EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms I J Ayo	**v**	**Resuscitation Council (UK) Ltd**

Heard at: London Central (in public; by video)

On: 25, 26, 27, 30 September & 1 October 2024

Before: Employment Judge **P Klimov**
Tribunal Member **D Kendall**
Tribunal Member **Dr V Weerasinghe**

Appearances:

For the claimant: **in person**

For the respondent: **Mr R Hignett of counsel**

JUDGMENT with reasons having been announced to the parties orally at the end of the hearing on 1 October 2024 and written reasons having been requested by both parties on 11 October 2024, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claim

1. By a claim form dated 9 November 2023, the claimant brought complaints of

   (i) Direct disability discrimination (s.13 Equality Act 2010 ("**EqA**")),
   (ii) Direct race discrimination (s.13 EqA),
   (iii) Discrimination arising from disability (s.15 EqA),
   (iv) Failure to make reasonable adjustments (s.20, 21 EqA),
   (v) Harassment related to race (s. 26 EqA), and
   (vi) Victimisation (s. 27 EqA).

2. The respondent resists all the complaints.

3. At the start of the hearing, the claimant withdrew the following allegations of direct disability discrimination:

   3.2.1 Subjecting the Claimant to a disciplinary process on the 22nd June 2023;
   3.2.2 Investigate the Claimant's complaints that she had made about the 22nd June 2023 meeting as a grievance, without first notifying her that that is what they were intending to do.
   3.2.3 Not give her advance notice that the meeting on the 14th July 2023 would be a grievance meeting
   3.2.4 Cause her believe that the grievance being investigated was a grievance against her.
   3.2.5 When the grievance report was provided to the Claimant on the 28th July 2023, they did not provide the full report.
   3.2.6 Not give the full report until the 14th August 2023, which was outside the normal time limit the Claimant had to submit an appeal against the outcome (10 days).
   3.2.8 Communicate with the Claimant whilst she was off sick excessively and in a threatening way.

4. The Tribunal dismiss that part of her claim upon withdrawal. The remaining allegations progressed to be considered on the merits. It was agreed that the Tribunal would deal with liability issues only, and any remedy issues (if arise) would be dealt with at a separate remedy hearing.

5. As noted above, the claimant issued her claim on 9 November 2023. The claim came for a case management preliminary hearing on 12 February 2024 before Employment Judge Singh. EJ Singh allowed the claimant's application to amend the original claim to add complaints of failure to make reasonable adjustments and discrimination arising from disability. All allegations related to all the complaints were set out in the agreed list of issues, recorded in the case management orders of EJ Singh (pp. 50 – 56 of the hearing bundle). The respondent was given leave to amend its response to answer added complaints and allegations. The respondent submitted an amended response on 19 April 2024. No further application to amend was presented by the claimant before or at this hearing. Therefore, although the parties remain in employment relationship and there were further developments giving rise to more disputes and hence potentially new/additional liability issues, for the purposes of this claim, the Tribunal may only determine the liability issues based on the state of affairs as of 12 February 2024, and not any subsequent developments.

The hearing and evidence

6. The hearing was conducted remotely by video (CVP). That format of the hearing was agreed at the case management hearing on 12 February 2024.

The claimant represented herself at the hearing. Mr Hignett, of counsel, appeared for the respondent.

7. The parties presented in evidence documents contained in a bundle of documents of 631 electronic pages. In this judgment all references in the format (**p.xx**) are to the respective page numbers printed in the right bottom corner of the relevant document, which do not match the PDF bundle electronic page numbering, due to the numbering convention ordered by EJ Singh not being observed in preparing the hearing bundle. In addition to the pleadings and case management orders, the Tribunal read only the documents referred to by the parties in their evidence and submissions.

8. The claimant gave oral evidence under oath and was cross-examined. The claimant also presented a statement by Michael Appleton, a Psychotherapist at Grenfell Health and Wellbeing Service. However, the claimant did not call Mr Appleton to give evidence under oath. The Tribunal read Mr Appleton's witness statement but decided not to give it any weight. In any event, it contained no useful evidence to establish the relevant facts on the liability issues. It might be relevant to remedy issues. The claimant also presented a witness statement by her friend, Ms Risha Patel. Mr Hignett said that he did not wish to cross-examine Ms Patel on her statement. Her statement was taken as read.

9. There were 4 witnesses for the respondent:
   (i) Ms Carrie Gaston ("**CG**"), Director of Governance and Assurance, the claimant's second line manager and LW's direct line manager.
   (ii) Dr James Cant ("**JC**"), Chief Executive Officer of the respondent.
   (iii) Professor Andrew Lockey ("**AL**"), Chair of the Board of Trustees of the respondent, and
   (iv) Mr Luke Williams ("**LW**"), Business Support Manager and the claimant's direct line manager.

10. All four witnesses gave their oral evidence under oath and were cross-examined by the claimant.

11. On day 2 of the hearing at around 15:30, the claimant became visibly unwell. I offered her to take a 15-minute break and email the Tribunal if she needed more time. The claimant agreed. While getting up from the chair the claimant shrieked and collapsed. I asked the clerk to call the claimant and if she did not answer, to notify the emergency services, which she did.

12. At 15:42, the claimant emailed the Tribunal, saying that she would not be able to continue with the hearing on that day. I adjourned the hearing until 10am on the following day and asked the clerk to email the claimant with that information and to tell the claimant to write to the Tribunal and the respondent by 9:30am if she felt she would not be able to continue with the hearing, giving reasons. The claimant emailed the Tribunal to say that she would be attending the hearing. The claimant joined the hearing at 10am and was able to continue until the end of the hearing with no further incidents occurring.

The Facts

13. Having considered the totality of the evidence before us, the Tribunal made the following findings of fact, pertinent to the issues in the claim:

Organisation and the claimant's role

14. The respondent is a charitable incorporated organisation. Its aims are to provide resuscitation training and guidance to healthcare professionals and to raise awareness of, and to educate people about, cardiopulmonary resuscitation and defibrillator use.

15. The claimant joined the respondent on 11 September 2003. As at the date of the hearing she remains in the respondent's employment, albeit being absent from work due to sickness since 2 October 2023. Her job title is Advanced Life Support ("**ALS**") Course Coordinator. The claimant's role involves providing administrative and customer service support for the ALS courses for doctors, nurses, paramedics and other healthcare professionals.

16. The claimant has a history of anxiety and depression. The respondent accepts that the claimant is a disabled person (withing the meaning of the EqA) by reason of depression from June 2013 to present and by reason of anxiety from 2016 to present.

17. In early 2023, the respondent reorganised its business structure, creating a new directorate of three support functions, including Customer Business Support, to which the claimant and other ALS Course Coordinators were assigned. Prior to that, ALS Course Coordinators sat in the Clinical Team, even though their work was principally administrative rather than clinical in nature.

18. On 1 March 2023, LW joined the respondent as the head of the Customer Business Support team. He became the claimant's direct line manager.

19. In April 2023, CG joined the respondent to fill in a newly created role of Head of Quality Assurance & Information Governance, with the general oversight of three teams: Quality and Compliance, Customer Business Support, and HR. She became the direct line manager of LW.

20. The claimant largely worked from home. The method of communication between her and LW was predominately Teams messages and email.

Claimant raising two issues

21. On 5 June 2023 at 5:44pm, the claimant received an email notification that her annual leave was approved. The claimant did not request annual leave on those dates. The claimant emailed LW about that. In her email the claimant said she was "*concerned as to how this could happen, and would*

like an explanation." She asked LW to "*Please update your records accordingly and confirm when this has been rectified*".

22. LW replied, at 9:41am the following morning:

> *"There were several requests that were auto authorised. They were selected and authorised from those that had requested them.*
>
> *I'm aware you were not off, and they have been removed."*

23. The claimant wrote back a few minutes later asking LW to advise her "*who manages/administers the peoplehr system.*"

24. LW replied by return, explaining to the claimant that he manages holiday requests from his team in the proplehr system and that the claimant's request had been in his authorisation queue, which meant that it must have been generated at some point in the past. He said that he would speak to HR to see if there were any technical issues with the system. He suggested that if the claimant wanted to request annual leave, she could just message/email him.

25. Two hours later the claimant sent another email about this issue. This time she copied CG, CG's manager, the head of Business Standards, and the head of HR. In that email the claimant retold her email exchange with LW of that day and said:

> You returned to me today advising the following "There were several requests that were auto authorised. They were selected and authorised from those that had requested them".
>
> I have major concerns. Are you now stating that the system randomly puts staff on annual leave even though they have not requested it. Does this also mean staff will randomly be put on sick leave, unpaid leave, any other absence without their prior knowledge.
> Please note that I did not request for any leave on the 26 May and 30 May 2023. In your email today you have informed me that "I'm aware you were not off". Despite this, you still authorised the leave on the 5 June 2023 for the 30 May 2023, leave which I did not request. I also noted that I have holiday booked on the 26 May 2023, of which I did not request nor did I receive any notification (I happen to come across this date while reviewing the system).
> I have copied in Adam Benson-Clarke, Carrie Gaston, Vicky Simm, Harmander Mangtani as you have confirmed that the system "auto authorised" even though I did not request this leave. This is an issue which will not only affect me but all staff at RCUK.
> Once again, I confirm that I did not request for any time off as annual leave for the 26 May and the 30 May 2023.
> Please can you provide me with a list of any leave on my record from January 2023 to date in order that I can check and ensure that there is no further discrepancies or erroneous entries of leave.
>
> Kind regards
> Jessica

26. Following receiving that email, LW spoke to the claimant via Teams and explained that in future she needed to speak to him and allow him to resolve the matter before escalating it to senior management. LW then tried to track down how the requested for annual leave had been generated in the system but was advised that it was not possible, because the request was no longer in the system.

27. Not long after that, on 20 June 2023, the claimant raised another concern that she had been omitted from an email distribution group that LW had set up. She sent an email to LW and CG about that. They both looked into it and replied to her that it was not the case. CG included a screenshot to illustrate that the claimant's email was included in the group. LW told the claimant that

it was “no biggie” and that he would check with external IT team, who later confirmed that the claimant was included in the group. The issue arose from the claimant not checking the group email box, to which she had access, and emails sent to the group email box not automatically appearing in the claimant’s and other group members individual email boxes.

28. That did not satisfy the claimant, and on 21 June 2023 she wrote:

From: Jessica Ayo <Jessica.Ayo@resus.org.uk>
Sent: 21 June 2023 10:00
To: Luke Williams; Carrie Gaston
Subject: Re: Team Meeting

Dear Luke,

I didn't receive any emails hence why I am querying it. I was informed about the email through my ALS colleagues.

Also, what does "no biggie" mean as I am not familiar with this terminology.

You can also see that the email was cc'd to all the other Coordinators, but my name was omitted from the list. As already mentioned in a previous email to Carrie, none of the Coordinators were aware of "coordinators@resus.org.uk" inbox.

I am getting concerned as there seems to be a recurring theme when it comes to me, i.e. errors with annual leave (please note I am yet to receive a response about this).

Thank you
Jessica

Meeting between the claimant and CG on 22 June 2023

29. On 22 June 2023, CG met the claimant for their first introduction meeting. The meeting was via Teams. CG wanted to meet each member of the LW’s team in person, but the claimant did not respond to her prior request for an in-person meeting. CG therefore organised a virtual meeting with the claimant via Teams.

30. The meeting was an informal discussion about several work-related matters to enable CG to understand better the claimant and her work challenges and priorities. At the meeting the claimant raised the issues of the incorrect holiday booking and her not being included in the ALS Course Coordinators email group. The claimant said that both issues had not been resolved to her satisfaction. CG tried to explain that the holiday booking approval request could not have been generated without the claimant first entering it in the HR system and confirmed again that the claimant was a member of the ALS Course Coordinators email group and showed the claimant a screen shot to demonstrate that. The claimant remained dissatisfied with these explanations.

31. CG then gave the claimant her feedback on the claimant’s style of communication about these two issues. CG said that the claimant could have raised these issues in a better way, and that the tone of her emails on these two issues appeared “*accusatory*” and “*aggressive*”. The claimant became visibly upset and went quiet. CG asked the claimant if there was anything

going on at work or at home that she wanted to share with her, at which point the claimant terminated the video call without saying anything.

32. CG was shocked by the abrupt ending of the meeting. She spoke with JC and the head of HR. CG drafted an email to the claimant, which she reviewed with the head of HR, in which email she set out her record of the meeting and offered the claimant the opportunity to continue the conversation, but making it clear that this was the claimant's decision. CG also said that the claimant could access support from LW, as her line manager, and if necessary, through the respondent's employee assistance programme. CG pointed out that whilst she understood that some of the things she had raised on the call might have been difficult for the claimant to talk about, it was not acceptable to abruptly terminate the call in the way the claimant did. She asked the claimant to refrain from doing that in future. CG sent her email to the claimant on 26 June 2023, at 16:46.

33. An hour later, the claimant sent an email to JC in which she provided her summary of the meeting with CG. In her email the claimant wrote:

> Regarding emails, I informed Carrie Garson that I felt excluded from important communications. The BSM manager informed me that TFS were investigating this matter. Additionally, I questioned the manner in which the BSM manager had spoken to me.
>
> To my surprise, Carrie Garson accused me of being disrespectful, aggressive, and accusatory to the BSM manager. I was taken aback as I had no knowledge that this meeting was meant to be an appraisal of my behaviour in nature. I believed I was right to raise legitimate concerns, but Carrie Garson insisted that my tone was aggressive and launched into what I perceived as a personal attack. This comment greatly upset me, and I requested that Carrie Garson suggest an alternative way for me to raise my concerns. She outlined the process I should have followed, which happened to be the same process I had actually already followed. She then stated that I seemed angry and aggressive, asking *'if something was going on at home'*.
>
> It is important to note that this meeting was intended to be an introductory meeting, and I had only briefly met Carrie Garson before. I felt insulted and humiliated by her judgment of my character - but most importantly, suggesting I had some personal issues impacting my professional work.
>
> I believe my concerns were legitimate, as the HR system's errors could negatively impact my leave record, and being excluded from emails may result in me missing vital information for my work. This should be a concern for the whole organisation.
>
> I am perplexed as to why I was not informed beforehand about the nature of the meeting and given the opportunity to have representation present. Being labeled as aggressive and angry makes me feel stereotyped and profiled.
>
> I would greatly appreciate any advice or guidance you can offer in this situation.
>
> Kind Regards

34. JC replied on 27 June at 10am:

Good morning Jessica

I am aware of your meeting with Carrie (whose family name is 'Gaston' btw) as she had updated me on it given the concerns she had about it and your behaviours during the call, which culminated in you hanging up on her without explanation, then or since.

Your account below does not accord with Carrie's account of the meeting, or the emails exchanged between you, Luke and Carrie in the run up to it.

The best way to move forward is for you to engage with your line manager to establish effective ways of working that accord with RCUK values of respect for all colleagues in verbal and written communications.

The appropriate course of action is for me to respect your line management structure. As such, your line manager will pick up these issues as part of your regular 121s.

Regards

JC

Claimant raising complaint with LW

35. The claimant met with LW via Teams later that day. The meeting focussed on the claimant's day-to-day work. The holiday booking issue was discussed again. LW asked the claimant about the issues she had raised with JC about the meeting with CG and whether she was okay. The claimant said that she felt as though CG's comments had been "*a racial attack*" and told LW that she would be taking her complaint "*to the highest possible level*". The claimant said that she had consulted external counsel. LW relayed that conversation in a note to JC and HR.

36. On 28 June 2023, LW emailed the claimant directing the claimant to the respondent's grievance procedure, if she wanted to raise a formal grievance, and explaining that she could discuss her concerns informally with LW, or HR, if she preferred. LW offered the claimant to speak by phone, on Teams, or in person. He also made her aware of the respondent's Personal Harassment Policy and Procedure, if the matter related to personal harassment. He reminded the claimant that the confidential employee assistance programme was available 24/7, if she needed it, and asked her to confirm how she wanted to proceed.

37. On 3 July 2023, the claimant replied saying that CG made serious allegations about her "*including claiming that my "tone is accusatory and aggressive" towards you "Luke", and other "colleagues*" and asking for evidence of complaints against the claimant by "colleagues".

38. Having received that email, LW discussed the matter with CG. They agreed that because the allegations was being made against CG it would be appropriate for it to be escalated to JC and for him to decide how to deal with this matter.

39. On 4 July 2023, LW emailed JC about that. JC responded on the following day, stating that he was engaging the respondent's external HR advisers, Peninsula, to investigate the matter.

Investigation and outcome

40. On 5 July 2023, JC emailed the claimant about the investigation. JC said:

> "*I am aware that you have made a series of complaints about your line manager, Luke Williams, and your director, Carrie Gaston.*
>
> *Given the serious nature of the allegations made against Carrie Gaston, I have decided to initiate a formal investigation. I have contacted Peninsula, and will ask them to carry it out on my behalf. This will allow the case to be given the undivided attention that it requires, and the benefit of an external perspective*."

41. The claimant replied on 6 July, confirming receipt of the email and thanking JC for contacting her. JC then contacted Peninsula to organise the investigation.

42. Having received advice from Peninsula, on 7 July 2023, JC wrote to the claimant, inviting her to an investigation meeting with a Peninsula consultant and explaining the purpose and format of the meeting. The claimant replied, on 10 July, asking for some clarifications, which JC provided later the same day. JC clarified that the process was to investigate the claimant's complaints against CG and that no allegations had been made by CG or anyone else against the claimant. There was a further email exchange between JC and the claimant, eventually resulting in the claimant agreeing to attend the investigation meeting on 14 July.

43. Peninsula appointed one of its consultants, Chris Cox ("**CC**"), to conduct the investigation. CC contacted the claimant to introduce himself and to invite her to the investigation meeting (CC called it a grievance investigation meeting). CC explained that the meeting would be audio-recorded. The claimant objected to the meeting being recorded and refused to attend the meeting on that basis. It was agreed that instead the claimant would provide her evidence in writing, which she did.

44. On 18 July 2023, CC completed his investigation (having spoken with LW and CG and having considered the claimant's written representations and evidence). CC produced a draft report. His findings and recommendations were as follows:

33. CCO does not agree the manner in which LW or CG spoke to JA suggest that she cannot raise legitimate concerns, however, CCO finds that the *manner* in which JA raised this concerns needs addressing.

34. CCO finds that it is a reasonable management request to ask an Employee to correct their behaviour in the way in which they engage with management. CCO has not been provided with any evidence to suggest the manner in which CG raised concerns regarding JA's approach is inappropriate.

35. **Therefore, CCO recommends that this Grievance point is not upheld.**

RECOMMENDATIONS

36. Having given full and thorough consideration to the information presented CCO recommends that this Grievance be dismissed in its entirety, as detailed above.

37. A copy of this report in its entirety should be made available to JA with the appropriate cover letter and report appendices.

38. CCO is satisfied that the minutes produced are an accurate summary of the hearing and refers to these whilst making their findings and recommendations.

39. It is a matter for the employer to decide whether they wish to accept any or all of CCO's recommendations.

40. JA will have the right to appeal the decision that is made and this should be done in line with the existing appeal policy.

Christopher Cox

45. CC also recommended to JC that the claimant was made to apologise "*for the distress she caused by her unprofessional and maybe confrontational behaviour*". JC, having consulted the respondent's external solicitors, decided not to adopt that recommendation. Otherwise, JC agreed with the conclusions and recommendations in the investigation report.

46. Meanwhile, while the investigation was ongoing, the claimant refused to attend one-to-one meetings with LW or CG.

47. On 25 July 2023, JC emailed the claimant, inviting her to a meeting for him to give her the outcome of the investigation and agree on next steps. The claimant replied asking to see the investigation report in advance of the meeting, which JC provided to her on 28 July 2023, together with his decision not to uphold the claimant's grievance and informing the claimant about the right to appeal the decision within 7 days.

48. On 3 August 2023, the claimant emailed JC with a list of eight questions about the investigation process, which JC answered a few hours later.

49. Later that day, JC and the claimant had a virtual meeting via Teams. The claimant surreptitiously recorded the meeting. At the meeting, JC explained to the claimant the outcome of the grievance and that she had the right to appeal his decision not to uphold the grievance. He also said that given that the matter had been investigated and his grievance had not been upheld, the claimant needed to return to normal working practices and stop refusing to attend one-to-one meetings with LW and CG. The claimant replied that the investigation was not over because she had the option of appealing the outcome, and she wanted to think about it.

50. The claimant also asked to see the transcripts of CC's interviews with CG and LW, which were not available, because Peninsula took a long time to produce them and when they were produced, the transcripts contained many mistakes and typos and required significant editing. JC chased Peninsula for corrected transcripts on four occasions and eventually provided the transcripts to the claimant on 14 August 2023.

51. There were other email exchanges between JC and the claimant (between 15 and 17 August 2023), in which the claimant sought further clarifications about the comments made by CG and LW at their interviews with CC, which JC responded to, having spoken with LW and CG first. JC urged the claimant once again to meet with LW and resume normal working communication with him. The claimant refused, saying that she did not feel "*comfortable, nor safe*" meeting with LW.

Appeal

52. On 23 August 2023, the claimant appealed the outcome to AL. Her appeal was presented as a letter of grievance, which the claimant said was her "*official initiation of the grievance process*". Having consulted Peninsula and external solicitors, AL decided that the claimant's letter should be treated as her appeal against JC's decision not to uphold her grievance. On 27 August 2023, AL sent the claimant an email confirming the same and inviting her to an appeal in-person meeting on 14 September 2023 at the respondent's London office. AL asked the claimant to confirm her attendance by 1 September, so that he could arrange his travel plans accordingly (AL is based in West Yorkshire). AL received an automatic reply from the claimant's email account, which said that she was "*currently out of the office*". It did not say that the claimant was on holiday or when she would be returning to the office. There was no suggestion in the claimant's grievance letter of 23 August 2023 that she would be going on holiday in the immediate future.

53. AL asked JC to check if the claimant booked annual leave. JC checked and confirmed that no annual leave was booked by the claimant in the respondent's peoplehr system.

54. On 30 August 2023, the claimant commenced ACAS early conciliation procedure.

55. Having received no reply from the claimant, on 5 September 2023, AL emailed the claimant again, asking her to confirm her attendance of the appeal meeting. AL said that if she had not confirmed that, he would assume that the claimant wished the appeal to be decided on the papers, without a hearing.

56. On 11 September 2023, the claimant replied. She apologised for not responding sooner due to being on annual leave. She thanked AL for his attention to her grievance and said that "*now*" she would continue to address this matter with ACAS, who would be in contact with the respondent.

57. AL emailed the claimant later the same day to clarify whether the claimant's response meant that she no longer wished to continue with her appeal. On 12 September 2023, the claimant sent a lengthy reply, complaining about the investigation process and the decision to treat her grievance letter to AL as appeal. She said that she had lost confidence in the respondent's ability to act impartially, and with that in mind, sought resolution via ACAS. She did not say whether or not she was withdrawing her appeal, and whether or not she would be attending the appeal meeting on 14 September 2023.

58. On 15 September 2023, AL sent the claimant a detailed letter, explaining how the matter arrived at this stage and the purpose of the appeal meeting. He invited the claimant to an appeal meeting, re-scheduled for 20 September 2023. In the same letter, AL set out his understanding of the claimant's grounds of appeal based on the claimant's letter of 23 August 2023. AL said that it was important that the claimant contacted him in advance of the hearing if his understanding on any of those matters was incorrect in any way, or if there was anything else she wished to be considered at the appeal meeting. AL confirmed that the appeal would be by way of a re-hearing of the original grievance, and if having considered the matter, AL decided that a further investigation was required, he would make it to be undertaken. AL requested the claimant to confirm her attendance.

59. On 18 September 2023, the claimant replied, referring AL to her earlier emails about her contacting ACAS, but still not answering the question whether she would be attending the appeal meeting. AL emailed the claimant by return, asking to confirm her attendance, so that he could manage his diary. The claimant replied a few hours later, saying that "*ordinarily, [she] would have welcomed the opportunity to engage with [AL] in an effort to discuss the incident … and hopefully to seek resolution. However, the matter in which this matter has been dealt with to date, and how [she has] been subsequently treated by [the respondent], leads [her] to believe that the best way forward is to engage with [ACAS] for Early Conciliation.*" The claimant still did not say whether she was withdrawing her appeal and whether she would be attending the appeal meeting on 20 September.

60. AL sent the claimant a Teams link for the re-scheduled appeal meeting on 20 September 2023. The claimant was at work on that day (working from home). AL joined the meeting at 1:02pm. The claimant did not join the meeting. AL terminated the meeting 24 seconds later. The meeting was recorded for 11 seconds.

61. AL considered the appeal based on the written evidence before him. AL decided not to uphold the claimant's appeal. Later that day, he sent the claimant a detailed letter with his findings and conclusions. The letter stated that the decision was final.

62. On 21 September 2023, the claimant replied saying that she intended to proceed via ACAS.

Suspension

63. On 26 September 2023, JC wrote to the claimant to let her know that in light of her appeal being determined and the grievance procedure exhausted, he expected her to resume line management meetings with LW and to be willing to work with CG. JC told the claimant that if she continued to refuse to work with them that would constitute a breach of her employment contract. The claimant replied on the same day, refusing to have meetings with LW and CG, "*pending resolution of the incident that took place on the 22 June 2023.*" She reiterated that she wanted resolution to be via ACAS.

64. On 27 September 2023, JC replied, restating the respondent's position that the incident on 22 June 2023 had been resolved by the conclusion of the grievance process and asking the claimant to confirm whether she was refusing to work with her line manager (LW) and her director (CG). The claimant replied by return, stating her view that "*the matter [was] still pending resolution*" and repeating that she sought resolution via ACAS.

65. JC took advice from Peninsula. Peninsula advised JC to invite the claimant to a meeting to talk about how to move things forward and to understand what the claimant wanted by way of a resolution. Peninsula also advised JC to suspend the claimant from work until that meeting, because of the disruption she was causing to the working environment.

66. On 2 October 2023, JC tried to contact the claimant by phone and Teams to communicate his decision, but she did not answer or return his calls. JC then sent the claimant the following email:

Comment | Links | Protect

On Mon, 2 Oct 2023 at 15:02, James Cant <james.cant@resus.org.uk> wrote:

Dear Jessica,

I have tried to make contact you via Teams messaging and calls since the middle of this morning. I have also sent you an email requesting that we speak. I finally put a meeting into your diary for 14:30-15:00 this afternoon. I sat on the call for the entire 30 minutes, hoping that you would join, as I wanted to talk you through this message before sending it. It's disappointing that you have not engaged with me, despite your calendar showing you to be at work and with no meetings or other diary conflicts.

I am contacting you again further to your email of 27/09/23.

You mentioned that you have contacted ACAS in relation to this situation. We have had no contact from ACAS at this time. Could you please share with me you point of contact at ACAS so that I can engage with them as soon as possible.

You have made clear that you will not engage with your line manager or director at this time, despite the conclusion of the independent investigation and the subsequent review by RCUK's President. We are not able to operate to appropriate business standards under these conditions. My personal experience in trying to make contact with you today serves to highlight this issue.

For that reason, I have decided that it would be best for both parties that you be suspended until such a time as a resolution can be found. This action is not something that I have taken lightly but given the circumstances and your refusal to engage with management, or any process, it is a measure that needs to be taken to protect both RCUK and yourself until a resolution can be found.

I would like to be clear that this is not disciplinary action and should not be seen in this way, this is purely a measure to allow a resolution to be found in the most manageable way possible.

Salary payments and other benefits that you presently receive from RCUK will continue at this time.

As your access to RCUK email and other systems will be suspended at this time, I shall communicate via your personal email from this point onwards.

I want to stress that RCUK will continue to treat this matter in the strictest confidence. I would ask that you do the same. Colleagues will be informed on a strict need-to-know basis only that you are not at work. No other information will be shared.

I look forward to a swift resolution of this situation, as I believe it's important that this is achieved for the sake of you and the organisation.

Please do contact me if you would like to discuss this further.

2

Sickness

67. Unbeknown to JC, the claimant called in sick on that day. At 9:25 she sent an email to LW, saying that she was unwell and would not be at work on that day. LW was on annual leave and did not see the claimant's email. The claimant did not inform CG that she was off sick (as was required by the respondent's policy), despite receiving an out of office message from LW's email account.

68. The claimant went to see her GP on 3 October 2023, who signed the claimant as not fit for work due to stress at work, general anxiety, depression and insomnia from 2 October to 1 November 2023. She sent the Fit Note to JC,

who replied wishing the claimant to get well soon and reiterating the need for the claimant to engage with her line management.

69. On 6 October 2023, JC wrote to the claimant asking her how the respondent could support her and enquiring if she would be willing to have a meeting to discuss a way forward.

70. On 10 October 2023, ACAS contacted the respondent to offer conciliation services. JC and CG engaged in that process. It was unsuccessful, and on 11 October 2023, ACAS issued to the claimant an early conciliation certificate.

71. On 18 and 23 October 2023, JC emailed the claimant to check on her and asked if she would allow LW to contact her via JC's email account to do welfare checks during her sick leave. The claimant refused.

72. On 23 October 2023, the claimant sick leave was extended until 30 November, and later again until 20 January 2024.

73. On 25 October 2023, JC sent the claimant a letter, in which he invited the claimant to a formal meeting on 2 November 2023, with him and LW. The letter said that the purpose of the meeting was to discuss: (a) the claimant's sickness absence, return to work and any support the respondent may be able to offer, and (b) matters of concern given the current situation regarding the claimant's employment and to look to seek a resolution. The letter warned the claimant that if no resolution could be found her employment may be terminated for some other substantial reason because of the breakdown in the relationship.

74. On 29 October 2023, the claimant replied, saying that she was still unwell and would not be able to attend the meeting. She made various criticisms of the content of the 25 October letter and of the respondent's handling of her grievance in general. She said that she was seeking advice "*to progress the matter to the next stage"*. She copied her letter to AL and other top executives and trustees of the respondent.

75. On 31 October 2023, JC wrote to the claimant asking for her consent to be referred to Occupation Health ("**OH**"). The claimant responded asking for further information about the OH provider, which JC provided to her.

76. On 1 December 2023, the claimant wrote refusing her consent to be referred to OH, because the OH provider was part of Peninsula Group.

77. On 8 December 2023, CG wrote to the claimant (which letter JC emailed to the claimant). In that letter CG again invited the claimant to reconsider her refusal to attend an OH appointment. CG said that the current situation was untenable and asked the claimant to attend a meeting with her and LW on 13 December 2023 in an attempt to resolve the issues that cause the claimant's absence from work. The letter said that the purpose of the meeting would be "*to:*

    a. *discuss and try to address the source of stress making you too ill to return to work at present*

b. discuss your return to work, and any adjustments or measures we may be able to make to support you

C. discuss our expectations of you as your employer, including our expectations for you to fully engage with your manager and director, with your team, and to fulfil all the obligations we expect of all employees, including conduct at work."

78. The letter also stated that the claimant's pay "*will be reduced to half pay from the 2nd of January, as per the terms of your employment contract"*, if she did not return to work before that date.

79. Th claimant replied on 11 December 2023 to JC, saying that she remained "*deeply affected by the comments made to [her] on the 22 June 2023 by [CG] and further treatment"* by the respondent. She said that she was still unwell and needed time to recuperate. She said that she still felt uncomfortable and unsafe meeting LW and CG because she felt being harassed and bullied by them. She said that she would be visiting her GP in the first week of January and would then update the respondent.

80. The claimant's pay was reduced to 50% on 2 January 2024 and to nil pay in March 2024, pursuant to the terms of the respondent's sickness policy.

81. From March 2024 the claimant engaged with the respondent in the absence management process, including agreeing to attend an OH review. However, these matters fall outside the scope of this claim and the Tribunal does not need to make any factual findings on those matters to determine the liability issues in the claim. As at the date of the hearing, the claimant remained in the respondent's employment on nil pay.

The Law

82. The relevant statutory provisions are found in ss. 4, 6, 9, 13, 15, 20, 21, 26, 27, 39, 123 and 136 of the Equality Act 2010. Judging by the parties' final submission, both sides are well aware of those provisions and the relevant case law. There is no need for me to reproduce them in this judgment.

83. In reaching its decision the Tribunal also directed itself to the well-known case law, interpreting these statutory provisions (including the authorities referred to by the parties in their closing submissions and the authorities the Tribunal drew to the parties' attention), as well as the relevant sections of the Equality and Human Rights Commission's Code of Practice on Employment 2011.

84. Where appropriate, the relevant legal principles will be further articulated in our analysis and conclusions.

Analysis and Conclusions

85. The Tribunal has come to its decision on all the complaints in the claim unanimously.

86. The claimant brings complaints of:

    a. Direct race discrimination
    b. Harassment related to race
    c. Victimisation
    d. Direct disability discrimination
    e. Discrimination arising from disability, and
    f. Failure to make reasonable adjustments

87. There is a substantial overlap between these complaints. That is to say, many allegations are being advanced under multiple heads of claims.

88. At the start of the hearing, the claimant withdrew several allegations of direct disability discrimination, which the Tribunal dismissed upon withdrawal, leaving three allegations of direct disability discrimination, namely:

    3.2.7 Suspension on 2/10/2023,
    3.2.9 Threatening to terminate the claimant's employment on 25/10/23, and
    3.2.10. Applying sick pay policy, instead of suspension policy

89. The suspension allegation is also advanced as a complaint of direct race discrimination, harassment related to race, and victimisation.

90. The threatening to terminate employment is also advanced as harassment related to race, but not as direct race discrimination.

91. Applying sickness policy is also advanced as a complaint of discrimination arising from disability and victimisation (albeit, formulated in a slightly different way – *the Claimant's pay being reduced on 2/01/2023(sic– should read 2024)*).

92. The complaint of harassment related to race is the most expansive one, in terms of the number of allegations, and included all three allegations of direct race discrimination (the meeting on 22 June 2023 with CG, the meeting on 3 August 2023 with JC and, as I have already said, the suspension).

93. Finally, the complaint of victimisation, alleges six detriments:

    8.2.1 On the 5th July 2023, initiating the grievance process to deal with the Claimant's complaints without first discussing it with her.
    8.2.2 The outcome of the grievance on the 18th July 2023.
    8.2.3 The conduct of Dr Cant in the meeting on the 3rd August 2023. In particular his manner and tone.
    8.2.4 The outcome of the appeal on the 20th September 2023.
    8.2.5 Being suspended on the 2nd October 2023.
    8.2.6 The Claimant's pay being reduced on the 2nd January 2023 (sic – should read 2024)

94. All six alleged detriments are also advanced under various other heads of claim.

95. Given this overlap, where possible and appropriate, I shall deal with our findings and conclusions by reference to specific allegations as they apply across various heads of claims. I will address the remaining allegations under each separate head of claim, as I go along. I will deal with the complaints of victimisation, failure to make reasonable adjustments and discrimination arising from disability separately. I will give our findings and conclusions on the out of time point when dealing with the failure to make reasonable adjustments complaint, as it is only relevant to that complaint.

96. In coming to our conclusions, we have considered all the parties' submissions, including additional written submissions, received after the oral submissions.

Meeting on 22 June 2023

97. I shall start with our factual findings and conclusions with respect to the 22 June 2023 meeting. The claimant alleges that at that meeting CG:

    a. accused the claimant "*of being angry and aggressive*" (harassment related to race) and
    b. called the Claimant "*accusatory", "aggressive" "angry*" and said to have "*used inappropriate challenge*" and "*had a very formal tone*", thus treating her less favourably than a hypothetical white employee because of the claimant's race (direct race discrimination complaint).

98. Our factual finding is that CG did not accuse the claimant of being angry and aggressive or called the claimant *"accusatory", "aggressive" "angry"*. We find that CG told the claimant that the tone of her emails to LW about the holiday booking issue and the group mailbox were "*accusatory*" and "*aggressive*" and that it would be better if the same messages were conveyed using different words.

99. We accept the CG's evidence on that point. To the extent they conflict with the claimant's evidence on this issue, we prefer CG's evidence for the following reasons.

100. In cross-examination, the claimant said that the meeting was in two parts, and it is after the discussion about the work-related issues (including about the holiday booking and group email issues) had ended, (that is, part 1 of the meeting), only then (in what the claimant called part 2 of the meeting) CG accused the claimant of being accusatory and aggressive.

101. This, however, does not tally with the claimant's evidence in chief. At paras 23 and 24 of her witness statement the claimant says:

> *"23. Following on from this, Ms Gaston raised the issue regarding the 'HR system' and the 'email distribution list'. I responded to Ms. Gaston that Mr Williams was looking into this matter and I will personally contact our IT provider too.*

> *Ms Gaston then insisted that she wanted to discuss this matter[1], she stated that the tone in my emails were accusatory and aggressive...*"

102. Although, the claimant goes on to say that she asked CG what emails she was talking about and CG did not specify them, it is clear from reading these two paragraphs together, that the discussion was about these two emails ("*raised the issue regarding the 'HR system' and the 'email distribution list"… "she wanted to discuss this matter" …. "the tone in my emails*").

103. Furthermore, at para 26, the claimant says: "*Afterwards, Ms. Gaston criticised my emails as "disrespectful, aggressive, and accusatory" towards Mr. Williams*".

104. At para 27, the claimant says:

> "*I was deeply shaken and sought help from my counsellor after the meeting. I felt profiled and stereotyped as an angry and aggressive Black woman. The lack of clarity about which emails or allegations Ms. Gaston referred to left me feeling threatened, intimidated, and harassed*".

105. Therefore, the claimant's own evidential case in chief is that the allegation of being "aggressive" and "accusatory" was in relation to her emails, albeit the claimant says she was not clear which emails CG was referring to, which is surprising given the two matters (holiday booking and group email) was what they were discussing at that time.

106. In any event, the claimant does not say that she was being accused of being aggressive and accusatory as a person, but it is the way she wrote those emails CG found as being "*aggressive*" and "*accusatory*".

107. We note, in passing, that it was not how the claimant presented this incident in her emails to JC of 26 June and to LW of 27 June. However, in her statement of events (p.145), the claimant prepared for the grievance investigation, she wrote: "*Carrie then questioned the tone of my emails I had previously sent regarding People HR system and being excluded from team emails. I had previously raised concerns of the discrepancies in my annual leave and the HR system (PeopleHr) approving leave I had not requested. I also raised concerns as I had been excluded from course coordinators team emails. Carrie then stated that the tone in these emails were accusatory and aggressive… Carrie continued to state that my tone was aggressive and accusatory in the emails.*" This, in our view, puts beyond reasonable doubt that the claimant knew that the reference to "*accusatory*" and "*aggressive*" were to the tone of her two emails to LW – "*the tone in these emails*".

108. In fairness to the claimant, she goes on to say that CG had said that the claimant "*was very angry and aggressive*", however, that was again in the context of the conversation about the claimant's emails and not as a separate and unconnected observation about the claimant as a person.

[1] Here and below, underlining are mine

109. In short, we find that the reference to "*accusatory and aggressive*" was to the tone of the claimant's two emails and not to the claimant as a person.

110. This context is very important here. It is one thing to accuse a person of being accusatory and aggressive as their personality trait (especially if one does not know that person well – as in the case of CG, who was new to the organisation never met the claimant before the meeting on 22 June), and it is a very different thing to point out that one's style and tone of email communications may come across as being accusatory and aggressive.

111. The claimant's race discrimination complaint about the meeting on 22 June is pegged to the former scenario. Effectively, the claimant says that CG accused her of being angry, accusatory and aggressive as a person and that was influenced by the claimant's race because of what the claimant calls "*the racial trope of an 'angry Black woman'*".

112. I pause here to say that although the list of issues states that "*In relation to the complaints of direct race discrimination, the Claimant identifies as black African and on her Ugandan nationality*" (and says nothing about "race" upon which the claimant relies for the purposes of her complaint of harassment related to race), the way the case has been argued before us shows that the claimant primarily relies on colour – i.e. her being a black person, and not her Ugandan nationality or ethnic origin – black African.

113. However, our conclusions on the claimant's race discrimination and harassment related to race complaints equally apply if the claimant's protected characteristic of "race" under s.9 EqA is to be taken as colour, or as her Ugandan nationality, or as her being black African - individually, or all three taken together. The evidence and arguments before us were largely related to colour. Therefore, for brevity, I will deal with the complaints on that basis. However, as I just said, the same conclusions apply by reference to the alternative elements of "race" or all of them taken together.

114. Given our factual finding that CG did not accuse the claimant of being angry, accusatory or aggressive as a person, but was talking about the tone of the claimant's emails, this complaint must fail as not being made out on the facts.

115. However, to the extent the claimant case can be regarded, in the alternative, as the claimant saying that criticising her email writing style as being "*accusatory and aggressive*" was effectively the same thing as accusing the claimant *as a person* as being "*accusatory, aggressive, and angry*", in our view such a case can only be sustained on two possible theories, the first of which is as follows.

116. Objectively viewed, the emails in question could not possibly be said to disclose any accusatory and aggressive tone, and therefore on reading these emails CG had no proper basis whatsoever to come to such a view. It follows, it was not the contents of those emails, but the claimant's race what operated

on CG's mind (in more than a trivial manner) when she decided that the tone of the emails was accusatory and aggressive. To put it differently, CG had conscious or subconscious bias against black women (or black African women or Ugandan nationals), viewing them as (in the claimant's words) "*angry Black women*", and that what made her unjustifiably jump to the conclusion that the tone of the claimant's emails was accusatory and aggressive.

117. However, there are two main and, in our judgment, insurmountable problems for the claimant to make good her claim on that basis. Firstly, we find that it cannot be said that CG had no proper basis whatsoever to criticise the tone of the claimant's two emails in question. Whilst we accept that there might be a legitimate difference of opinion as to the level of formality that business communications dictate, it cannot be said that CG as LW's manager had no proper basis to consider that the way the claimant (as LW's direct report) communicated with him about these two relatively minor issues was inappropriate and not conducive to building and maintaining a collegial and friendly work environment.

118. We have examined these emails in some detail during the hearing. I do not need to go into much detail about them here. The factual findings at paragraphs 21-28 above speak for themselves. Suffice to say that we find that it was not wholly baseless for CG to take a view that the tone of the claimant's emails was accusatory and aggressive. I am not saying that this Tribunal necessarily agrees with that view. It is irrelevant how we would have viewed those emails. However, what is relevant is that, viewed objectively, it was not unreasonable for CG to find the tone of those emails accusatory and aggressive.

119. Secondly, other than the claimant saying that she was being "*profiled and stereotyped*" as "*an angry Black woman*" we have no cogent evidence to support the contention that CG held the alleged stereotypical view of black women (or black African women, or Ugandan nationals) as being angry, and that is what operated on her mind when she made those comments about the claimant's emails. The claimant did not put to CG in cross-examination that she held a stereotypical view of black women (or black African woman) being angry.

120. The claimant has failed to establish any other primary facts from which we could permissibly infer that the claimant's race was what motivated CG in making those comments.

121. The second possible theory (alluded to by the claimant in her evidence) puts the claimant's case even higher. Effectively, the claimant says that black people's email writing style is more formal and professional than how white people write their emails, and because of the prevailing stereotypical view <u>in the society in general</u> that black women (or black African women) are "angry", when a black woman writes an email, using the typical formal and professional style of a black writer, a white reader, being influenced by the societal racial prejudices (what the claimant calls - a racial trope of an "*angry*

black woman") jumps to the conclusion that the email is written in an aggressive and accusatory tone.

122. There are, however, several problems with this theory. Firstly, it requires the Tribunal to take judicial notice (that is to say, to accept as a fact, which is so obvious that needs not to be proven by evidence) that black people's email writing style is more formal and professional than how white people write their emails. We are not prepared to do that. No member of this Tribunal is aware of that premise being researched and evidenced as a fact, or being a generally accepted view in the society.

123. Secondly, this theory also requires the Tribunal to take judicial notice that white people in this country are prone to see black women (or black African women) as being "*angry*". In other words, that what the claimant says "*racial trope of 'an angry black woman'*" is prevalent in the society. Whilst we do not say that this society is free from biases and prejudices, including against black women (or black African women), we do not accept that we can take it as a proven fact that black women in this country are generally viewed as "*angry*" by white people.

124. Finally, this theory itself betrays a biased view against white people, as them being prone to hold a biased view against black women as "angry black women". Of course, this observation can be retorted by an equally valid observation that it too betrays a biased view against black people, as them being prone to hold a biased view of that kind against white people, and so on *ad infinitum*.

125. I have probably already spent more time than it is necessary to deal with this particular allegation, however, the point I want to emphasis is that we, as the Tribunal, must judge the case on its facts, as we found them, meaning that it is insufficient as evidence and it would be an error of law on our part, if we were to find that the claimant was discriminated against or harassed because of her race simply on the basis that it was how the claimant felt at that time.

126. Whilst how the claimant felt is relevant as an element of her harassment complaint, when deciding whether she was treated less favourably because of her race or was subjected to unwanted conduct related to her race, the focus must be on what the putative perpetrator of discriminatory conduct did or did not do and what operated on their mind at that time, which made them to act in the impugned way, and not on how those actions made the claimant feel.

127. We, of course, accept that impugned conduct could be motivated by conscious or subconscious biases. However, we can only come to that conclusion if there are primary established facts, from which we could permissibly draw such inferences. The claimant has fallen far short of establishing such facts.

128. For all these reasons, we find that this allegation as complaint of direct race discrimination (issue 4.2.1) and harassment related to race (issue 7.1.1) fails and is dismissed.

7.1.2 The letter of the 26th June 2023 from Ms Gaston

129. Before moving to deal with the next set of allegations against JC, I shall briefly give our conclusion on the second allegation of harassment against CG (issue 7.1.2).

130. It is worth explaining that there are three elements that need to be established to make out a complaint of harassment related to race.

131. First, there must be unwanted conduct. That is unwelcome or uninvited by the employee. This is largely to be assessed subjectively, i.e. from the employee's point of view. However, if the employee through his/her words or conduct shows that he/she has not objected to the conduct in question, it will not be unwanted.

132. Secondly, the conduct must have the proscribed purpose or effect, that is the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her. For brevity, I shall refer to this statutory formulation as "**proscribed purpose"** and **"proscribed effect**", respectively.

133. When assessing whether the conduct had the proscribed purpose, the focus must be on what operated on the alleged perpetrator's mind when engaging in the impugned conduct.

134. However, when assessing whether the conduct had the proscribed effect, each of the following must be taken into account:

a. the perception of the victim
b. the other circumstances of the case, and
c. whether it is reasonable for the conduct to have that effect — S.26(4) EqA.

135. Thirdly, the conduct must relate to a protected characteristic (race, in the present case). There is vast case law on the meaning of "related to", whether it denotes a looser causal connection than "because of" (the formulation in direct discrimination (s.13)), or "on the ground of" (as it was in the antecedent legislation).

136. However, the bottom line is that there must a link between the conduct in question and the protected characteristic, and the Tribunal must examine all the relevant circumstances of the case to see whether that link is present or not. Of course, in many cases, where the conduct in question is inherently or overtly racist such link would be obvious, regardless how the putative harasser saw it. Cases where the conduct in question is not inherently or

overtly are more difficult, but the link can still be found on full and objective examination of all the circumstances of the case.

137. In examining the matter, the Tribunal should bear in mind that the alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic cannot be conclusive of that question.

138. As with all other forms of discrimination, the shifting burden of proof provisions under s.136 EqA apply. That is to say that before the burden of proof shifts to the respondent, the claimant will need to establish, on the balance of probabilities, that she was subjected to 'unwanted conduct' which had the proscribed purpose or proscribed effect. She also needs to establish the facts from which the Tribunal could (as opposed to definitely would) conclude that the conduct in question related to her protected characteristic (race).

139. Only if the claimant meets that burden (often refer to as establishing a *prima facie* case), the burden will shift to the respondent to prove that the claimant's race "in no sense whatsoever" was the reason for the treatment complained of. When considering whether the claimant has established a *prima facie* case, the Tribunal must disregard any explanation for the treatment complained of advanced by the respondent. That is of course, not to say, that the Tribunal must disregard the respondent's evidence on disputed facts upon which the claim of harassment is founded.

140. Now, with these principles in mind, I turn to analyse the claimant's second allegation of harassment against CG and her other allegations of harassment against others. The claimant's evidence on this second allegation is sparse.

141. At para 30 of her witness statement the claimant says:

> "*On the afternoon of 26 June 2023 Ms. Gaston emailed me a redrafted summary of her discussion with Ms. Mangtani from 23 June 2023. The tone of her email left me feeling extremely uncomfortable and intimidated. Alongside the allegations from 22 June 2023, Ms. Gaston mentioned she had made "inquiries" into my wellbeing, stating I did "not seem very happy at work". This inquiry was never communicated to me during the meeting, nor did she specify who she spoke to or the nature of my unhappiness. I was unaware of any investigation, as the Respondent had not informed me or provided details. This lack of transparency made me perceive the 22 June 2023 meeting as a disciplinary hearing - and not as an introductory meeting as had been cited in the agenda.*"

142. Despite now saying that the email left her "*feeling extremely uncomfortable and intimidated*", at the time the claimant did not raise any objections about receiving that email. She did not write back to CG to say that her email was unwelcomed. She did not complain about it in her email to JC of the same day or to LW in her email of 27 June. She did not raise it in her Statement of Events for the grievance investigation.

143. In her grievance letter to AL, the claimant referred to that email, but her complaint was not about receiving that email, but about not receiving the

requested details about who CG had spoken to about the claimant being unhappy at work.

144. In short, despite the claimant now saying that the email made her "*extremely uncomfortable and intimidated*" her reaction to that email at the time does not support that. On a fair reading of that email, there is nothing there that could sensibly be read as designed to intimidating the claimant or make her feel uncomfortable, or as having the possibility of having that effect.

145. The email simply summarises what happened at the meeting on 22 June 2023. CG asks the claimant not to terminate calls abruptly in the future, and invites her to carry on with the conversation, if she so wished. It also directs the claimant to sources of further support, if needed.

146. We, therefore, find that the claimant has failed to establish on the balance of probabilities that she perceived CG sending that email as unwanted conduct or as having the proscribed effect. It clearly did not have the proscribed purpose.

147. In any event, even if we are wrong on this, we find that in those circumstances it was unreasonable for the claimant to perceive the CG's email as having the proscribed effect. As I have already said, we find nothing in that email which could reasonably viewed as having such an effect.

148. Finally, the claimant has not adduced any evidence from which we could find any link between CG's sending that email and the claimant's race. Even in her witness statement the claimant does not say that she perceived that email as having any connection with her race. She complains about the lack of transparency, which she deduced from reading the reference to inquiries CG had made, which in turn made her to believe that the meeting on 22 June was a disciplinary meeting. However, that is a different matter altogether.

149. There is nothing in the content of that email that could sensibly be said as having any connection to race.

150. In summary, this allegation of harassment related to race fails and is dismissed.

Allegations against JC

151. I shall now deal with the allegations against JC. I shall take the first six together. I will deal with the email of 26 September and suspension separately.

152. The first six allegations are:

> *7.1.3 On the 27th June, upon reporting a complaint to Dr Cant, he responded in a way that was negatively judgment, insensitive and missed the point of what was being said.*

7.1.4 The invite to the meeting sent to the Claimant on the 10th July 2023.
7.1.5 On the 14th July 2023, being told that the meeting was a grievance meeting.
7.1.6 The email from Dr Cant on the 25th July 2023.
7.1.7 The outcome to the grievance report on the 28th July 2023.
7.1.8 The 1-2-1 meeting with Dr Cant on the 3rd August 2023.

153. They are all allegations of harassment related to race. There is also an allegation of direct race discrimination about the claimant being questioned by JC about the way she spoke on 3 August.

154. The initiation of the grievance process on 5th July, the outcome of grievance and the conduct of JC at the meeting on 3 August also complained of by the claimant as detriments for the purposes of her victimisation complaint. I will deal with them separately later in the judgment, however our findings on these episodes in the context of the harassment and direct race discrimination complaints are equally relevant to our analysis of these allegations in the context of the victimisation complaint.

155. The short answer to all these six allegations is that they all must fail because the claimant has failed to adduce sufficient evidence to show that her race was in any way related to the matters she complains about in those allegations. Therefore, the burden of proof has not shifted to the respondent.

156. In any event, even if the burden of proof had shifted to the respondent, we would have concluded that none of these matters were related to the claimant's race. In other words, we can make the positive finding that the claimant's race played no part whatsoever in the conduct of JC the claimant complains about.

157. We say that for the following reasons. Firstly, we accept JC's evidence as to why he acted as he did. Examining each of these allegations by reference to the contemporaneous documents reaffirms our view.

158. JC replied to the claimant's email of 26 June to point out that what he had heard from CG was different to how the claimant had presented the events at the 22 June meeting. He directed the claimant to her line manager (LW) to deal with this matter, saying that he would respect the line management structure.

159. The claimant's email of 26 June made no reference to any racial discrimination or harassment or otherwise indicated that her race had anything to do with what had happened at the meeting on 22 June. Therefore, there was no reason for JC to decide that the claimant's race was in any way a relevant matter. JC's response itself has no reference to the claimant's race, either. In the circumstances, it was not unreasonably for JC to see the matter as a communication style issue and no more than that, which issue should be addressed in discussions between the claimant and her direct line manager, LW.

160. Although, this might or might not be the best course of action when one looks at this matter from HR/employee relations point of view, as one can see why the claimant might have perceived that reply as JC rebuffing her concerns without giving them due consideration, this is insufficient to show that in doing so JC could be motivated by the claimant's race.

161. The claimant says in her witness statement at [31] that she felt that JC's response was biased because he accepted CG's version instead of hers. However, JC in his email does not say that. He simply says that this issue needs to be dealt with through the claimant's direct line manager. The claimant seems to suggest that JC was equally predisposed against her, operating under the biased view of the claimant being "*an angry black woman*". We reject that for the same reasons for which we have rejected that theory when dealing with the allegations against CG.

162. The claimant says that JC's response dismissed her complaint, which fell under the respondent's Diversity and Inclusion and Personal Harassment policies. Firstly, the claimant's email of 26 June did not refer to her race. On a fair reading of the claimant mail, it could not be understood as her complaining about discrimination or harassment related to race. Therefore, it is hard to see on what basis the claimant now says that it should have been handled by JC as a complaint under Diversity and Inclusion and Personal Harassment policies.

163. Secondly, JC did not dismiss the claimant's complaint but directed her to raise it with her direct line manager, LW, as JC concluded that it was a matter of establishing an effective way of working together and communicating respectfully in the team.

164. Thirdly, this course of action was consistent with the respondent's grievance policy, which says that if an employee feels aggrieved by any matter related to their work (except personal harassment) they should first raise it with their line manager.

165. Finally, it seems rather strange that the claimant, on the one hand, complains that JC had failed to realise that her email of 26 June was in fact a complaint of racial harassment (which complaint should have been dealt with under the respondent's Diversity and Inclusion and Personal Harassment policies), but on the other, when JC later initiated that very process, the claimant complained about him doing that, alleging that JC doing that was an act of harassment related to her race and victimisation. All this makes little, if any, sense.

166. For the same reason, it is hard to understand on what basis the claimant says that the initiation of the formal grievance process on 5 July and sending her a letter on 10 July, inviting her to attend an investigation meeting was perceived by her as a detriment and unwanted conduct.

167. The claimant accepted in cross-examination that the allegations she was making against CG were very serious, they called for a proper and independent investigation, she wanted the matters to be dealt with. In these circumstances, we fail to see how the respondent initiating this process could be seen by the claimant as anything other than what she wanted to happen.

168. The claimant seems to be complaining that she had not been afforded access to internal HR person, Ms Mangtani, before the respondent decided to use Peninsula to investigate the complaint. However, it was within the respondent's management powers to decide whether the matter should be investigated internally, or by an external HR consultant. It decided to use Peninsula, and Ms Mangtani was not involved. Again, it is hard to see how that could be unwanted conduct or to find any link to the claimant's race.

169. Furthermore, in her conversation with JC on 3 August, the claimant acknowledges that what she wanted was in effect what JC described as a catch 22 situation. On the one hand, the claimant said that she wanted to speak to CG to make her understand how she felt about the conversation on 22 June before the matter became formal, but on the other hand - she accepted that she had refused CG's invitation to carry on talking because she did not like the tone of her email of 27 June, which email contained that very invitation to talk.

170. The claimant also complained that the matter was "escalated" without her being given the opportunity to get it resolved informally. But the claimant was given that opportunity when JC directed her to speak to LW about that issue. It was the claimant herself who escalated the matter by making the allegation of race discrimination in that meeting with LW. So, it was not JC, but the claimant, who raised the stakes and moved the process into the formal grievance route. As JC said in his evidence, the claimant forced his hand.

171. Given the seriousness of the allegations the claimant was making, JC had no other option. JC was correctly concerned not only about the claimant, but also about CG and indeed about LW. He, as the CEO of the respondent, owed equal duty of care to all of them. The only way this matter could have been reverted to the informal route was if the claimant had withdrawn her allegations of racial discrimination, or otherwise indicated that she wanted to resolve the matter by simply talking to CG informally. She never did that. In fact, she raised stakes even higher by making further allegations and treating every step in the process as further acts of racial harassment, discrimination and victimisation on the part of the respondent.

172. Moving on to the next allegation against JC, it is hard to understand what exactly about the invite to the investigation meeting sent to the claimant on 10 July, the claimant takes an issue with. Her witness evidence on this subject is confusing. She seems to be complaining not about the invite itself, but the fact that her request for further details about the meeting had not been answered properly. However, it had been. JC promptly responded to the claimant email of 10 July giving all the details she was asking for. In any

event, again, we fail to see how any of that could possibly be linked to the claimant's race.

173. The same applies to the claimant's next allegation of being told on 14 July that the meeting was a grievance meeting. This makes little sense, why that would be unwanted conduct and how it could possibly relate to the claimant's race. The claimant did not complain at the time about that. Her issue was with the meeting being recorded, not how it was called. And that is why she withdrew from it.

174. The claimant also alleges that the email from JC to her on 25 July 2023 was an act of harassment related to race but gives no details about that in her witness statement. The email is an invitation to meet to give the claimant the outcome of the grievance investigation and to agree next steps. There is nothing in that email which could sensibly be said to be unwanted or related to the claimant's race.

175. The claimant says that the outcome of the grievance report on 28 July was an act of harassment. The claimant complains that the report was incomplete because the appendices were missing. We accept JC's explanation for that – it had nothing to do with the claimant's race, but Peninsula's inefficiency in producing the transcripts.

176. The claimant also complains that the report said that she had raised a grievance, but she did, as a matter of fact, hence the grievance investigation, in which the claimant herself participated by producing the statement of events, providing further details of her grievance, and initially agreeing to participate in the hearing, albeit later withdrawing from the hearing, because she did not wish it to be recorded.

177. In short, even if the claimant disagreed with the outcome of the investigation and in that sense perceived receiving the report with that outcome as unwanted conduct, the claimant still needs to show that the outcome (i.e. the conclusion CC reached following his investigation, which conclusions were accepted and adopted by JC) were related to the claimant's race.

178. Yes, of course, the investigation was about the claimant's complaint of racial harassment, but that does not follow that the outcome (i.e. the conclusions) were also linked to the claimant's race. The claimant needs to show that in coming to those conclusions CC was somehow influenced by the claimant's race, or there were other circumstances to show that CC not upholding the claimant's race harassment complaint (and JC agreeing with that outcome) was related to the claimant's race. The claimant has not done that on evidence.

179. The claimant seems to suggest (at para 42.1 of her witness statement) that the report was deliberately altered. She gives example that – point 31 on page 216 states, "*CCO asks JA how she believes this discussion with CG amounts to feeling profiled and stereotyped*", when in fact the question, as

recorded in the email exchange was, "*Can you clarify how and why you feel your meetings with Carrie and Luke have left you feeling profiled and stereotyped?*" We see no material difference between the two sentences. They both convey the same meaning, with the first being just a shorthand for the actual question asked. Anyhow, what's more important is the claimant's response to that question, and that was one of the evidence before CC, upon which he made his conclusions. We reject the claimant's evidence that it was "*manipulation of recorded facts*" or "*deceitful misrepresentation of historical accounts*."

180. The conclusion she draws from that false premise is equally puzzling. She says at para 42.2 of her witness statement that this was "*designed to portray the situation as inclusive - by assuming that black and mixed-race people are seen as equal - while in fact, most official documentations continue to treat black and mixed-race individuals unequally*". The claimant does not explain what "*official documentations*" she refers to and how it treats black and mixed-race people unequally and how all that relevant to the outcome of her grievance. We reject that evidence as unsubstantiated.

181. Moving to the 3 August meeting, which the claimant covertly recorded. The claimant complains about that meeting as an act of harassment, but without specifying what exactly about that meeting that was unwanted conducted that had the proscribed purpose or proscribed effect and was related to her race. She also says that she was treated less favourably because of her race at that meeting by being questioned by JC about the way she spoke. Finally, she says she was victimised by JC by his conduct at that meeting in particular his manner and tone.

182. We have spent some time during the claimant's evidence in considering what happened at that meeting. We also had the benefit of a transcript of that meeting. Despite the claimant making serious allegations about JC's conduct at that meeting (including, in answering my question, saying that JC called her "aggressive" at the meeting) she was unable to substantiate these allegations by taking us to the relevant parts of the transcript, where JC's harassing conduct is recorded.

183. Having read the transcript from cover to cover we see nothing of the kind the claimant that alleges JC's conduct was at that meeting. In fact, it appears that JC was trying his best to make feel the claimant at ease and welcoming. At the end of the meeting, he went as far as to tell the claimant how much she was missed in the office and was generally accommodating and patient with the claimant.

184. The word aggressive appears in the following sentence: "*It's about and this what Luke wanted to gently feedback to you and hold a mirror up, it's about how you went back with your feedback, which having seen the transcripts I thought your feedback and your challenge could be delivered in a in a kinder less aggressive way and that was the feedback that Luke and then Carrie was trying to they were trying to give you.*" That is not calling the claimant "aggressive" or pre-judging her in any way.

185. The claimant says that referring to LW's style of communication as "*young*", "*London*", "*very friendly and engaging*" and saying that the claimant's style was "*not particularly kind*" reflected bias on the part of JC, that is his stereotypical view of the claimant as "*an angry Black woman*". We reject that.

186. Firstly, this piece is taken out of context and when read in the context of the entire exchange, what JC was saying is the following. Having explained why he felt compelled to treat the claimant's complaint as a formal grievance and to initiate an investigation into it, he goes on to explain why LW was part of it, that is because the whole matter started with the way the claimant interacted with LW in those two emails. JC then says that he found nothing wrong with the way LW spoke to the claimant and explained that his informal style of communication was because of him being a young Londoner and that was not unique to how he interacted with the claimant, and he spoke with JC in the same manner.

187. JC then says that he did not think that the way the claimant spoke with LW was "*particular kind* [to be] *perfectly honest*". In other words, JC came to the same view as CG having seen those two email exchanges. I have already explained, when dealing with the allegations against CG, why we find that the claimant's race had nothing to do with that. The same reasoning applies here. This allegation fails on that basis too.

188. Finally, all these allegations against JC must also fail because we find that none of JC's action the claimant complains about had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, and, even if the claimant perceived them as having such an effect, in the circumstances, it was unreasonable for her to perceive them as having the proscribed effect. I have already explained why we find nothing discriminatory in any of these actions by JC, and these are our reasons for this conclusion too.

189. We also find that JC did not treat the claimant less favourably than a hypothetical white employee in the way he questioned the claimant about the way she spoke. As I have just said, JC explained the difference in style of communication used by LW and how the claimant spoke to LW in those two emails. That had nothing to do with the claimant's race. We find that JC would have discussed this issue in the same terms if the two emails were sent by a white employee. There were no other discussions in that meeting about how the claimant spoke.

Allegations about appeal

190. There are three allegations of harassment related race with respect to the appeal process.

7.1.9 Being coerced to attend the appeal hearing whilst on annual leave.
7.1.10 Recording the appeal hearing on the 20th September 2023.
7.1.11 The appeal letter on the 20th September 2023.

191. The outcome of the appeal is also alleged to be an act of victimisation.

192. This part of the claim makes little, if any, sense.

193. Firstly, the claimant was not coerced to attend the appeal hearing whilst on annual leave. That is incorrect.

194. The claimant submitted her grievance on 23 August, which AL acknowledged on 27 August and invited the claimant to an appeal meeting on 14 September, giving the claimant two and a half weeks to prepare. He asked the claimant to confirm her attendance by 1 September, so that he could arrange his travel plans accordingly.

195. Having not received any response from the claimant, on 5 September, AL wrote again to the claimant, asking whether she was available to attend the appeal meeting and explaining why he needed to know that in advance, to plan his travel from Yorkshire to London. AL said that if he hadn't heard from the claimant by 6 September, he would have to assume that she wanted him to proceed on the basis of the information she had already supplied.

196. The claimant responded only on 11 September. She apologised twice for not responding earlier, explaining that she was on annual leave and saying that she would prefer to engage via ACAS. I pause here to note that by that stage the claimant had already initiated ACAS early conciliation process on 30 August.

197. AL could not have known that the claimant was on annual leave. The automatic out of office reply, AL had received in response to his first email of 27 August, simply said that the claimant was "*currently out of the office*". It did not say that she was on annual leave, nor did it say how long she would be out of the office. We accept AL's evidence that he checked with JC whether the claimant was on holiday, and upon checking the respondent's internal holiday booking system JC informed AL that he could not find that she had booked any annual leave in the system. The claimant's grievance letter did not state that she was going on annual leave any time soon, either.

198. In any event, the hearing was scheduled for 14 September, which on the claimant's own case was after she had returned from her annual leave. So, on her own case, she was not coerced to attend the hearing <u>whilst on annual leave</u>.

199. AL replied to the claimant's email of 11 September by return, explaining the purpose of the appeal hearing and asking the claimant if she wanted to proceed with the appeal. In response, the claimant sent a long email re-stating and expanding her grievance, but still not giving a clear answer as to whether she wanted to proceed with the appeal hearing or not. She again referred to ACAS and said that she had lost confidence in the organisation's ability to act impartially.

200. On 15 September, AL sent to the claimant a detailed letter re-scheduling the grievance hearing to 20 September and explaining that the appeal would be by way of a re-hearing of her entire grievance, setting out all the elements of the claimant grievance (as he understood them) to be considered at the hearing. AL also invited the claimant to submit any further evidence she wanted, and stated that if, having carefully considered what the claimant had to say at the hearing, he decided that further investigation was necessary, it would be undertaken.

201. The claimant response on 18 September was evasive. She again referred to ACAS, but did not answer the direct question whether she would be attending the hearing, yet without withdrawing her appeal. AL once again (and that is for the 5th time) asked the claimant to confirm whether she would be attending the appeal hearing. The claimant still did not answer his direct question and kept maintaining that she wanted to engage via ACAS.

202. I pause here to briefly deal with the claimant's contention that this should not have been an appeal hearing, but a first stage grievance hearing, because she never formally raised a grievance until her letter of 23 August. We reject that. Even though the claimant's verbal complaint to LW at the meeting on 23 June was not raised as a formal grievance, considering the allegations of "*racial attack*" and the threat to take this "*to the highest possible level*", it was for all intents and purposes a formal grievance, and it was imminently sensible for the respondent to treat it as such. In fact, if the respondent had ignored it or did not treat it with all the seriousness it deserved, the respondent could have been rightly criticised for that, and that could have been a valid basis for a complaint of discrimination and/or victimisation.

203. In any event, the claimant engaged in that process herself, albeit later refused to attend the grievance investigation meeting with CC, but not because it was a formal grievance investigation meeting as such, but because it was going to be recorded.

204. Furthermore, she herself said in her call with JC on 3 August that the investigation was not over "*because there is an appeal process if I want to take it forward*". She also said that she had seven days to appeal, and she did present her grievance/appeal by that deadline.

205. In any event, it was made clear to the claimant that the appeal would be by way of a full re-hearing of her grievance, and if required a further investigation would be called before any final decision was made. I asked the claimant when she was giving her evidence why did it matter to her how the hearing was called if her grievance would be fully and conscientiously considered at the hearing. She did not have a good answer for that.

206. Now, returning to the allegation of being coerced to attend the hearing whilst on annual leave, as can be seen from the above findings, the allegation is false and fails on the facts.

207. It is surprising and regrettable that knowing all that the claimant still chose to pursue that complaint and repeated that allegation in her witness statement that she was *coerced into attending an appeal hearing for a grievance she did not raise*.

208. I will return to the significance of the claimant repeatedly referring the respondent to engage with her via ACAS later in the judgment when dealing with the issue of suspension.

209. The allegation of recording the appeal hearing as harassment related to race is even more puzzling. The claimant did not attend the hearing. There was nothing to record. As the documents show (p.523) the recording was 11s long and the meeting itself lasted 24s, that is because the claimant did not turn up for the meeting, despite working on that day.

210. AL, having verified that the claimant was not attending the hearing, moved to deal with her appeal on the papers. This allegation makes no sense and fails both on the facts and because the claimant has failed to present any evidence as to what basis she says that 11s of the recording of AL waiting for the claimant to join the hearing (which I presume would be a recording of silence) was harassment related to her race.

211. The final allegation – the appeal letter as an act of harassment related to race is equally unsustainable. The only evidence the claimant gives about the letter is that it was "*confusing*" because "*it stated that the grievance was the same in one section and similar in another*", but she does not say how that all was an act of harassment related to her race.

212. In short, the claimant has failed to establish a *prima facie* case of harassment in relation to any of these allegations. Accordingly, this part of her complaint also fails and is dismissed.

Email of 26 September

213. The next allegation of harassment related to race is the email of 26 September from JC to the claimant, in which he is asking the claimant to stop refusing to meet with her line managers and explaining that if the claimant persists with this, she would be putting herself in breach of her employment contract.

214. Again, the claimant's evidence is wholly inadequate for her to establish a *prima facie* case of harassment related to race with respect to that email. She says at para 53 of her witness statement that she was confused why CG was the one that was putting next steps in place when CG was her "*harasser*". However, by the stage the investigation of that grievance had determined that CG was not the harasser, and that finding was confirmed by AL on appeal. Therefore, it was entirely reasonable for JC to tell the claimant that she must resume normal working relationships with LW and CG.

215. Besides, that was what JC and the claimant had discussed on the call on 3 August, in which the claimant said that she wanted the grievance process to run its course to the end before re-engaging with LW. The process was at an end, but she was still refusing to resume her normal work duties and engage with her managers.

216. This allegation fails and is dismissed.

Suspension

217. I shall now deal with the claimant's suspension, which the claimant alleges was an act of harassment related to race, direct race discrimination, direct disability discrimination and victimisation.

218. The short answer to all these complaints is that based on the evidence we heard we make the positive finding that the sole reason the claimant was suspended was because JC had determined that the on-going situation was untenable. The claimant was technically at work but refusing to engage with her direct line manager and his manager's manager. Considering the size of the respondent's organisation, the size of the claimant's team and the way the team was meant to work together and regularly interact with each other and with their manager on a 1-2-1 basis this situation was untenable and destructive.

219. This, of course, should not be taken to mean that we find that the suspension was the right and proper step for the respondent to take in those circumstances. We make no such finding. That is because we are not concerned with any questions of fairness of the suspension or indeed whether it was in breach of the implied term of trust and confidence. We are concerned with the question whether the claimant's race or disability influenced (in more than trivial way) JC when he decided to suspend the claimant. We find that neither did.

220. Additionally, we accept JC's evidence that he did not know that the claimant had a disability at that stage, and for him the first indication of her disability was her sick note of 3 October, which he received after he had decided to suspend the claimant. This, of course, does not mean that the respondent as an organisation did not have constructive knowledge of the claimant's disability by that stage, but this is a different question, to which I will come in due course.

221. As I have said earlier, the claimant's repeated reference to engaging with the respondent via ACAS has some significance in this context too. The claimant complains about her suspension. However, at the same time she is not willing to perform her normal work duties and re-engage with her managers, and says that she lost confidence in the respondent's ability to act impartially. Yet, she is not resigning and continues to accept salary and other benefits from the respondent.

222. The claimant says that her grievance has not been dealt with properly. At the same time, she refuses to engage in the process designed to deal with her grievance properly, instead directing the discussions through ACAS.

223. As I have explored with the claimant during her cross-examination, ACAS is not a body that hear internal grievances (and if the claimant was in any doubt about that, ACAS would have told her that). Therefore, if she sought their advice on how to deal with her internal grievance, they would have referred her back to her employer.

224. The other function of ACAS is early conciliation, which is a mandatory first step before a claim can be lodged with an employment tribunal. The claimant sent her EC notification on 30 August. It is after that date that she kept referring AL and JC to her wish to engage with the respondent via ACAS.

225. Therefore, it appears that she wanted to engage with the respondent in the process of early conciliation to see if her dispute could be settled by way of a COT3 settlement agreement, and not in any process of resolving her internal grievance and resuming her normal working duties. This suggests that all she was looking for was a financial settlement (to put it simply, to be paid off), rather than a resolution of her grievance and resumption of the normal working relationship with her managers.

226. All the steps taken by the claimant leading up to her suspension clearly indicate that she was looking for a way out, as opposed to a way of returning to work and performing her duties as normal. That was too a relevant matter for the respondent to take into account when deciding to suspend the claimant, pending a possible resolution of the matter. As was stated in the JC's email of 2 October it was not a disciplinary action, but "*purely a measure to allow a resolution to be found in the most manageable way possible*".

227. In any event, for the reasons explained earlier, we do not need to examine whether the suspension as a measure to allow a resolution to be found was a step open to the respondent to take without putting itself in breach of the implied term of trust and confidence. We are simply concerned with the question why it did that, which we find had nothing to do with the claimant's disability or race.

228. It follows that this allegation as complaints of harassment related to race, direct race and direct disability discrimination fail and are dismissed.

229. This was the last of the allegations in the complaint of direct race discrimination, meaning that this complaint fails in its entirety and is dismissed.

230. I, however, will need to return to the suspension issue in the context of the claimant's disability arising from discrimination complaint later in the judgment, as it is the relevant (and in our view – a critical) element in the whole picture we must consider for the purposes of that complaint.

Letter of 25 October

231. The claimant complaint about this letter is advanced as direct disability discrimination and harassment related to race.

232. The claimant says that the letter contained a threat of termination of her employment and that exacerbated her anxiety and depression.

233. As far as the complaint of direct disability discrimination is concerned it fails because the claimant has not presented any evidence to show that she was treated less favourably than the respondent treated or would have treated another employee without a disability. The comparators the claimant refers to in her witness statement are unnamed two course coordinators and a receptionist who she says were absent between 3 and 6 months but were not threatened with their employment being terminated.

234. The first problem with that is that the claimant has not presented any evidence to show whether these three individuals are valid comparators. We do not know who they are, whether they had any disabilities or not, what the circumstances of their absences were, and importantly - whether they too refused to engage with their direct line managers. We were not presented with any evidence what letters (if any) had been sent to them and on what basis the claimant says that any letters sent to them did not have a similar warning.

235. The claimant also makes a reference to them being white but makes no complaint of direct race discrimination. She complains that the sending of the letter was unwanted conduct related to her race but does not explain on what basis she says her race was in any way related to the sending of the letter.

236. Furthermore, these three individuals are not identified as comparators in the list of issues and the claimant's case (as she confirmed in her submissions yesterday) is based upon reliance on a hypothetical comparator.

237. In any event, we accept JC's evidence that the sole reason why the letter was sent and included the reference to possible termination of employment for some other substantial reason was because by that stage the parties had reached an impasse, with the claimant maintaining her position that she would not return to work with LW, regardless of whether she was fit for work or not, and the respondent needed to find a way of resolving this impasse, with termination for the breakdown in the relationship being one of possible options, which, as the letter stated, the respondent very much hoped to avoid. In those circumstances, it was not unreasonable for the respondent to explain all that to the claimant well in advance of any such stage being reached. It was not a threat, but a proper prior warning.

238. Furthermore, this warning must be read in the context of the entire letter, which was primarily inviting the claimant to a meeting to discuss her

return to work and any support she needed. We accept JC's evidence that the paragraph was included on advice from Peninsula. We are satisfied that in including that warning, the respondent did not treat the claimant less favourably than it would have treated another hypothetical employee who had been absent from work for the same period of time and who was refusing to engage with their managers, but who did not have a disability. We also satisfied that the claimant's race played no part whatsoever in the respondent's decision to send the letter containing that termination warning paragraph.

239. This allegation fails and is dismissed. This also means that the claimant's entire complaint of harassment related to race fails and is dismissed.

240. As with respect to the suspension, I want to be clear that our conclusion on this allegation should not understood as us saying that it was right and proper for the respondent to include that warning in the letter at that stage of the claimant's sickness absence.

241. In fact, had this allegation been presented as a complaint of discrimination arising from disability or if we had a complaint of unfair (constructive) dismissal before us, the outcome might have been quite different. However, for the reasons explained above, this allegation as a complaint of direct disability discrimination and harassment related to race must fail.

242. As I side note, we, of course, appreciate that the respondent is a small organisation with limited financial means and organisational resources. It is a charity. It appears that in dealing with this matter the respondent heavily relied on external HR advisers. It is very unfortunate that two out three pieces of crucial HR advice the respondent received from Peninsula led to further deterioration of the dispute, moving parties further apart, and the only reason the first piece of Peninsula's advice (to make the claimant to apologise to CG and LW for causing them distress) did not result in the situation going off track earlier was because JC very sensibly decided not to follow it.

Applying sickness policy/reducing the claimant's pay

243. Turning to the final allegation of direct disability discrimination.

3.2.10 Apply the Respondent's sick pay policy to the Claimant's absence instead of the suspension policy, causing her to eventually suffer reduced pay

244. This allegation (with a slightly different formulation) is also advanced as an allegation of unfavourable treatment for the purposes of s.15 (discrimination arising from disability) complaint and as a detriment for the purposes of the victimisation complaint.

245. I first deal with it as a complaint of direct disability discrimination. This complaint fails because the claimant has not presented any cogent evidence to show that in no materially different circumstances the respondent would not have applied sickness policy to an employee who was equally suspended and who was on sick leave for the same period as the claimant, but who did not have a disability.

246. The respondent's sickness pay policy (p.83) does not distinguish between sickness related to disability and sickness not related to disability and simply sets the timing brackets when the pay will be reduced and by how much.

247. The claimant's witness statement (at para 68) does not deal with this issue in these terms. The claimant complains that the respondent has not made any adjustments to alter the absence process with sickness absence which relates to a disability, but that only confirms that the respondent's sick pay policy treats people on sick leave the same whether their sickness absence is disability related or not. Therefore, on the claimant's own case reducing her pay in accordance with the sick pay provisions was not her being treated less favourably than a non-disabled person on sick leave. It appears that the claimant says that the respondent should have made a reasonable adjustment to its policy and extended her sick pay, but that is a different complaint of failure to make a reasonable adjustment, which the claimant does not bring in these proceedings with respect to sick pay.

248. The claimant also refers to "*suspension policy*", but we have not been shown any such document. To the extent the claimant says that having been suspended meant that her full pay should have been preserved regardless of whether she was fit to come back to work <u>as a matter of policy or her contract</u>, we do not accept that this case is made out on the evidence before us. However, this does not mean that the respondent's case that employees on suspension who go off sick are only entitled to sick pay pursuant to the respondent's sickness policy, as a matter of its policy is made out on evidence. We find that the respondent has failed to make out that case. More on that a little later.

249. We have not been taken to any part of the claimant's employment contract, where it is said that once employee is suspended, he or she is entitled to full pay come what may. The employees on suspension are paid their salary because they are ready, willing and able to work, and it is the employer that does not want them to come to work. Therefore, under the general principles of employment contract law, they are entitled to be paid what they would have received if the respondent had allowed them to work as normal.

250. However, when an employee goes off sick, he or she is not ready, willing and able to work. He/she is incapacitated, and therefore, in the absence of some contractual entitlement to full pay, the employee would only be entitled to such amount as the employer agreed to pay for the period of his/her incapacity (subject to the statutory sick pay entitlement).

251. In any event, to determine this claim we do not need to decide whether as a matter of contract (or other legal entitlement) the claimant was entitled to full pay whilst on suspension, regardless of her capability to do any work due to ill health. It is not a claim for unlawful deduction from wages or breach of contract that we are dealing with. We do not need to decide whether the claimant was legally entitled to unreduced pay while she was suspended as a matter of her contractual rights or her right not to suffer an unauthorised deduction from wages.

252. In Further Written Closing Submissions the respondent suggested that the Tribunal could deal with the claim for unlawful deduction from wages. We do not consider that it would be just and proper for us to deal with this issue at this late stage of the proceedings. This complaint is not reflected in the List of Issues. The fact that the claimant ticked the box "other payments" is not determinative. Many litigants in person tick that box as an indication that they are seeking compensation or damages for discrimination and other complaints they bring. More importantly, the claim had been fully reviewed by EJ Singh at the preliminary hearing on 12 February 2024. A comprehensive list of issues was settled. The list does not contain a complaint of unauthorised deduction from wages. The parties were ordered (para 9 of EJ Singh's orders) to write to the Tribunal and each other as soon as possible if they thought the list was wrong or incomplete. Neither party did. The claimant said at the closing submissions that unlawful deduction from wages was not part of her claim. This claim involved potentially difficult issues of law and fact, which need to be properly examined and argued for the Tribunal to make a fair determination.

253. This, however, is not to say that the promise contained in the 2 October letter that salary payments and other benefits "*will continue at this time*" is completely irrelevant for this claim. In our judgment, it is highly relevant in the context of s.15 EqA complaint, whatever the correct contractual position might have been with respect to the claimant's legal entitlement to full pay whilst on suspension.

254. As I have mentioned earlier, we do not accept the respondent's case that as a matter of its policy employees on suspension who go off sick are entitled to sick pay only. We have not been presented by the respondent with any relevant documentary evidence (in particular, the relevant disciplinary policy), which deal with the respondent's right to suspend employees. The December 2023 policy we have in the bundle was not the one that applied at that time of the claimant's suspension in October 2023.

255. That December policy says that "*suspension on contractual pay*" is a temporary measure that the respondent may implement in order that an uninterrupted investigation can take place. However, there was no on-going disciplinary investigation into the claimant's conduct and no disciplinary charges were put to the claimant then or at any time after her suspension.

256. It also contains a paragraph, which reads:

"Where an employee on temporary suspension tells us that they are sick, the employee will be considered to be on sickness absence, rather than suspension, until the employee notifies us that they are no longer sick, at which point suspension will resume where appropriate;"

257. The claimant says that it was not in the earlier version and was inserted later in response to her suspension and reduction in sick pay. The respondent did not present any cogent evidence to rebut that allegation. The highest it took its case on that issue was in JC's evidence at [68] "*We always pay sick pay if any employee goes off sick while they are suspended from work*", and in CG's evidence at [47]: "*This is the approach that RCUK takes with any employee who goes off sick while suspended from work*".

258. We do not accept that being sufficient evidence to show that there was a policy to that effect operated by the respondent at the time of the claimant's suspension and her going off sick. To the extent there was a written policy to that effect, it is surprising that it was not in the hearing bundle. If the respondent relies on some unwritten policy or custom and practice, we would have expected to hear about examples when that policy was applied in practice to other employees.

259. In any event, as I have said earlier, the respondent's own case is that it was not a disciplinary suspension and therefore whatever the disciplinary policy says on that is not relevant.

260. However, what is relevant for the purposes of s.15 complaint (to which I will turn shortly) is that we do not accept JC's evidence that the claimant going off sick had the effect of lifting the suspension. There is no proper evidential basis for that. In fact, JC's own evidence I have just quoted contradicts that evidence, that is because he says that it is possible for an employee to be off sick and suspended at the same time, which is unsurprising. In fact, it would be highly surprising if an employee suspended by the respondent was able to unilaterally unsuspend him/herself by simply going to their GP and obtaining a fit note.

261. JC said in his evidence that as soon as he had received the claimant fit note on 3 October, the respondent went into the "*duty of care mode*", and the claimant was no longer suspended. We reject that for the reasons I have just articulated. In addition, it is not clear what JC meant by "*duty of care mode*". If that was the email of 25 October with a warning of possible dismissal, it is hard to see how that could be said the respondent exercising its duty of care or lifting the suspension.

262. The claimant was suspended by JC "*until such a time as a resolution can be found.*" When the claimant went off sick no such resolution was found. It was not found when her pay was reduced on 2 January 2024.

263. On 29 October, responding to the respondent's letter of 25 October the claimant wrote:

"… Following reporting that I was unwell, I was subsequently suspended from work…"

and later:

"*The following should be noted:*
[…]

- *Prior to being suspended (and being denied access to RCUK email and systems to date) as always, I have fulfilled the duties of my role, attending team meetings with included the Line Manager and the Director".*

264. In his reply of 31 October, JC does not say that the claimant is no longer on suspension. Instead, he says that the respondent needs "*to consider both [the claimant's] situation and the operational needs of the organisation and consider what decisions need to be made"*. He repeats the warning that if the evidence indicate that the claimant is unlikely to return to work in the reasonably near future the respondent may have to consider terminating her employment.

265. Finally, the letter of 8 December also states that "*the current situation is untenable as we appear unable to address and attempt to resolve the issues which are causing you to be absent from work*", which indicates the respondent's view that the untenable situation, which was the reason for the claimant's suspension, remained, and it needed to be resolved before the claimant could be allowed to return to work, regardless whether she is fit to do so for health reasons. That was listed as the third item for discussion:

(c) discuss our expectations of you as your employer, including our expectations for you to fully engage with your manager and director, with your team, and to fulfil all the obligations we expect of all employees, including conduct at work.

266. In short, we find that at the date of the treatment complained of for the purposes of s.15 complained (that is the reduction of pay on 2 January 2024 pursuant to sickness policy) the claimant's suspension had not been lifted. We do not need to decide whether and if so when and how it was lifted after that date.

267. Returning to the issue in hand, for the purposes of this allegation as a complaint of direct disability discrimination and victimisation we find that the sole reason for the reduction in pay was the respondent applying its sickness policy. Whether in the circumstances the respondent was entitled to do that as a matter of contract is not an issue we need to decide. What is critical for the purposes of the complaints that we do need to determine is that this had nothing to do with the claimant's disability or her protected acts, to which I shall turn next and deal with the complaint of victimisation.

Victimisation

268. I shall deal with that complaint relatively briefly.

269. Firstly, we do not accept that

8.1.1 The email to Dr Cant on the 26th June 2023

8.1.2 The email to Luke Williams on the 27th June 2023.

were protected acts. There is nothing in those emails that could be said to be an allegation of contravention of the Equality Act 2010, or otherwise come within the three other definitions of a protected act under s.27(2) EqA.

270. The first allegation of discrimination was made by the claimant verbally to LW on 27 June, and that was after she had sent the 27 June email to him. However, she does not rely on that conversation as a protected act.

271. We accept that the grievance letter of 23 August, lodging ACAS EC on 30 August 2023 and submitting the claim on 9 November 2023 were all protected acts within the meaning of s.27(2) EqA.

272. We reject the respondent's submission that lodging ACAS EC on 30 August was not a protected act because the respondent was not party to the communication and/or correspondence between the claimant and ACAS at that time. The respondent's participation in or knowledge of a protected act happening is irrelevant to the question whether the act in question amounts to a protected act under s.27(2) EqA. Staring an ACAS early conciliation procedure with respect to a complaint of discrimination is clearly "*doing a thing for the purposes or in connection with the EqA*" (s.27(2)(c). The question of the respondent's knowledge of a protected act arises only with respect of the issue of causation.

273. Therefore, this finding necessarily means that the first three allegations of detriment could not have been because of a protected act, because they all pre-date the first protected act on 23 August.

274. In any event, I have dealt with them in some detail in the context of the harassment related to race complaint. Our finding and conclusions equally apply here, meaning that all these allegations fail as detriments and/or on causation.

275. In passing, I observe, that the law says that although the threshold of "detriment" is fairly low, an unjustified sense of grievance (i.e. something that a reasonable employee could not reasonably complain about as a detriment to him/her) cannot amount to a detriment. For the reasons explained earlier, we find that the first and the third of the alleged detriments (initiating the grievance process and JC conduct at the meeting on 3 August) fall into that category of unjustified sense of grievance.

276. There is a further problem with the second detriment because as was observed by Langstaff P (as he then was) in *A v CC West Midlands Police* UKEAT0313/14 at [21, 22]:

> "*21. … The purpose of the victimisation provision is protective. It is not intended to confer a privilege upon the [complainant] …, for instance by enabling them to require a particular outcome of a grievance or, where there has been a complaint, a particular speed with which that particular complaint will be resolved. It cannot in itself create a duty to act nor an expectation of action where that does not otherwise exist.*

> *22. It follows that in some cases – and I emphasise that the context will be highly significant – a failure to investigate a complaint will not of itself amount to victimisation. Indeed, there is a central problem with any careful analysis and application of section 27 to facts broadly such as the present. That is that, where the protected act is a complaint, to suggest that the detriment is not to apply to a complaints procedure properly because a complaint has been made, it might be thought, it asks a lot and is highly unlikely. The complaints procedure itself is plainly embarked on because there has been a complaint: to then argue that where it has not been embarked on with sufficient care, enthusiasm or speed those defects are also because of the complaint itself would require the more careful of evidential bases*."

277. These observations are pertinent to the case before us. The claimant has failed to present any cogent evidence as to why she says that it is the fact that her complaint contained an allegation of race discrimination was in and of itself the reason why it was not upheld.

278. The last three allegations fail for the same reasons as why they have failed as allegations of harassment and discrimination. We find that these actions were taken for the reasons I have explained earlier and had nothing to do with the claimant doing any of the protected acts.

279. It follows that the claimant's complaints of direct disability discrimination and victimisation both fail and are dismissed.

Reasonable adjustments

280. Now, before dealing with the reduction in pay as the complaint of discrimination arising from disability, I shall first give our findings and conclusions on the claimant's complaint of failure to make reasonable adjustments.

281. There are two alleged PCPs, which the claimant says placed her at a substantial disadvantage when compared with people who do not have her disability.

282. These are:

> *6.2.1 The requirement for the Claimant to work in the directorate of Carrie Gaston and Luke Williams, and*
>
> *6.2.2 The requirement to use the new telephone system.*

Telephone system

283. It was unclear from the start what the claimant was complaining about in that respect. However, during the hearing, the claimant clarified that her complaint was about not being allowed to have 2-hour breaks away from attending on telephone duties. She said that the 2-hour breaks had been put in place as a reasonable adjustment in 2020, but it was later removed and never reinstated. Instead, she said, she had to ask to have breaks away from telephone and these were given to her on an ad-hoc basis.

284. This complaint fails for several reasons. Firstly, we are not satisfied that the claimant has established facts to show that the alleged reasonable adjustment of 2-hour breaks had been in place and that it had been put in place as a reasonable adjustment to accommodate her disability, as opposed to simply allow her to deal with her workload more efficiently. The claimant refers in her witness statement to an email (p.437) from her previous manager, Sue Hampshire, as proving the alleged adjustment. However, that email says nothing of the kind. On the contrary, it says that the claimant would be increasing her hours.

285. Secondly, the claimant evidence was that the adjustment had been removed by Sue Hampshire before LW came into the role. The claimant never raised that with him or anyone else at the respondent. We accept LW's evidence on that. When the claimant asked LW for time off the phone, he allowed that, but in asking that the claimant was complaining about her workload and did not say that it was needed as a reasonable adjustment to accommodate her disability. Therefore, neither LW nor anyone else at the respondent knew and could have reasonably been expected to know that the requirement for the claimant to answer phone calls without 2-hour regular breaks was likely to place her at a particular disadvantage by reason of her disability.

286. Furthermore, the particular disadvantage, as formulated by the claimant, has no obvious link to her disability. She says that the lack of sufficient breaks caused her stress as she was not able to manage her workload. However, the lack of sufficient breaks is most likely to cause a non-disabled person stress if they were not able to manage their workload as a result. Therefore, the comparison test is not met.

287. Finally, and critically, this allegation is significantly out of time. On the claimant's own case the adjustment had been taken away by Sue Hampshire in November 2022. Therefore, the time started to run from that moment and the primary limitation period expired sometime in February 2023, where the claimant started ACAS EC on 30 August and presented her claim on 9 November 2023. Therefore, it is at least 9 months out of time.

288. The claimant gave no evidence as to why she did not present her claim with respect to that allegation earlier or why she says it would be just and equitable to extend time. Her final submissions on this issue were less than persuasive. This, of course, does not automatically follow that the Tribunal cannot exercise its wide discretion and extend time, but it is a relevant consideration for us to take into account.

289. The claimant argued that it was conduct extending over a period, which could be linked with other alleged discriminatory actions, which are in time. We reject that. It was a discrete act by Sue Hampshire, who was not involved in any other allegations of discrimination advanced by the claimant in these proceedings. All other allegations of discrimination relate to the events on and after 22 June, some 7 months later. Therefore, it cannot be said to be "an ongoing state of affairs". Accordingly, we find that it was not a continuing act.

290. We also find it will not be just and equitable to extend time. The complaint is historic. It was not properly formulated or supported by evidence for the respondent to understand it. The way the respondent pleaded its defence to that claim clearly shows that the respondent understood it as the claimant complaining about some new telephone system installed by the respondent, which was not the case. It was reasonable for the respondent to have understood it in that way. It was only during the course of this hearing when the claimant finally explained what that complaint was about.

291. The forensic prejudice to the respondent is significant. Sue Hampshire was not called as a witness, because it would not have been reasonably apparent to the respondent that her evidence was needed to meet that claim. She is no longer with the respondent. Given that the claimant had failed to formulate her complaint properly referring to "new telephone system", the respondent prepared its evidential case to meet this complaint on the basis that it was factually incorrect and there was no new telephone system installed by the respondent. Therefore, allowing this complaint to proceed in the form formulated by the claimant at the hearing, would mean putting the respondent into an impossible situation when it would have to meet a different complaint, for which it had not prepared any evidence and not prepared for a good reason.

292. For all these reasons, this allegation as a complaint of failure to make reasonable adjustments fails and is dismissed.

The requirement for the Claimant to work in the directorate of Carrie Gaston and Luke Williams

293. This part of the complaint also fails for several reasons. First, we do not accept that this PCP put the claimant at a substantial disadvantage as compared to a non-disabled employee "*because her anxiety and depression was exacerbated because she was unable to discuss grievance issues properly*".

294. Her grievance was properly dealt with by people outside the directorate and therefore there is no connection between the claimant's ability to discuss her grievance and the PCP.

295. Secondly, we find that the respondent did not know and could not have expected to know that the PCP was likely to place the claimant at a substantial disadvantage by reason of her disability. The claimant was asked to resume working with LW and CG after all steps of her grievance process had been completed. There was no live grievance to discuss with them at that stage. The claimant was saying that she felt unsafe coming back, but did not explain why, especially considering that she had raised no complaints against LW. In any event, she was asked to engage with LW and CG not to discuss her grievance, but to resume her normal working relationship.

296. Furthermore, the fit note produced by the claimant show that her GP signed her off as unfit for work, not that she would be fit to return with reasonable adjustments. We also note that the recent occupational health report does not say that with this adjustment implemented (i.e. moving the claimant to a different team), the claimant would be able to resume her work, or that had that adjustment been implemented earlier she would have been able to return to work earlier.

297. Finally, we find that it would not be reasonable for the respondent to move the claimant to a different directorate. We accept CG's evidence that there was nowhere else where the claimant could be moved as an ALS Course Coordinator. She was in a small team. LW was the only manager in that team. There were no parallel course coordinator's teams, and it would not be reasonable to move the claimant into the clinical team, considering that the whole restructure process undertaken by the respondent was to bring all course coordinators together into one team under the new support structure.

298. For all these reasons, the complaint of failure to make reasonable adjustments fails and is dismissed.

Discrimination arising from disability complaint

299. Returning to deal with the allegations of the reduction in pay as a complaint of discrimination arising from disability, which is the last complaint before us.

300. The alleged unfavourable treatment is formulated as "*Pay the Claimant under the sick pay policy whilst she was absent from work after being suspended from October 2023*".

301. Effectively, the claimant complains that paying her in accordance with the sick pay policy (and not her full salary) was unfavourable treatment because of her sickness absence, which absence arose in consequence of her disability.

302. I have already dealt with the question whether the claimant was contractually entitled to be paid her full salary by reason of suspension earlier. There is no need to return to that.

303. However, it is important to note that the way the claimant formulated the relevant treatment complained of. Unlike her complaint of victimisation, where she says the detriment was her "*pay being reduced on the 2nd January 2024*", for the purposes of this s.15 complaint the claimant says that the unfavourable treatment was the application of sick pay policy whilst she was absent from work after being suspended. It is not a complaint that a reasonable adjustment should have been made to the sickness policy to extend her sick pay without a reduction.

304. We accept that the claimant sickness absence was something arising from her disability and the respondent did not argue to the contrary.

305. We also accept that the second causal link is made out, that is the payment to the claimant under the sickness policy was because of the claimant's sickness absence. There is no argument about that either.

306. The question, however, is whether applying the sickness policy was "unfavourable treatment", and if it was – whether the respondent had a legitimate aim, which that treatment (i.e. payment in accordance with sickness policy) was a proportionate means to achieve it.

307. The respondent pleaded case says that the legitimate aim was *the effective control and management of the charity's finances and of ensuring that charity resources are used in the furtherance of the Respondent's charitable objects*.

308. We accept that it is a legitimate aim. However, that is only half of the story. The key question is whether paying the claimant in accordance with the sickness policy when she was on suspension was a proportionate means of achieving that aim. This requires examining the adopted means against their discriminatory effect before arriving at the decision whether objectively viewed they were proportionate. We had no evidence from the respondent on this balancing exercise, and indeed whether the respondent ever applied its mind to this issue before reducing the claimant's sick pay in accordance with the sickness policy, despite the claimant being on suspension and was told that she would continue to receive her salary and benefits as normal.

309. However, we must take things in their proper order.

310. First, dealing with the issue of knowledge. The respondent pleaded that at the relevant time it did not know and could not reasonably have been expected to know, that the claimant was disabled at the relevant time. We reject that. The claimant went off sick with depression and anxiety on 2 October 2023. She had a history of health-related absence in the past. The respondent knew that she was suffering from panic attacks. The claimant made repeated complaints about her mental health being affected during the grievance process. The respondent itself sought to refer the claimant to occupational health to ascertain the severity of her condition. On 11 December 2023, the claimant wrote to say that she was receiving treatment for psychological and physical health issues.

311. The Equality and Human Rights Commission's Statutory Code of Practice on Employment ("**the Code**"), which the Tribunal must have regard to when dealing with discrimination case, as required by section 15(4)(b) of the Equality Act 2006 says that:

"Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"" (para 5.14). The Code gives an example, at paragraph 5.15, of where a sudden deterioration in an employee's time-keeping and performance and change in behaviour at work should alert an employer to the possibility that these were connected to a disability and lead the employer to explore with the

worker the reason for the changes and whether difficulties are because of something arising in consequence of a disability, in this example, depression."

312. Further, paragraph 6.19 of the Code says:

"The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

313. These examples are pertinent to this case. In short, there was more than enough of various signals to put the respondent on notice that the claimant might have had a mental health condition which could well amount in law to a disability. Therefore, even if the respondent did not have actual knowledge, it was fixed with constructive knowledge of the claimant's disability by the time it meted out the treatment complained of, that is implemented the reduction in pay on 2 January 2024.

314. It is no defence to s.15 claim if the respondent did not know that the 'something' leading to the unfavourable treatment (in this case the claimant's sickness) was a consequence of the disability (see *City of York Council v Grosset* [2018] ICR 1492).

315. Now, returning to the question of "unfavourable treatment". The respondent says that it was not unfavourable treatment because it was a benefit, and a benefit is not unfavourable treatment, but the opposite. With all due respect, this is a circular argument, which betrays its logical fallacy. Just calling something "a benefit" does not automatically mean that that "something" is favourable. One needs to look at whether the beneficiary of the "benefit" is better off or worse off as a result of that "benefit" being bestowed on them.

316. The example Mr Hignett gives at para 46 of his closings is a valid one. He says: "*It is clearly favourable treatment to be paid full pay and then half pay whilst off sick since employees without such a benefit receive payments of SSP only*." However, this ignores the important fact that the suspension email on 3 October promised that the claimant would be paid her salary and benefits whilst on suspension.

317. That promise gave the claimant "a benefit" of receiving her full salary and other benefits whilst on suspension. I will call it "**the suspension promise**" as a shorthand and for want of a better description. However, it should not be understood as a finding that the claimant was legally entitled to that benefit by reason of her suspension. She was simply promised that whilst on suspension she will be paid her normal salary and benefits.

318. As we have found the claimant's suspension was not lifted automatically by her going off sick, nor was it lifted by the respondent before it applied the sickness policy and reduced the claimant's pay. Therefore, withdrawing the suspension promise and giving her "sick pay" benefit in return made the claimant worse off. And that is the relevant treatment she complains about, which on any reasonable view is unfavourable. As I have explained earlier, it is not a complaint of failure to make reasonable adjustments to the sick pay policy or the application of sickness policy to disable people *per se*.

319. The way Mr Hignett invites us to look at the matter by focusing solely on the sick pay benefit is to look only at one half the picture and ignore the importance element of the suspension promise that the claimant enjoyed at the relevant time, before the respondent told her on 8 December that her pay would be reduced to 50% and reduced it accordingly on 2 January.

320. The *Williams v Trustees of Swansea University* 2018 UKSC 65 case the respondent relies upon is of no assistance to the respondent. That is because, unlike in the present case, Mr Williams was not entitled to early retirement benefit other than by reason of his disability and he was awarded a pension for that reason. The issue was about how it was calculated due to his part-time work arising in consequences of his disability. The Supreme Court found that there was nothing intrinsically "unfavourable" or disadvantageous about Mr Williams being given an early retirement pension, because had he been able to work full time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all. Unsurprisingly, between no pension at all and an immediate early retirement pension (albeit not as generous as it could have been, had for example Mr Williams was a full-time employee and became suddenly incapacitated on a permanent basis) the Supreme Court said that the award of pension was not an unfavourable treatment.

321. Equally, the EAT decision in *Cowie & Ors v Scottish Fire and Rescue Service* [2022] EAT121 is not on point. In that case, the EAT found that the Tribunal erred in law by focusing on the pre-condition of the benefit, that is that the employees had to use up their accrued time off in lieu before being able to access paid special leave. The EAT held that the pre-condition and the benefit were "not intrinsically entwined" and as the ET found that the benefit was favourable it fell into error by looking at the pre-condition, which was not the relevant treatment for the purposes of s.15 complaint in that case.

322. In the present case, there was no pre-condition for the claimant to have to give up the "suspension promise" to be entitled to sick pay. Reducing her pay from the promised full pay while on suspension to half pay pursuant to the sickness policy was the respondent's single treatment, which the claimant complains about.

323. We accept Mr Hignett's submission that s.15 claim does not require a comparator, and we should not engage in comparing how the claimant was treated against how the respondent treated or would have treated someone

on suspension who was not on sick leave due to a disability. However, we do not accept that in deciding whether the treatment complained of (that is, the withdrawal of the "suspension promise" and its replacement by the sick pay benefit) we should not compare the two positions (before and after), in deciding whether in overall it was unfavourable treatment. As Mr Hignett says that comparison lies at the heart of the claimant's case that she was treated unfavourably, and rightly so. The comparison is not with another actual or a hypothetical comparator, but between the two positions of the claimant before and after her pay was reduced on 2 January 2024.

324. The Supreme Court in ***Williams*** endorsed the view that the concept of unfavourable treatment does not require an over-elaborate analysis and has a "*relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under [section 15]*".

325. Finally, whether or not either of the two "benefits" was contractual is irrelevant for the purposes of deciding whether the treatment in question was unfavourable. There is no law known to this Tribunal (and we have not been referred to any such law by the parties) that withdrawing a more generous non-contractual benefit and replacing it with a less generous contractual benefit cannot be unfavourable treatment for the purposes of s.15 EqA. I observe in passing that the claimant's contract of employment and the terms of the sick pay policy seem to suggest that payments of sick pay are at the respondent's discretion and non-contractual, but nothing turns on that.

326. We also reject Mr Hignett's submission at para 4 of his further closings. I have already explained why it is not only legitimate but necessary to compare the suspension promise and the sick pay benefit to decide whether it was unfavourable treatment. The fact that the suspension promise did not arise in consequence of the claimant's disability is irrelevant. In fact, sick pay benefit did not arise in consequence of the claimant's disability either. What arose in consequence of the claimant's disability is her going off sick. And it is because she was off sick the respondent reduced her pay in accordance with the sickness policy thus withdrawing her suspension pay promise. That was unfavourable treatment because of something arising.

327. It is, therefore, our finding that by reducing her pay on 2 January 24 the respondent did treat the claimant unfavourable because of something arising in consequence of her disability.

328. The next question is whether that unfavourable treatment was a proportionate means of achieving a legitimate aim?

329. It is important that we remind ourselves and the parties that statutory language we must apply reads:

Section 15 Equality Act 2010:

> "*(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."

330. This means that it is for the respondent to show that the reducing the claimant's pay in accordance with the sick pay policy, despite the claimant remaining on suspension and the suspension promise given to her, was a proportionate means of achieving a legitimate aim.

331. As I have said earlier, whilst we accept that the pleaded aim of "*the effective control and management of the charity's finances and of ensuring that charity resources are used in the furtherance of the Respondent's charitable objects*" was a legitimate aim for the respondent, we had no evidence on what basis the respondent determined that reducing the claimant's pay in accordance with the sick pay policy, despite the claimant remaining on suspension and the suspension promise given to her, was a proportionate means of achieving that aim, nor did the respondent state in its response or amended response why it will say this was a proportionate means.

332. The respondent relies on the Court of Appeal decision in ***O'Hanlon v HMRC*** [2007] EWCA Civ 283. We find that this reliance is misplaced for the following reasons.

333. Firstly, ***O'Hanlon*** was decided under the antecedent legislations - s.3(A) of DDA 1995, which had a particular provision (sub-section 6) to the effect if a person was under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified, unless it would have been justified even if he complied with that duty.

334. S.15 EqA does not contain similar provisions. A complaint of failure to make reasonable adjustments is a separate and independent course of action under ss.20, 21 EqA.

335. Unlike in ***O'Hanlon***, with respect to the relevant treatment for the purposes of s.15 complaint, there is no complaint before us for failure to make reasonable adjustment, in the alternative. In ***O'Hanlon*** the tribunal decided that increasing sick pay was not in the circumstances an adjustment a reasonable employer would be required to make, and that Court of Appeal said it was enough to make good the justification defence.

336. We made no determination whether it would be a reasonable adjustment for the respondent to amend its sickness policy to extend full pay for the claimant. It is not an issue we needed to decide.

337. It is in the context of the tribunal findings on reasonable adjustments that in ***O'Hanlon*** the Court of Appeal [at 67 – 68] said why it thought that it would be a rare case when an adjustment to sick pay for disabled people would be considered necessary as a reasonable adjustment, and gave its

reasons for that. It did not, however, said that justification was not required at all.

338. Critically, for the present purposes, the relevant treatment in *O'Hanlon* was the application of the sick pay policy, where, as I have said earlier, in the case before us it is not the application of the respondent's sickness policy, but the reduction of the claimant's pay, whilst on suspension, from what she was promised in the suspension letter and replacing it with the sick-pay benefit.

339. For the same reasons, the Supreme Court's judgment in *Seldon v Clarkson & Jakes* 2012 ICR 716 SC is not to the point. We are not concerned with the application of the sickness policy *per se*, but the respondent reneging on its suspension promise, and instead paying the claimant in accordance with the sickness policy.

340. As was observed by HHJ Richardson in *Buchanan v Commissioner of Police of the Metropolis,* 2016 WL 05484785 (2016) at [46]:

> "*If the treatment is the direct result of applying a rule or policy, it will usually be the rule or policy which has to be justified.*"

341. As I have said earlier, our finding is that the respondent has failed to show that at the relevant time it had the policy or rule of applying sick pay to employees on suspension who go off sick. The sick pay policy by itself cannot serve as a justification of the relevant treatment.

342. The respondent can only justify the relevant treatment by showing that the policy of reducing pay to sick pay for employees on suspension who go off sick due to a disability is justified. That is not how the respondent pleaded or argued its case, nor did we hear any evidence on this point.

343. Furthermore, HHJ Richardson in *Buchanan* said at [48]:

> *"In my judgment it will be rare in disability cases concerned with attendance management for the approach in Seldon to be applicable. This is because generally speaking the policies and procedures applicable to attendance management do allow (adopting the words of Elias LJ quoted by Baroness Hale in Seldon) for a series of responses to individual circumstances. And this is in keeping with the purpose underlying disability discrimination law. It is to secure more favourable treatment for disabled people and it requires employers to assess on an individual basis whether allowances or adjustments should be made for them: see Griffiths at paragraphs 15 to 16.*

344. In the circumstances of this case, it was undoubtedly open for the respondent to respond in different ways. It could have kept the suspension promise, it could have removed the claimant's suspension. It, however, chose to keep the claimant suspended and to reduce her pay despite the suspension promise, thus meting out the unfavourable treatment she complains about.

345. While we accept that it might not have been a particular high hurdle for the respondent to justify that treatment as a proportionate means of achieving the pleaded legitimate aim, it has simply failed to do so by not putting forward any positive case to address this issue.

346. We appreciate that the claimant going off sick virtually at the same time as the respondent have decided to suspend her (and without realising that she was about to go off sick) in some respect “wrong-footed” the respondent, and perhaps made it to “take their eyes of the ball” as far as the suspension was concerned. With the claimant going off sick for a lengthy period of time, the original rational for suspension (the untenable situation with the claimant being technically at work, but not engaging with her managers) was no longer present, yet it appears that either the respondent has failed to apply its mind to that change in the circumstances (and that is despite the claimant reminding it on 29 October that she was still suspended), or having applied its mind positively decided to continue with the suspension, but to reduce her pay in accordance with the sickness policy. Either way, it is for the respondent to justify that treatment. It has failed to do that.

347. For all these reasons, we find that the respondent has failed to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

348. It follows that the claimant’s complaint of discrimination arising from disability is well-founded and the respondent must pay the claimant compensation for discriminatory treatment to be determined at a remedy hearing, if not agreed.

349. All other complaints in the claim are not well-founded and are dismissed.

Employment Judge Klimov

12 November 2024

Sent to the parties on:

20 November 2024

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For the Tribunals Office