therefore find that the respondent did not apply the fourth PCP and, in the alternative, that the fourth PCP relates to the period before the respondent knew that the claimant was disabled.

321. The fifth PCP relied upon by the claimant is an alleged requirement to be in the office throughout the grievance process and to have contact with witnesses during the course of the grievance. The first part of the alleged PCP is directly contradictory to one of the allegations made by the claimant in her discrimination arising from disability claim – namely that she was required to go through the grievance process whilst off sick.

322. We find that the grievance process did take place whilst the claimant was at work, but that this was with the agreement of the claimant and was not something imposed upon her by the respondent. In addition, it was an individual arrangement made for the claimant, rather than a wider PCP applied generally by the respondent.

323. The respondent changed the claimant's reporting structure before she came back to work so she did not have to report to Andrew Richman or Jo Creasy. She could limit her contact with those two individuals as much as she wanted and could also work from home to suit her. On one occasion she chose to travel to Nottingham with Mr Richman – this was her choice and not imposed upon her.

324. For these reasons we find that the respondent did not apply the fifth PCP.

325. The claimant also relies upon a sixth PCP of refusing to allow employees to make their own recordings of meetings. The respondent admits that it applied that PCP. The application of that PCP also took place at a time when the respondent had knowledge of the claimant's disability.

326. We have then gone on to consider whether the sixth PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability. The disadvantage relied upon by the claimant is that as a result of her menopausal symptoms, including anxiety, forgetfulness, and difficulty concentrating, she found it particularly difficult to recall questions or recall where follow up action was required without access to a verbatim recording.

327. That was, however, not the reason given by the claimant for wanting to record the meeting at the time. Rather, when asked why she wanted to record the meeting, she said that her trade union had advised her to ask for a recording, so that it could be shared. We find that the reason given by the claimant at the time was the true reason why she wanted to record the meeting, namely that the union advised her to ask for a recording so that it could be shared. That was the contemporaneous evidence, and not given with hindsight with a view to supporting a claim in the Employment Tribunal.

328. We therefore find that the sixth PCP did not place the claimant at a substantial disadvantage compared to someone without the claimant's disability. There was no evidence before us to suggest that not being able to share a recording placed the claimant at a substantial disadvantage when compared with someone who did not have the claimant's disability.

329. The claim for failure to make reasonable adjustments therefore fails and is dismissed.

330. Although not strictly speaking necessary in light of our findings above, we have nonetheless reached the following conclusions in the alternative in relation to the reasonable adjustments claim:

a. The claimant was not unable to meet the usual performance standards because of the effects of her menopausal symptoms. We accept that her ability to give presentations was affected by hot flushes, but that was only a small part of her role. It is only with hindsight that the claimant has made the link between her underperformance and menopausal symptoms.

b. The evidence before us suggested that the problems with her performance preceded the onset of the menopause and perimenopause. They date back originally to when she was first employed by the respondent and received a 2 rating.

c. There was no evidence before us to suggest that the claimant's disability made her particularly vulnerable to feelings of stress and anxiety caused by interactions with those that she had

complained about in her grievance. The respondent tried to make it easier for her by changing her reporting structure. She could have worked from home to limit contact. It is common for people who raise grievances to find it difficult to work with those they have complained about, and is not specific or linked linked to the menopause.

d. The respondent did not know nor could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantages she alleges, in light of our findings above about knowledge.

e. A number of adjustments were made for the claimant. These included:

    i. Putting the grievance process on hold until the claimant felt well enough to engage.

    ii. Setting manageable objectives. On one occasion Jo Creasy told the claimant to reduce the number of objectives she had set for herself. There was no evidence before us as to why and how the claimant thought the objectives were not manageable. On the contrary her evidence was that she had achieved them all.

    iii. Providing meaningful support by giving timely and constructive feedback with specific examples and suggestions to improve performance.

    iv. Offering to refer her to occupational health. The claimant chose not to go.

    v. Agreeing to condense her hours, and allowing her flexibility to work from home and set her start and finish times to suit herself.

<u>Harassment related to disability and/or age and/or sex (Equality Act 2010 section 26)</u>

<u>331.</u> We have considered first whether the respondent did subject the claimant to the unfavourable treatment alleged as part of the harassment claim. There were eight allegations of unfavourable treatment made by the claimant.

<u>332.</u> The first allegation was that the respondent failed to provide the claimant with positive feedback or recognition from line managers relating to her successes and did not relay positive feedback when it was shared with them, focusing on negative feedback instead, between October 2018 and January 2020? We find that the respondent did not subject the claimant to this unfavourable treatment. The respondent did give the claimant positive feedback as well as negative feedback. The claimant has chosen in support of this

part of her claim to focus on the negative feedback, but the feedback was in our view balanced and fair.

333. The second allegation is that the claimant was subject to an unfair performance review and a rating of 2 (inconsistent performer) without examples or objectives in May 2019. We find that the claimant was subject to a performance review and a rating of 2 but that this was not unfair. Mr Richman's rating of the claimant was justified based upon his genuine view of her performance and was supported by colleagues involved in the moderation process. This allegation of unfavourable treatment therefore also fails.

334. The third allegation is that the respondent told the claimant that she would be placed on a formal performance plan in July 2019, despite being 'in a good place' and meeting Q2 dominant goals. We find that the respondent told the claimant in September 2019, and not in July, that she would be placed on a formal performance plan. We accept that this is capable of amounting to unfavourable treatment.

335. The fourth allegation is that the respondent implemented a new office seating plan in September 2019, leaving the claimant alone on a separate unconnected desk. We find that the respondent did implement a new office seating plan, but that this did not amount to unfavourable treatment. The claimant was given the opportunity to move seats / desks but chose not to. Instead, she preferred to remain at her desk. It is difficult to see how the new seating plan amounted to unfavourable treatment given that the claimant chose to remain at her desk when given the option to move.

336. The fifth allegation is that the respondent sent abrupt messages to the claimant in September 2019 whilst she was on sick leave, requiring her to attend weekly check ins. We find that this did not happen. The claimant was initially asked to do weekly check-ins, but once she said that she found these stressful, they were reduced in mid October to fortnightly. She agreed to this. We find that Mr Richman's communication with the claimant was at all times professional and appropriate. There was no evidence before us to support the claimant's assertion that abrupt messages were left.

337. The sixth allegation is that Mr Richman, on 18 September 2019 make a comment that 'Jo will pick that apart' just before the claimant was about to deliver a presentation. We find that Mr Richman did make that comment but that it was not unfavourable treatment. Rather Mr Richman was giving the claimant feedback during a dry run of the presentation, to help her improve.

338. The seventh allegation is that between October and September 2019 the respondent effectively demoted the claimant by reallocating her projects to junior / more inexperienced members of staff without any consultation, justification or explanation. We find that did not happen. The claimant remained working on meaningful projects and was not demoted. Some of her business as usual work was allocated to colleagues, but this was to help her out after she told Jo Creasy

she was struggling to manage her workload, and did not amount to unfavourable treatment.

339. The final allegation of unfavourable treatment is that in January 2020 the respondent failed to allocate meaningful work to the claimant on her return to work following sick leave, whilst assigning core objectives to the rest of the team. For the reasons set out above, we find that this did not happen, and that the claimant was allocated meaningful work on her return from sickness absence.

340. We also find, on the evidence before us, that none of the unfavourable treatment alleged by the claimant related to sex, age or disability. There were good business reasons for all of the treatment, and the claimant has not discharged the burden of showing that there was some link between the treatment and the protected characteristics relied upon. Even the claimant could not articulate how the behaviour complained of related to sex, age or disability.

341. We accept that the respondent's managers were motivated by wanting to help the claimant to improve her performance. They liked and respected her and it cannot be said that the purpose of their behaviour was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

342. We also find that it was not reasonable for the conduct complained of to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We accept Ms Firth's submission that the claimant was hypersensitive and reacted badly to any negative comments about her performance.

343. The claim for harassment therefore fails and is dismissed.

Victimisation (Equality Act 2010 section 27)

344. The respondent admits that the claimant did a protected act when she raised a grievance on 14 October 2019. We have therefore considered whether the respondent subjected the claimant to detriment because she did a protected act. The claimant makes nine allegations of detriment and we set out below our conclusions on each of those allegations.

345. The first allegation is that the respondent subjected the claimant to detriment by continuing to communicate with her in October 2019 when she was on sick leave, despite the claimant advising that the volume of communication was exacerbating her stress. We find that the respondent did continue to communicate with the claimant, but adjusted the communication style as she asked. It moved to fortnightly catch up meetings with Rachel Nolan and other correspondence was by letter rather than email. This was not, in our view, a detriment.

346. The second allegation is that the respondent subjected the claimant to detriment by devaluing her in December 2019 by stating that her performance did not compare to her grade, reminding her that she was one of the highest paid Grade Ds, suggesting that she was a 'round peg square hole' and that her line manager was required to spend more time managing her than other colleagues. We find that no comment was made to that effect by Mr Richman, except in the grievance appeal meeting to Mr Spiers. This allegation also fails.

347. The third allegation is that in January 2020 the respondent failed to agree an allocation of team objectives despite the claimant being invited to a meeting in Nottingham to allocate objectives, and despite all other team members being allocated objectives despite being unqualified and inexperienced. We accept that the claimant was given flexible objectives and that she found these to be vague. We find that this was done to help her.

348. The fourth allegation is that the respondent failed to allocate the claimant meaningful work upon her return from sick leave on 6 January 2020, thereby further excluding her. For the reasons already set out above, we find that the claimant was allocated meaningful work on her return from sick leave. She was not excluded.

349. The fifth allegation is that the respondent failed to prepare for the claimant's return from sickness. For the reasons already set out above, we find that the claimant did prepare for the claimant's return from sickness absence. It put in place a plan of work and changed her line manager. It took steps to reinstate her IT access.

350. The sixth allegation is that the respondent gave the impression through its treatment of the claimant that it did not want her to return to work, and discouraged her from believing that she had a future as an employee. This allegation is not upheld. Neither Ms Creasy nor Mr Richman wanted the claimant to leave. They liked and valued her. They wanted her back and performing well and her job still exists.

351. The seventh allegation is that on 6 January 2020 the respondent blocked the claimant's access to all levels of its IT system upon her return from sick leave, in breach of the respondent's discipline and appeal policy, resulting in the claimant being without access to critical IT resources and support for weeks. We have already made findings on this issue, namely that the claimant's IT access was blocked whilst she was off sick in line with the respondent's normal policy – to protect customer and company data. It was not blocked on 6 January 2020.

352. The eighth allegation is that from 31 January 2020 the respondent delayed in responding to a data subject access request, failed to deliver to the specifications within the request, and unjustifiably redacted documents and sent duplicate copies. Having heard the evidence of Mr Brady on this issue, we are satisfied that the respondent did not unreasonably delay in responding to the claimant's data subject access request. The claimant made a very wide request which initially identified millions of documents. The claimant was asked to narrow her search but refused to do so.

353. Considerable steps were taken to respond to the claimant's subject access request. There was no evidence before us to suggest that the respondent unjustifiably redacted documents – it is common practice when responding to subject access requests for employers to redact personal data relating to other individuals or information which is commercially sensitive.

354. This allegation therefore fails.

355. The final allegation of victimisation is that the respondent delayed in responding to the grievance appeal and required unnecessary and excessive paperwork before dealing with the appeal between 31 January 2020 and 21 April 2020.

356. We find that there was some delay in concluding the grievance appeal, but that this was due to the number of issues raised by the claimant in the appeal, and the impact of Covid on Paul Spiers' workload. The appeal investigation was thorough, and given that the country had just gone into national lockdown, the timescales for concluding the grievance appeal were in our view reasonable.

357. We also find that the claimant has not discharged the burden of proving that any of the alleged detriments were because the claimant did a protected act. The respondent has provided alternative explanations for each of them, which we accept.

358. The victimisation claim therefore fails and is dismissed.

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Time limits

359. In light of our findings above, it has not been necessary for us to make any findings on the question of time limits.

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Employment Judge Ayre

1 February 2023

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JUDGMENT SENT TO THE PARTIES ON

2 February 2023