EMPLOYMENT TRIBUNALS

Claimant: Ms A Kavale

Respondent: Guy's and St Thomas' NHS Foundation Trust

Heard at: London South
On: 2, 3, 4, 5, 6 September 2024 and 4 October 2024 (in chambers)

Before:
Employment Judge Heath
Mrs H Carter
Mrs M Foster-Norman

Representation
Claimant: In Person
Respondent: Dr M Sharp (Counsel)

RESERVED JUDGMENT

The claimant's claims of indirect sex discrimination, harassment related to sex and victimisation are not well-founded and are dismissed

REASONS

Introduction

1. This case concerns the respondent's treatment of the claimant following her return to work following her maternity leave. The claimant says that the respondent indirectly discriminated against her on grounds of sex in requiring staff to attend the workplace 2 days per week, and that various ways in which she was treated amounted to sex-related harassment and victimisation following her putting in a grievance in which she complained of discrimination.

2. The respondent denies applying a requirement to attend the workplace twice a week, denies that such a requirement, if applied, put women or the

claimant at a particular disadvantage, and asserts that such a requirement was objectively justified. It denies harassing or victimising the claimant.

Issues

3. The issues in this case were agreed at a preliminary hearing for case management before Employment Judge Pritchard on 8 November 2023. A List of Issues was set out in the Judge's summary of that hearing, and is annexed to this decision.

4. At the start of the hearing the tribunal discussed the List of Issues with the parties. Following some discussion between the parties themselves:

    a. Issue 5.2.3 was clarified to read as follows: "*Raised issues about the claimant's performance in an email dated 25 January 2023 which was not evidenced or reflected in grievance outcome*".

    b. The claimant clarified in respect of Issue 5.2.4 that, in terms of the "continued" refusal to grant reasonable requests to work one day in the office, she sought to rely on a decision by Ms McCann on 30 October 2023 as an act of victimisation. We will return to this clarification in the Procedure section below.

5. When we refer to a particular issue within the List of Issues in our decision we will do so using the following format **LOI 4.1.1** to indicate paragraph 4.1.1 in the List of Issues.

Procedure

6. The tribunal provided a Lithuanian interpreter for the claimant. The claimant confirmed at the start of the hearing that she wished to conduct the hearing in English, and to seek assistance from the interpreter as and when she felt she needed it. Ms Dikiene was the interpreter on day one, and Ms Mituziene for the remainder of the hearing.

7. We were provided with an agreed 884 page bundle. When we refer to pages in the bundle in this decision we will do so by referring to the page number in square brackets (eg. [123]).

8. The claimant provided a witness statement and gave evidence on her own behalf.

9. The following provided witness statements and gave evidence on behalf the respondent:

    a. Mr Adam Jarosz (Procurement Associate Director). Statement dated 22 July 2024 and supplementary statement provided on 3 September 2024.

b. Mr Simon Williams (Assistant Director, Procurement Shared Services Team). Statement dated 22 July 2024 and supplementary statement provided on 3 September 2024.

c. Mr Remmy Kamya (Procurement Specialist).

d. Dr Andrew Stradling (Executive Medical Director).

10. As set out above, at the start of the hearing, following some discussion between the parties, the claimant clarified that she sought to rely on a decision of Ms McCann on 30 October 2023 as an act of victimisation under **LOI 5.2.4**.

11. The respondent objected to the claimant relying on this decision. Dr Sharp said that Ms McCann was not a witness, and that although the respondent would be in a position to address the issue through Mr Jarosz and Mr Williams, they would have to produce short supplementary statements and refer to a couple of further documents not in the bundle.

12. On balance, we accepted that the respondent was put to some prejudice by this clarification in the claimant's case. However, this prejudice could be addressed by allowing the respondent's to produce short supplementary statements from two of their witnesses who would refer to a couple of further documents. Accordingly, Issue 5.2.4 is to be construed as encompassing the decision by Ms McCann on 30 October 2023. Mr Jarosz and Mr Williams produced short supplementary statements on 3 September 2024, and six pages of emails to the claimant and added to the bundle.

13. There was a disagreement at the start of the hearing about certain documents disclosed late and added to the bundle, but sensibly both parties reached agreement and there was no dispute on this issue that we had to resolve.

14. Part of the first morning was taken up with "housekeeping" matters, and for the rest of the day the tribunal read the witness statements and documents referred to in those statements. We reminded the parties that we would not be reading documents unless the parties specifically drew our attention to them in their statements or during the course of the hearing. If we do not refer to evidence raised by either party this should not be taken to mean that we have not considered it.

15. The claimant gave evidence on day two and into day three. The respondent's witnesses gave evidence on day three and day four.

16. On day four, in the middle of the claimant's cross-examination of Mr Williams, the claimant made an application to adduce evidence of a covert recording of a meeting she had with Mr Williams on 6 December 2022. The respondent objected to this application. For reasons given orally we rejected the claimant's application. In brief:

a. The claimant does not assert any acts of harassment or victimisation during the course of the 6 December 2022 meeting. An audio recording of such meeting therefore has marginal relevance to the issues in the case.

b. The application was made at an extremely late stage. We did not accept that the claimant had simply forgotten that she had made this recording. Employment Judge Pritchard's orders had been clear that "documents" which needed to be disclosed by the parties included audio recordings (paragraph 7), that parties relying on recordings should provide a transcript (paragraph 9) and that the tribunal did not have facilities for playing audio recordings and parties should bring their own equipment (paragraph 10).

c. The recording had not been disclosed to the respondent. To admit the recording into evidence would require the tribunal to adjourn the hearing to give the respondent the opportunity to listen to the recording, for a transcript to be provided if necessary, and perhaps for further submissions on whether the recording should be put into evidence. The hearing timetable at this stage was already running behind, and taking these further steps would jeopardise the hearing of the evidence within the time slot.

17. The respondent provided written closing submissions on the morning of day five, which Dr Sharp amplified on orally. The claimant gave oral closing submissions. It was clear at this stage that the tribunal would not be in a position to deliberate, prepare and deliver an oral judgement. The parties were therefore told that a reserved decision would be provided. The tribunal deliberated for the remainder of the day the tribunal further deliberated on 4 October 2024.

Facts

18. The respondent is an NHS Trust. The part of the NHS which this case is concerned with is the London Procurement Partnership ("LPP"), which represents all London NHS Trusts and former Clinical Commissioning Groups. The purpose of the LPP is to act on behalf of the NHS Trusts as the contracting party for the procurement of non-clinical services. The LPP was physically located in office space in the Guy's Hospital site at Great Dover Street near London Bridge.

19. The claimant started employment with the respondent as a Procurement Specialist, a Band 7 post, on 18 November 2019. This was a full-time role of 37.5 hours per week. This was a reasonably senior role, and the claimant's work involved a fair degree of responsibility, dealing with high value procurement exercises. We accept the unchallenged evidence of the respondent that the work of the Procurement Specialist involved close engagement with external stakeholders.

20. The respondent has numerous policies and procedures, including a Flexible Working Policy and Procedure. This policy includes:

a. A principle that managers will seek to accommodate requests where practical and where the request does not compromise services or result in additional cost;

b. A list of considerations for managers reviewing applications, including business reasons which might justify refusal such as cost, detrimental effect to patients/service users, inability to reorganise work among staff, detrimental impact on performance or quality, impact on the rest of the team or other departments or impact on the individual eg. training and personal development;

c. The procedure for making and considering an application and appealing outcomes, reviewing and changing working arrangements.

21. The claimant worked in a team of four Procurement Specialists who were her peers. One of these, until his promotion into a new role on 13 January 2023, was Mr Kamya. The claimant was initially managed jointly by Ms Reeve and Ms Stapley.

22. In or around June/July 2020 the claimant informed her managers that she was pregnant. She also informed them about significant domestic difficulties she was experiencing.

23. Around September 2020 Ms Reeve needed a leave of absence and it was decided that Mr Jarosz, Procurement Associate Director, would take over the line management of the claimant and the other Procurement Specialists. The claimant and the other Procurement Specialists were informed of this on 28 August 2020. On this date the claimant was also told that she had a mid-year review coming up and Ms Reeve asked her for her filled out copy of the performance development review ("PDR") form.

24. Mr Jarosz kept notes of various key dates, meetings and other relevant matters in a Word document [146-153], which was a living document which he added to. We asked Mr Jarosz how he created and maintained this document, but the claimant did not challenge the contents in any way. We are satisfied that this document constitutes a contemporaneous record made by Mr Jarosz of relevant interactions with the claimant. No basis for challenging the accuracy of such a record was put forward, and we accept the contents as being broadly accurate.

25. From a reading of Mr Jarosz's notes we find as a fact that on 1 September 2022 Mr Jarosz together with Ms Atack (a manager within LPP) had a meeting with Ms Tolladay and Ms Pelken of HR. There was a "*General Discussion around Capability + Attitude*" concerning the claimant. Mr Jarosz noted down numerous bullet points relating to the discussion, which included informal discussions having taken place with the claimant around her lateness, not acknowledging any issues with her conduct, the claimant often being late to meetings, the claimant having a bad attitude and blaming others for her inadequacies, the claimant working well below

her band and colleagues working on more complex projects. The bullet points tend to suggest that there was discussion around going through the claimant's job description with her relating it to her workloads, setting expectations of delivery, the possibility of raising an informal notice, documenting all shortcomings and sharing them with the claimant, agreeing an action plan, trying an informal process first and allowing a reasonable time for improvement.

26. Mr Jarosz's notes suggest further interactions with HR on 2 September 2020 and further input from Ms Stapley. HR were advising that various matters needed to be taken up with the claimant at her mid-year review meeting, including making the claimant aware of concerns about her capability and timekeeping, asking what support she requires, asking what concerns she has, agreeing an improvement plan detailing what support and training she might require, regular meetings with the claimant providing evidence of improvement. HR further advised that managers should raise at the mid-year review issues about the claimant answering personal calls during meetings and reinforcing to her that working from home is work and that "*personal activity needs to be reduced*". Ms Stapley raised her concerns about the claimant's lack of ownership for tasks which were assigned to her and her clear failure to work to the level required of the role.

27. It is also clear from Mr Jarosz's notes that he was having discussions with the claimant about her upcoming maternity leave. The claimant requested to be allowed to work from home for a month before going on maternity leave

28. On 3 September 2020 the claimant attended her mid-year PDR which Ms Reeve conducted but with Mr Jarosz in attendance as he was shortly to take over the claimant's line management. Up until this point Ms Reeve had been line managing the claimant and she led this process on 3 September 2020.

29. Mr Jarosz provided his notes of this meeting [771-773]. The claimant did not seek to challenge their accuracy. We asked the claimant when she gave evidence whether she was asserting that these notes were either falsified or inaccurate in any way. She said she could not recollect certain things being raised during the meeting, but did not suggest the notes were falsified. In cross-examination of Mr Jarosz she did not challenge the accuracy of these notes. We find that there is nothing to undermine the broad accuracy of these notes.

30. We find as a fact that during the course of the mid-year PDR on 3 September 2020 Ms Reeve and Mr Jarosz discussed with the claimant in depth where her performance was significantly below where it needed to be. In particular, but in brief:

    a. It was explained that the claimant was working at a very admin level and not getting involved in more complex tendering projects.

b. When the claimant suggested that her manager was not giving her work, it was suggested that the claimant needed to approach managers when she does not have sufficient work. The claimant needed to be more proactive and to lead on projects.

c. The claimant needed to be more proactive on various other matters, such as her claim that she had not been given access to the team's inbox for over a month.

d. The claimant did not follow correct procedures for booking annual leave, and had taken leave without approval.

e. The claimant appeared continually to be blaming others for failures and non-delivery.

f. The claimant was persistently late to meetings, and had actually missed an entire meeting.

g. The claimant herself said that "*it was difficult working from home; Internet connections are sometimes bad, so she cannot connect, there was a parcel delivery, personal phone calls*". Mr Jarosz suggested the claimant should log on early to important meetings or to "*come to the office for the more important meetings to ensure [she] can take part*".

h. The claimant was told that there had been a few complaints about her recently and that certain teams within LPP did not want the claimant to become involved in their work as they had concerns about the quality of her delivery and from a reputational perspective.

i. The general conclusion of the meeting was that the claimant was not delivering to the required standards and that she seemed to blame multiple people across LPP for the lack of delivery on her projects. She lacked a proactive approach and she appeared to wait for things to be resolved rather than approach her line manager or others. She appeared to lack the skills to complete the more complex tasks although she had never raised this as a concern or requested further training.

31. The PDR process leads to the staff member being scored between 1 and 5. 1 represents an "underperformer" and 5 represents an "outstanding performer". The claimant was scored 2, an "inconsistent performer". We accepted Mr Jarosz's evidence that it is very rare to give a grade as low as 2, and that this was the first time that Mr Jarosz had ever been involved in giving such a score.

32. The claimant's case before the tribunal was that in the months prior to her maternity leave she was told by managers that she did not have to do any large projects because she would be going on maternity leave. She did not appear to accept that any performance concerns were raised with her. We

do not accept her evidence. Mr Jarosz's notes suggest that, both behind-the-scenes, and at the mid-year PDR meeting on 3 September 2020 numerous significant performance concerns were explicitly raised about and with the claimant.

33. At the meeting of 3 September 2020 the managers asked the claimant to prepare an action plan to support her to improve her score in her PDR and to meet her objectives. Mr Jarosz set up a follow-up meeting on 8 September 2020 to discuss next steps and actions in respect of this. Mr Jarosz repeated his request for an action plan to be prepared by the claimant.

34. On 16 September 2020 Mr Jarosz had a meeting with the claimant to discuss the improvement plan. Mr Jarosz and the claimant met and the claimant had prepared actions relating only to one objective. There was further correspondence after this meeting in which Mr Jarosz reiterated his request for an action plan relating to the other objectives showing clear steps, achievements, milestones and target dates. The claimant set out in an email that she would like assistance from someone experienced in monitoring performance to assist with this. She acknowledged that one of the objectives was the need for her to be proactive and to build trust.

35. Ms Stapley had been copied into the correspondence, and on 18 September she emailed the claimant with suggestions on what to put in an action plan. She set out that while there was no dedicated template for an action plan, she could use her PDR plan as the basis for the action plan. She suggested areas the claimant should focus on including planning individual projects or tasks to meet her objectives, to identify skills or behaviours that need improving to set out timelines, to record actions completed, how to measure success of the plan. She suggested the claimant may find help in referring to the competency framework. She also said that she would be happy to review any draft plan the claimant prepared. She set out that the claimant should not worry if she did not get the plan correct on the first go, but that it was important that she started drafting.

36. We can see how it might be difficult for someone who might not accept that they were a poor performer to prepare an action plan to address such poor performance. However, the claimant was operating at a relatively senior level and was given guidance and direction by managers.

37. On 21 September 2020 the claimant went off sick.

38. The claimant returned to work on 12 October 2020. She met with Mr Jarosz that day to discuss a return to work.

39. On 26 October 2020 Ms Reeve returned to work. Mr Jarosz emailed the team to say that Ms Reeve would return to the procurement team to manage the procurement specialists, including the claimant.

40. It is right to say that during this period Mr Jarosz continued to have concerns about certain aspects of the claimant's performance, such as her compliance with absence management procedures, attendance and lateness for meetings.

41. During this period, there were discussions about the claimant's impending maternity leave and her outstanding annual leave. It was agreed that the claimant could take her period of annual leave prior to going on to maternity leave.

42. On 2 December 2020 the claimant went on maternity leave. For a variety of reasons, it did not prove possible to create or put into effect any action plan to address the significant areas of underperformance identified at the midyear PDR meeting of 3 September 2020 before the claimant went on maternity leave.

43. The claimant gave birth to her daughter sometime in early 2021. She was a single parent.

44. On 2 December 2021 the claimant returned to work following her maternity leave.

45. Shortly before the claimant returned to work Mr Williams had been appointed Assistant Director of LPP. He himself was managed by Mr Jarosz. Mr Williams became the claimant's and the other Procurement Specialists' line manager.

46. The circumstances of Mr Williams' appointment to this role meant that he had a fairly short period in which to familiarise himself with the role while he was also finishing off work relating to the role he was leaving. We accept that he had a fairly surface level awareness of performance issues in relation to the claimant, but was not aware of the detail.

47. It would appear from the evidence that the efforts to put in place an action plan to address the claimant's poor performance prior to her maternity leave were not taken up on her return. We accept Mr Williams' evidence that, notwithstanding his awareness of performance issues, he wanted to make his own mind up about the claimant's work.

48. While the claimant had been on maternity leave, the LPP had adopted a new e-tendering system called Atamis. Training was available to the team, there were written guidance and video tutorials and there was a dedicated support team to assist the procurement specialists.

49. The claimant initially was asked to support two projects which did not, for a variety of reasons, progress. During the first few months of her return there were not significant outputs to show for the claimant's work because of this.

50. Nonetheless, by the spring of 2022 Mr Williams was becoming aware that the claimant was not operating at the level that he would expect for a Band 7 worker. In March 2022 an external stakeholder contacted a senior

manager in LPP to raise concerns that the claimant had been unable to answer some basic questions in a meeting she had attended with them.

51. Mr Williams held monthly one-to-one meetings with the claimant which were minuted. On 8 April 2022 there was a discussion about the claimant's working pattern. It was noted that the claimant was taking compressed hours with Wednesday as her non-working day. Concerns were raised that this would not be workable once the claimant was back in the office, while also juggling childcare, and the arrangement would have to be reviewed depending on how many days were spent in the office. There was a discussion about the possibility of reducing hours for one year. Mr Williams advised that compressed hours would be expected to be completed on each working day once in the office although this could be a combination of working from home and office working.

52. On 3 May 2022 the claimant emailed Ms Petken of HR cc Mr Williams as follows:

> *I would like to ask if I could request working from home full time and come to office when needed only (in case of any important event or meeting) based on my current situation. I am a single mum having a 14 months old child and would really benefit from saving 2 hours a day when not required to come to office. This would let me work more efficiently and save time for my personal and child's needs. Coming to office would mean that I have to leave earlier to avoid the traffic and not to be late for my daughter's pick up from the nursery as I would be charged for that. Then I would need to find the time to cover these hours later on in the evening and this would be quite a challenge having an active toddler at home.*
>
> *I could apply for this through HR presenting more reasons on why I would benefit from working from home full time or at least reduced coming to the office to 1 day a week. I believe I have good reasons to ask for a reduced coming to office comparing to others especially when I work full time.*
>
> *Please let me know if this can be considered.*

53. Ms Petken responded that the claimant would first need to discuss these issues with her line manager.

54. Shortly after this the claimant made Mr Williams aware of her desire to work from home full-time. Mr Williams discussed this with Mr Jarosz, and Mr Jarosz and Mr Williams discussed the issue with Mr Joseph, LPP Chief Operating Officer.

55. We heard evidence from Mr Williams and Dr Stradling, who was later to hear the claimant's grievance, about high-level decisions within LPP about working from home and the return to the office-based working practices post-Covid. This evidence was not challenged and we accept it. We find that LPP was situated in offices provided on the Guy's Hospital site in

Great Dover Street. The Trust had adopted a practice of staff working at least 2 days per week onsite. The LPP worked with stakeholders within Guy's hospital and more widely with London NHS Trusts. There was a perceived value in aligning LPP's working practices with the rest of the respondent Trust. Additionally, there were discussions at a high level about whether office space was needed at Great Dover Street, and there was a fear that the space could be lost if sufficient staff were not working in it. There were also discussions about whether inner-London weighting could be maintained for staff who were working at home outside of inner London.

56. In short, we find that the senior leadership had moved towards developing at this point an expectation that staff should work on site for at least two days per week. This was not a rigid policy, but an expectation that could flex to individual circumstances.

57. We further find that Mr Joseph communicated this expectation to Mr Jarosz and Mr Williams in early May 2022.

58. As a result of these discussions Mr Jarosz emailed the procurement team (including the claimant) and LPP managers on 9 May 2022 with a reminder of arrangements for working in the office. He set out that the "*expectation is that everyone should be working in the office now for at least 2 days per week. Please can you ensure that 2 of your working days per week are based in the office*".

59. Later that day the claimant responded to Mr Jarosz's email, cc Mr Williams and HR. She referred to a right in law for a single parent to ask an employer for flexible working. She requested to work from home full-time and to come into the office only when needed for an important event or meeting. She set out that she was a single mum to a 14-month-old child and could benefit from saving two hours a day when not required to come into the office. She said this would help her work more efficiently and save time for her own and her child needs. She said that working from the office would require her to leave early to avoid the traffic not be late to pick up her daughter from nursery. She said that she would find it challenging to find time to cover these hours later in the evening with an active toddler at home. She referred to the fact that she had reverted back to a five day week (following a trial with compressed hours as set out above).

60. Mr Williams responded by email on 10 May 2022 noting the claimant's email and saying that HR were being consulted and he would get back to the claimant.

61. On 12 May 2022 Mr Williams emailed the claimant responding to her request to work from home full-time [222]. He set out that Mr Joseph had reiterated to Mr Jarosz and himself that there was an expectation on all staff within LPP to come into the office twice a week which would bring them in line with all Trust staff who have returned to the office. He went on to say:

Now that you have reverted to 5 day working week pattern I am quite happy for flexibility around the hours you would work in the office. I understand that your daughter attends nursery from 8am to 6pm Monday, Tuesday and Thursdays? Therefore I am happy that you only need attend the office on any two of those days and you can start and finish to allow time to travel to drop off/collect your daughter. In other words you can come in after 9am and leave before 5pm as long as you can maintain your contracted hours weekly with WFH and maintain your outputs.

Happy to discuss in terms of practicalities but not the decision. You do of course have the right to make a formal request to HR on this but I believe we are acting entirely in line with the Flexible Working Policy which I attach. It is my view, and Adam's, that LPP has already extended this to all staff with up to three days being permitted as working from home.

62. On 13 May 2022 Mr Williams and the claimant had a one-to-one meeting. By that stage the claimant had returned to working a five day week (that is to stay not compressed hours). The record of this meeting makes clear that Mr Williams reiterated the information he conveyed in his email the previous day. The notes suggest that Mr Williams and the claimant discussed which days the claimant's daughter attended nursery and the times (8 AM to 6 PM). It was discussed that on Tuesdays and Thursdays the claimant could start and finish at times that allowed her to drop off and collect her daughter. The arrangement was envisaged to start on the week commencing 16 May 2022.

63. Pausing here, the thrust of the claimant's evidence before the tribunal was that she was not able to find the time to take her daughter to nursery, take public transport to work, do a day's work, and then return to pick her daughter up from nursery. The contemporaneous documents do not suggest that she was saying this at the time. She was saying she could "benefit" with cutting out her commute. Furthermore, it is clear that Mr Williams was offering flexibility around working times that would allow the claimant to drop off and pick up her daughter.

64. On 16 May 2022 the claimant was absent sick until 30 May 2022.

65. On 31 May 2022 Mr Williams met the claimant for her mid-year PDR. During this meeting Mr Williams raised with the claimant a number of performance issues, including that despite her experience in procurement she was not currently working at the level of self-sufficiency expected of her band. Issues about her capability with the Atamis system were raised as well as her lack of ability to advise stakeholders on procurement compliance. The PDR form was in the bundle [228-238]. This form makes clear the areas of concern Mr Williams raised. He also made reference to the pressures she faced due to her childcare responsibility and he committed to supporting her as much as he could with flexibility in working arrangements. However, he said that ultimately the needs of the business would have to take precedence as with everyone else in the team. He set

out that there was likely to be renewed pressure on the team to deliver in the coming year because of the expectation that all tendering activity would be carried out by the team. There were some high profile projects in the offing and it the whole team would need to work at an advanced level in terms of workload and quality. Mr Williams expressed his confidence that, as the claimant was taking on work that he asked to, that she will meet her objectives in the year to come. Overall Mr Williams graded the claimant 2. For her part, the claimant commented that she was finding it challenging returning to work full-time following her maternity leave as a single parent. She commented that her line manager had been "*really supportive and always available for help and support whenever I needed*". She believed that she was meeting her objectives and that performance was close to the expected level given her long break from the business.

66. Following the mid-year PDR Mr Williams encountered further instances of under-performance by the claimant. In early July 2022 the claimant provided Mr Williams with a project plan relating to work on medical gases. The plan was deficient in a number of key, and fairly basic, respects, and Mr Williams considered it a "sloppy" piece of work given the claimant's experience. On 8 July 2022 Mr Williams emailed the claimant, expressing himself in restrained and moderate terms, identifying the deficiencies, suggesting an approach, offering more time if that were needed and requesting that the claimant prioritises the plan.

67. On 14 October 2022 Mr Williams discussed at a one-to-one meeting the claimant's apparent inability to download tenders using the Atamis system. He considered this a core function of the claimant's role. He also reinforced that Procurement Specialists would have to lead on projects requiring to them to speak directly to Trusts without involving managers. He considered this an issue of the claimant's general lack of self-sufficiency and self-management.

68. Mr Williams gave evidence, not challenged by the claimant, that despite communicating the expectation to the claimant in May 2022 that she would be required to attend the office two days a week, she was in fact working from home practically full-time.

69. On 3 November 2022 the claimant made a formal application under the respondents Flexible Working Policy for flexible working. Her application included references to:

    a. Her personal circumstances as a single mother with sole responsibility for a 20 month old child who was attending nursery.

    b. Her desire for either "*Working from home during normal working time or make up hours. This would let me cut the commute/ensure quiet time on an occasional or ad hoc basis",* or *"Work less than the usual number of full days per week - reduce to 3 days a week*".

    c. Her belief that the arrangements proposed would not impact the business, but would allow her to dedicate more time to work. It

would allow her to reduce the risk of getting ill when commuting and help her psychologically deal with very intense work and achieve a better work life balance.

d. Her acknowledgement that reducing her hours would impact on colleagues. However she did not consider this to be a significant issue.

70. The application was uploaded onto an HR portal.

71. Mr Williams discussed the claimant's request with Mr Jarosz. They had concerns that a proposed reduction in hours would impact the wider team. They discussed this with Mr Pace the managing director of LPP and HR. It was agreed that the claimant would be allowed to reduce to three days a week but that she would be required to work these three days in the office. The reason Mr Williams and Mr Jarosz felt the claimant needed to work on site was that it was felt she needed to be drawn more into the team to support her to make the required improvements in her performance. The most effective way of doing this would be if she were physically within the office.

72. On 24 November 2022 the claimant attended the office for her monthly one-to-one meeting with Mr Williams. We find that Mr Williams did mention during the course of the meeting a number of issues which were a cause for concern for him. He indicated that the claimant was not showing enough progress against her objectives and indicated that it would be unlikely that she would score higher than a 2 again. He noted a tendency of the claimant to rely on colleagues to support her in many routine activities and then when issues arose, put the responsibility on them. He noted the claimant appeared not to be taking personal responsibility and showing leadership and was not working at the level of her band. He acknowledged that certain processes, such as the Atamis system had changed during the claimant's maternity leave, but that enough time had passed for her to be familiar with them. The claimant asserts that giving her lower scores without any real rationale was an act of sex-related harassment (**LOI 4.1.4**).

73. From Mr Williams' perspective he felt that the claimant appeared at this meeting to acknowledge that she was struggling with work and needed help. He provided the claimant minutes to the one-to-one meeting. To Mr Williams' surprise the claimant responded with a large number of substantial amendments to the minutes, which suggested she was flatly denying some of the matters he had raised with her. There followed correspondence in which some amendments were made and further amendments proposed. Essentially a stalemate occurred whereby Mr Williams provided minutes and the claimant was given the opportunity to put her comments in a text box.

74. On 30 November 2022 Mr Williams rejected in part the claimant's application for flexible working. On the HR portal the claimant's primary request to work full-time at home was rejected on the basis that the

Executive had reiterated the requirement for some on-site working. Her secondary request to drop down to 3 days per week was agreed to, but it was stipulated that the claimant would be required to work on site three days per week. Mr Williams acknowledges that he failed to indicate on the HR portal that the claimant was entitled to appeal this determination.

75. Nonetheless, by email to Mr Williams of 1 December 2022 the claimant appealed the determination in respect of her application for flexible working [276-80]. This email included:

    a. The assertion that procedures were not followed correctly, and her request had not been taken seriously.

    b. The basis for the request related to her work life balance as a mother of a young child who cannot afford to pay full-time childcare.

    c. Being required to work three days a week in the office was not possible for the claimant as it would leave her little time to provide care as the sole carer of her daughter. She would have to start work late and finish work early in order to take and collect her daughter from nursery. She would be unable to make up these hours during the evening or other times.

    d. It was not fair to allow her colleagues to attend office twice a week but require her to attend three times a week.

76. On 12 December 2022 a team meeting was scheduled to take place at 10 AM in the office. However, adverse weather conditions led to a decision being taken, communicated at 9:17 AM by email, that this would be converted into a remote meeting. The timing of the meeting was pushed back to 10:30 AM.

77. The claimant's evidence was that she was on the train on the way into work when she received the email converting it to a remote meeting, and that she decided to go home. It is not necessary for us to determine whether this was in fact what happened, though it strikes us as an odd approach.

78. At 10.30am all team members apart from the claimant attended the team meeting remotely. The meeting lasted for around 45 minutes, at which point the team members disconnected leaving Mr Williams and Mr Jarosz in the meeting. They spent some time discussing various issues including the claimant's flexible working request and her performance generally. It is appropriate to make a few contextual observations at this point. We find that Mr Williams genuinely was concerned about various aspects of the claimant's performance. He had recently been involved in a protracted email correspondence attempting to agree minutes of a meeting at which he had sought to address performance issues. Mr Williams and Mr Jarosz quite reasonably believed that they were the only people in the meeting at this point in time. Because of this, we find, Mr Williams and Mr Jarosz

were less inhibited in the manner in which they expressed themselves, and Mr Williams was "venting" his frustration.

79. While Mr Williams was discussing the claimant's performance the claimant joined the meeting at 11:23 AM, 53 minutes after it had started. Mr Williams at this point was talking about some work that the claimant might find herself doing and said words to the effect of "*she will probably fuck that up*". The claimant relies on these words as sex-related harassment (**LOI 4.1.1**).

80. Mr Jarosz noticed the claimant had joined the call at this point. Mr Jarosz's evidence is that he and Mr Williams apologised for the language used. He then asked the claimant why she was late, and she responded by quoting Mr Williams' words back to him. The claimant's evidence in her witness statement was that she experienced harassment and verbal abuse from both Mr Jarosz and Mr Williams as she overheard Mr Williams swearing at her.

81. After the meeting Mr Jarosz emailed the claimant cc: Mr Williams confirming the earlier conversation. He set out the circumstances of the meeting being delayed and converted to remote meeting. He referred to the claimant not being present at the start of the meeting and referred to previous meetings that the claimant have not been present at. He set out the circumstances of the claimant joining the meeting late and asked the claimant to ensure that she attended meetings on time in the future.

82. The claimant responded to this email saying that a technical issue with Outlook and led to her delay joining the meeting. She referred to Mr Williams swearing and Mr Jarosz attacking her for not attending the meeting. She said that it was a lie that she had not attended previous meetings. She said she understood Mr Jarosz's frustration towards her, but this was not the first time she had experienced this and this went beyond the boundaries of acceptable.

83. We find as a fact that Mr Williams did use the words above, and he admits this. We accept his explanation that he had genuine concerns about the claimant's performance and was venting his frustration, believing himself to be talking to Mr Jarosz alone. We accept that he was mortified when he realised the claimant had overheard him. On balance we consider it more likely than not that both he and Mr Jarosz apologised to the claimant at the time. We find that hearing one's line manager expressing themselves in these terms would have been extremely distressing to the claimant. We are surprised, in these circumstances, that Mr Jarosz chose to focus the claimant's lateness in his later email.

84. The claimant was due to have a one-to-one meeting Mr Williams later on 12 December 2022. She electronically declined meeting that day. Mr Williams emailed her to ask why she had declined and asked if she wanted to rearrange. The claimant responded to say that she had declined the one-to-one meeting as she did not feel it was fit for purpose. She referred to the problems with the minutes of the previous one-to-one

meeting, and suggested that there had been no talk about performance management during the meeting. She referred to her appeal against the flexible working determination. She also referred to the incident earlier that day when Mr Williams had sworn about the claimant. She said she did not want to attend meetings with Mr Williams or Mr Jarosz to avoid any unfair treatment, and was waiting to hear from HR.

85. On 13 December 2022 the claimant was signed off sick. She provided a fit note citing "stress" indicating she would be absent from work until 3 January 2023.

86. Going back, briefly, to October 2022, it was announced that another Band 7 Procurement Specialist in the same team as the claimant, Mr Kamya, would be promoted to a Band 8a role in Estates, Facilities and Corporate Services ("EFCS"). He was due to take up the role on 13 January 2023.

87. Mr Kamya began working with the claimant in the autumn of 2022 on a project known as the Minor Works DPS project ("MW DPS"). This project was fairly admin intensive and it was envisaged that the claimant would inherit this project on Mr Kamya's promotion. Mr Kamya gave evidence, which was not challenged, and which we accept, that he formed the view while working with the claimant that there were various issues with her performance. She seemed to struggle with projects that she had been asked to undertake and kept on asking for additional support from the team. Mr Kamya was made aware by other colleagues of issues they had experienced working with the claimant. Mr Kamya formed the view that the claimant was not being proactive in working out how to deal with her issues, and defaulted to simply asking colleagues what to do. Mr Kamya spent significant time preparing user guides and standard operating procedures ("SOPs") for the claimant for managing processes on the MW DPS project. Mr Kamya told us that there were a number of times when the claimant asked him for help on matters which were clearly set out in the guidance he had prepared. He gave evidence that the claimant made a number of mistakes which led him to believe that the claimant simply have not read the guides. He observed that the claimant regularly attended meetings unprepared and could not respond to basic questions. He observed the claimant being on her phone in meetings in front of managers even after she had been asked not to do this. We accept Mr Kamya's evidence that these issues meant that people were losing faith in the claimant's abilities and that it reflected badly on the team as a whole.

88. Returning to the beginning of 2023, the claimant returned from work from sickness absence on 3 January 2023.

89. Prior to her sickness absence the claimant had been working on a project relating to Medical Gases. During the claimant's absence a colleague, Rebecca, had picked up this work and had been working with the stakeholder, Ms McMillan. On 3 January 2023 the claimant emailed Ms McMillan, cc Mr Williams, to say that she would be attending a meeting the following day relating to this project. Ms McMillan emailed Mr Williams and an email chain ensued. Essentially, and in brief, it became clear that Ms

McMillan wanted the claimant removed from the project, preferring instead to work with Rebecca. However, Mr Williams on 5 January 2023 made the decision that the claimant would be working on the Medical Gases project.

90. On 3 January 2023 the claimant and Mr Williams corresponded. Mr Williams asked the claimant to liaise with Mr Kamya about the MW DPS work. The claimant responded that this work was very complex and she wanted clarity on how it was to be managed. She also referred to waiting to hear from HR, and that she did not want to have any conversations with Mr Williams about "*outstanding issues*", which we take to mean the performance concerns raised by Mr Williams. She referred to having spoken to someone from the equality and diversity department who confirmed that she had been discriminated against and that she would be taking this matter further. Mr Williams outlined that the claimant would lead on the MW DPS but would be supported by Rebecca. He also outlined that she would lead on a Waste project and a Linen and Laundry project. He also indicated that there had been "*some movement*" on the flexible working request that he could update her on. In a subsequent email he said that the respondent could agree to the claimant working three days a week, with only two of those being worked in the office. This would enable Mr Williams to support the claimant to meet her objectives, and that, as before, she would be able to pick up and collect her daughter as required in mornings and afternoons. The claimant asked why she would have to attend the office twice a week as this would create difficulties for her. Mr Williams responded that staff were expected to attend twice a week, and that in the case of the claimant this would enable him to support her to meet her objectives.

91. On 4 January 2023 the claimant was due to attend the Medical Gases Teams meeting at 11 am with Ms McMillan and Mr Williams. Our finding of fact is that at 10:31 am Ms McMillan emailed the proposed attendees of the meeting to apologise for the short notice but asked to postpone the meeting [355]. The claimant did not read this email and joined the Teams meeting at around 11 am. Her doing this would have triggered Teams notifications to be sent to the other invitees of the meeting. Mr Williams and Ms McMillan received such notifications and joined the meeting. It was explained that the Medical Gases meeting had been postponed. Mr Williams thought this was a good opportunity to discuss the flexible working request which he had discussed by email with the claimant the previous day. After explaining that the meeting had been postponed, Mr Williams said words to the effect of "*While I've got you*" that they could discuss the flexible working issue. The claimant was resistant to this and disconnected the call, effectively hanging up on Mr Williams.

92. The claimant's case (paragraph 27 of her witness statement) appears to be that Mr Williams intentionally tricked the claimant into attending this meeting in order to bully and harass her. Her case is that the claimant knew that Ms McMillan was not going to connect and he used this as an opportunity to bully her. We find it difficult to accept this assertion. Ms McMillan sent the email postponing the meeting to the claimant and all

other attendees around half an hour before the meeting. One would have expected that all recipients of this email would simply not connect to the meeting. The fact that the claimant did connect, was because she had not read the email. When the claimant attended the meeting on Teams, the attendees would have been alerted. We cannot see how Mr Williams was somehow strategising all this in order to bully the claimant. It would be a strategy the success of which depended on the claimant attending a meeting she had clearly been told would not be taking place. We accept his explanation of events and not the claimant's. The claimant relies on the request for this meeting, and one the following day, as being an example of sex-related harassment (**LOI 4.1.2**). We would observe, as a matter of fact, that this was a meeting the claimant herself had chased up with Ms McMillan the previous day, and was one which only took place because the claimant had not read any email postponing the meeting.

93. Mr Williams took advice from HR about the claimant hanging up on him and how to address capability issues. His emails with Ms Ryden, an Acting Senior HR Adviser, about these issues and other emerging ones were in the bundle at [403-8].

94. Ms Ryden emailed Mr Williams on 5 January 2023 [408] confirming a meeting with him earlier that day. She set out areas they had discussed. She referenced advice to invite the claimant to a formal meeting to discuss the outcome of her request for flexible working. She referred to advice she had given about inviting the claimant to a quick catch up meeting to discuss conduct issues relating to hanging up on a Teams call after being argumentative and refusing to discuss concerns, joining a meeting late, not familiarising herself with areas of work, failing to respond to a PDR document and refusing to sign off on it. Ms Ryden indicated that if the claimant declined to attend any meeting then an informal sanction of an improvement notice could be served. Mr Williams emailed Ms Ryden on 5 January 2023 [407] thanking her for meeting with him that day and for her helpful advice. He said that he would take up Ms Ryden's suggestion to invite the claimant to a meeting to consider issues relating to hanging up on him, being late for meetings and failing to respond to one-to-one notes. He said that capability issues were best dealt with under a capability management process. He also set out that he would send an invitation to a flexible working outcome meeting separate from any conduct/capability issues. He wondered whether being accompanied by HR would be helpful for him at this meeting.

95. On 5 January 2023 Mr Williams emailed the claimant a letter inviting her to a meeting to discuss the outcome of her flexible working request. The letter expressed that this was a meeting to confirm his response to the claimant's appeal, and would take place on 10 January 2023 by Teams. He said the meeting could be pushed back to a date convenient to the claimant. The claimant was given the opportunity to be accompanied by a work colleague or trade union representative. The claimant was invited to ask any questions relating to that matter.

96. Further, following Ms Ryden's advice, on 5 January 2023 Mr Williams sent a Teams invitation to a meeting the following day to address concerns following the meeting the previous day. Mr Williams explained that this should not take more than a few minutes and was separate to the proposed meeting on 10 January 2023. He invited the claimant to propose a different time if this was inconvenient. The claimant responded the following day to ask for confirmation on what this meeting was about, and indicated she did not want to participate until someone from HR joined or she could talk to HR. Mr Williams responded that it was a recap of the discussion he had, and HR had advised him to have this discussion.

97. The claimant relies on the invitation to the 6 January 2023 meeting as being an act of sex-related harassment (**LOI 4.1.2**).

98. On 10 January 2023 the claimant met Mr Williams via Teams to discuss the outcome of her flexible working request. Mr Williams confirmed the outcome of the meeting by email of 13 January 2023 [448-450]. The letter set out the history of the request for flexible working and made the proposal of the following:

> *1. Working onsite 2 days a week.*
>
> *2. Reduce to 3 days a week as previously agreed.*
>
> *As you know the Executive have stated that the expectation on LPP staff is that they work at least two days a week onsite in order to maintain team cohesion with face to face meetings and discussions that reduce email traffic. It is also in line with the requirements of Guys & St Thomas Trust, our host. In addition we have a customer facing role for LPP member trusts and external clients/suppliers so we occasionally will be required to attend meetings at their sites such as you were recently requested to, for the moderation meeting for the Linen & Laundry mini-competition at Royal Free Hospital.*
>
> *I understand that your daughter attends nursery on Monday, Tuesday and Thursday so my assumption is that these would be your 3 working days. The particular 2 days spent onsite need not be fixed and we agree these on a week by week basis.*
>
> *You will of course be able to collect your daughter to and from nursery on those days. Her hours are 8am – 6pm so reasonable start and end times for you to travel to and from Curlew Street/London Bridge and Croydon would be also be allowed for. The expectation is that you might have to work longer on your remote working day to make up any deficit.*
>
> *As above, if you were asked to meet with external clients at another site then this would be counted as one of your two days of onsite working.*

During our discussion you stated that you would want only the proposed flexible working pattern to last until February 2024, whereupon your daughter will have her third birthday and be eligible for more supported nursery time. Your expectation therefore is that once that was in place you would revert to a five day working pattern.

If agreed to by you, these arrangements will be subject to a trial period which will commence on a date agreed by us and Payroll and continue for two months from that date. A formal review of the trial period will be booked after the two months have elapsed when a final decision on your request for flexible working will be made. If the trial period is unsuccessful you will revert to your previous working arrangement.

99. The letter made reference to any necessary adjustments to salary and annual leave and gave the claimant the opportunity to appeal the decision.

100. On 12 January 2023 Mr Williams had an informal meeting with the claimant to discuss the claimant's unsatisfactory behaviour regarding reluctance to meet him in one-to-one's and hanging up during a meeting.

101. On 13 January 2023 Mr Kamya took up his new role. The new role did involve working on similar projects and there was some overlap with his work as a Procurement Specialist.

102. On 16 January 2023 the claimant appealed the determination on flexible working. She set out that she did not believe that working on site would reduce any email traffic. She said that in terms of her customer facing role she had only had one on-site meeting in three years. She said she had evidence of somebody working for LPP part-time with a clinical role attending the office just once a week. The claimant said she felt she had been discriminated against.

103. In respect of the part-time clinical worker, this was a Ms Fisher who the claimant had contacted by email in January 2023. Ms Fisher had explained in an email of 12 January 2023 to the claimant that she had been recruited to work 2.5 days a week. Pre-pandemic she had worked in the office for two days, and works the half day at home. Like the rest of LPP, she works from home during the pandemic, but now came in one day a week "*so the same expectation as for full-time LPP staff but pro-rata'd*".

104. The respondent accepts that the claimant's grievance amounted to a protected act for the purposes of her victimisation claims.

105. On 17 January 2023 Mr Williams emailed the claimant a letter which served as an informal improvement notice. This letter was dated 18 January 2023. The letter set out that the claimant had met Mr Williams on 12 January 2023 informally and without representation. He referred to the claimant's unsatisfactory behaviour in terms of her reluctance to meet Mr Williams without colleagues being present. Mr Williams considered that he

was entitled to make reasonable requests to meet with the claimant as her line manager to discuss work, performance and other matters. The letter set out improvements that would be expected, namely that the claimant would meet with Mr Williams when requested, and when this was not possible to let him know and to rearrange meetings for mutually convenient times. If the claimant considers that Mr Williams was treating her unfairly she could take this up under the respondent's grievance policy. If there were no improvements under this informal process the matter could proceed to a formal process under the respondents disciplinary policy.

106. The claimant asserts that issuing this improvement notice was an act of sex related harassment (**LOI 4.1.3**) and victimisation (**LOI 5.2.2**). In terms of the victimisation allegation, we note that on 5 January 2023 Ms Ryden refers in her email to Mr Williams of her advice to address conduct concerns informally in a catch up meeting. She says that if the employee declined the invitation or leaves the meeting "*you can also address these concerns by issuing an informal sanction of an improvement notice*". Mr Williams emailed Ms Ryden on 6 January 2023 to let her know that the claimant had not attended the informal meeting, and so he had drafted an informal improvement notice. This was 10 days before the grievance. The further correspondence with Ms Ryden makes clear that on 11 January 2023 Mr Williams was considering dropping the improvement notice to concentrate on informal capability management, sickness review and ongoing management. However, Ms Ryden pointed out that if Mr Williams did not address conduct concerns informally this may make matters difficult if the situation escalated, as standards needed to be set. Ms Ryden also explained that HR would not attend any informal meetings to support him.

107. During this time Mr Williams, Mr Jarosz and Mr Kamya were encountering difficulties meeting the claimant. It is not necessary to go into the detail.

108. On 19 January 2023 Mr Williams sent the claimant an invitation to a meeting the following day, giving the claimant the option to reschedule if this was not convenient. The claimant responded that she felt that this was a new form of harassment. She said she had confirmed in writing that she was not comfortable talking to him about unresolved issues. She would not attend any meetings with him until a formal investigation had been done, unless HR put something in as an interim remedy.

109. Mr Williams sought advice from Ms Ryden, who advised [486] that the best approach would be for a new line manager to take over managing the claimant whilst a formal grievance was investigated. Ms McCann took over as the claimant's line manager on 23 January 2023.

110. The Tribunal was presented with a significant amount of evidence about the work of the Procurement Specialists, and in particular the projects they undertook. We do not feel that a particularly clear picture was presented to us. We formed the strong impression that no two

projects would be the same, and that within each project there would be peaks and troughs in terms of the workload. It was also clear that there was a strong element of collaborative working, which required team members to provide assistance when other team members were absent or when there was an intense period of work required on a particular project. Simply looking at the numbers of project held by each team member would not give an accurate picture of the work they were doing.

111. What emerges from the evidence of the respondent's witnesses and the contemporaneous documents is that there was a strong impression within the team, based on reasonable grounds, that the claimant would complain when she felt that she did not have work she perceived as being high-profile, but would appear to struggle when she was required to do the work.

112. This particular issue came to the fore in the latter part of January 2023. On 23 January 2023 Mr Kamya emailed the claimant asking her urgently to carry out some work (supplier evaluations) on the MW DPS as a number of deadlines had passed. The claimant's response was that it would take her five full days to carry out this work, and that as she only works three days a week this would take her two weeks.

113. On 25 January 2023 the claimant sent an email to numerous senior managers across LPP and to Mr Kamya and to HR. She asked why managing MW DPS had landed solely on her as it had never been managed by one person before. She asked Ms Reeve and Ms Stapley how long it would take to conduct a supplier evaluation, and suggested that this responsibility had landed on her after she had placed an official flexible working request.

114. Ms Stapley responded to the email (and all recipients) saying that it was difficult to put an exact timeframe on evaluating a supplier as it depended on a number of factors. She said she had looked at Atamis reports and she produced a chart which allowed her to conclude that an evaluation would take between 30 minutes to 3 hours. Based on her previous experience, she believed that one hour would be the most common time frame for completing an evaluation. She indicated that historically the MW DPS had been managed by one person at a time, with additional support when their workload became too burdensome. She pointed out that when MW DPS was handed over to the claimant she was supported by Mr Kamya.

115. The claimant replied to this email disagreeing with Ms Stapley, saying that evaluations always took her a minimum of 3 to 4 hours. She suggested that if anyone could do an evaluation in 30 minutes the work should be transferred to them.

116. Ms Stapley provided a further response, measured in tone, and setting out that she was giving a perspective from her own experience. The claimant responded suggesting that Ms Stapley should perform "*test evaluations and invite all participants in this email to witness that*".

117. One of the participants in this email chain was Mr Kamya. He gave evidence that he was getting rather frustrated with this email exchange. He considered the claimant was making assertions which were not true, such as that she was the only person who ever had to deal with this piece of work on her own. He also felt the claimant was trying to insinuate that he had not been able to do work within the time estimate provided by Ms Stapley. Mr Kamya knew this project, and what work was involved, as he had run the project single-handedly for about three years. He also found it extremely frustrating seeing the claimant complaining about her workload when he himself had spent significant amounts of time trying to support the her. With this background Mr Kamya joined the email chain.

118. In an email at 5.09 pm on 25 January 2023 Mr Kamya set out that he agreed with Ms Stapley, saying that it took him about 45-50 minutes to do an evaluation. He pointed out that he, Ms Reeve, Ms Stapley and another colleague had all evaluated MW DPS while juggling other work commitments. He pointed out that in the past there had been 5 to 6 applications to be evaluated each week, whereas now there were far fewer applications coming through, perhaps two a week. These applications would not be as resource intensive. Mr Kamya pointed out to the claimant that Mr Williams had recently suggested taking some projects away from her as it appeared she could not manage them. He said that the claimant rejected his proposal and asked to keep the projects. He pointed out that the claimant had recently said that it would take two weeks to complete three supplier applications that had already passed their deadline. He pointed out that he had sent the claimant detailed emails with instructions on how to run the process and advised her to make sure that she was reading the relevant SOPs and guides. He suggested that the issues the claimant was raising ought properly to be raised directly with Mr Williams or Mr Jarosz and not in email to multiple colleagues. Mr Kamya recommended that he temporarily returns to managing the MW DPS as there was urgent work that needed to be done and various supplier messages that had not been read since the previous week.

119. The claimant responded that this email was a good example of bullying. The claimant relies on Mr Kamya's email as an act of victimisation (**LOI 5.2.1 and 5.2.3**). Mr Kamya gave evidence, which was unchallenged and which we accept, that he was unaware that the claimant had presented a grievance in which she alleged discrimination.

120. On 26 January 2023 the claimant went on long-term sick leave from which she never returned.

121. On 3 February 2023 the claimant initiated Early Conciliation with ACAS. She presented her claim on 17 March 2023.

122. On 14 March 2023 Dr Stradling, who had been appointed as the grievance hearing manager, met the claimant to discuss her grievance. On 4 April 2023 Dr Stradling met Mr Jarosz and Mr Williams to discuss the

claimant's grievance allegations. On 6 April 2023 Dr Stradling met Mr Kamya.

123. On 24 April 2023 Dr Stradling produced a grievance outcome [573-580]. In brief, and where relevant to the issues in this case, Dr Stradling's findings included:

a. Mr Williams had not provided a response to the original request for flexible working in that he did not provide a detailed outcome and did not set out a right of appeal. However, the claimant did appeal and no unfairness was caused to her.

b. The claimant had been allowed to reduce the working pattern to 3 days a week, and the approach and rationale had been explained to her and was based on legitimate business reasons.

c. The claimant's PDR score of two was based on observations on the standard of work, and the rationale for the score had been explained to the claimant. However, there was not evidence that underperformance had been adequately raised with the claimant prior to the PDR.

d. There was no evidence that there had been an unfair allocation of workload in the team.

e. Mr Williams's comment on 12 December 2022 was unprofessional and upseting.

f. Mr Kamya's tone in his email of 25 January 2023 was abrupt and unhelpful, but he was not aware of the claimant's flexible working request or her grievance.

124. The claimant appealed against Dr Stradling's grievance outcome. On 4 September 2023 Mr Dunkerley, Chief Commercial Officer, did not uphold the appeal. The claimant had been offered three dates to attend the grievance appeal hearing, but did not attend.

125. As we have set out above, the claimant was off sick from 26 January 2023. The management of her sickness absence was not a matter for determination by the tribunal in determining the issues in this case. However, given the clarification at the start of the hearing about **LOI 5.2.4** (a continued refusal of the claimants requests to work one day in the office and two days from home) we were referred to the outcome letter dated 16 October 2023 from the claimant's line manager Ms McCann relating to a sickness advisory meeting which took place on 12 October 2023. This letter referred to the necessity of the claimant being in the office to enable her to be retrained on the systems required for her role. Ms McCann was of the opinion that the best way to support the claimant would be by a training programme that would be delivered in the office for maximum effectiveness. More flexibility could be offered as the claimant becomes more proficient in her role.

126. There was a further sickness absence meeting on 19 October 2023 reconvened on 24 October 2023. Ms McCann sent a letter following these meetings on 30 October 2023. This letter referred to the claimant saying that she was fit for work but was unable to return to work under the proposed working pattern due to childcare arrangements. There had been discussion at the meeting of the claimant's preference to work for three days remotely with only occasional attendance in the office. Ms McCann advised that this was not likely to be acceptable as it would have a detrimental impact on the team's efficiency and the effective delivery of the business. Proposals had been discussed with the team, which expressed the view that the claimant's training needs required her to be in the office to refresh her knowledge on procurement systems and the requirements of the role. A further proposal of the claimant working to 7.5 hour days from home and a shorter five hour day from office with the possibility of making up additional hours remotely was discussed. This proposal was deemed not conducive to the business needs of the team. Reduced attendance and availability during the working week could delay critical meetings and jeopardise the work. Additionally, the claimant's PDR score of 2 meant that she would require additional support and supervision in the office to meet the expected performance standards. The claimant's long-term absence indicated an anticipated need for even further support. Changes in the law would require the team to provide additional training to stakeholders. Additional support and training would need to be delivered in the office to be the most effective. A single period of five hours work in the office would not allow this to be done.

127. On 26 June 2024 the claimant's employment was terminated in circumstances about which we did not hear to any great extent, and about which we need not make findings.

The Law

Harassment

128. Section 26(1) EqA provides: -

> *A person (A) harasses another (B) if—*
>
> > *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> >
> > *(b) the conduct has the purpose or effect of—*
> >
> > > *(i) violating B's dignity, or*
> > >
> > > *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

129. Section 26(4) EqA sets out factors which tribunals must take into account: -

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

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

130. Section 212(1) EqA provides that conduct amounting to harassment cannot also be direct discrimination.

131. The Court of Appeal in *Richmond Pharmacology v Dhaliwal [2009] IRLR 336* stated:-

> *"an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so….We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

132. The Court of Appeal again emphasised that tribunals must not cheapen the significance of the words of section 26 EqA as "*they are an important control to prevent trivial acts causing minor upsets being caught up by the concept of harassment*" (*Land Registry v Grant [2011] ICR 1390*).

Victimisation

133. Section 27 EqA deals with victimisation and provides: -

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

(a) B does a protected act, or

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

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

134. A person suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.* An unjustified sense of grievance is not sufficient (*Barclays Bank plc v Kapur (No. 2) [1995] IRLR 87* and *EHRC Employment Code*, paragraphs 9.8 and 9.9).

Indirect discrimination

135. Section 19 EqA provides:

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

136. The claimant does not have to establish why a PCP puts the affected group at a particular disadvantage but a causal connection between the PCP and the particular disadvantage experienced by the group and the individual is required. The reason for the disadvantage need not be unlawful, or even under the control of the employer. There is also no requirement that the PCP puts every member of a group at a disadvantage. It is commonplace, but not essential for disparate impact to be shown by statistical evidence. Finally, it is open to the employer to justify the PCP. (*Essop v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice* [2017] UKSC 27.

137. In terms of establishing group disadvantage, a number of authorities have considered the issue of judicial notice being taken of the fact that women bear the greater burden of childcare responsibilities than men and this can limit their ability to work certain hours. The EAT in *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] IRL 729 considered this issue and reviewed the authorities. The EAT concluded as follows at paragraph 56:

> *In summary, when considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear in mind that particular disadvantage can be established in one of several ways, including the following:*
>
> > *a. There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected in limine;*
> >
> > *b. Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;*
> >
> > *c. The disadvantage may be inherent in the PCP in question; and/or*
> >
> > *d. The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken.*

138. On the question of whether a PCP is “applied”, the EAT held in *Glover v Lacoste UK Limited* [2023] ICR 1243 that it was not the case that a an employer’s decision on an application for flexible working could only be applied once there had been attempts to work to the new pattern.

139. The Supreme Court in *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601 set out the following questions to address on the issue of justification:

a) *Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right?*

b) *Is the measure rationally connected to that aim?*

c) *Could a less intrusive measure have been used?*

d) *Bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?*

140. In *Hardy v Hansons and Lax* [2005] IRLR 726 the Court of Appeal observed that:

> *"The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. […] This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal."*

141. In considering whether there were less discriminatory ways by which the Respondent's legitimate aim could have been achieved the Tribunal is required to carry out a balancing exercise where the employer's business needs are weighed against the (potentially discriminatory) impact of the proposed measures on both the shared group and on the Claimant specifically: *Birtenshaw v Oldfield* [2019] IRLR 946.

142. The burden of proof provisions (which apply to all causes of action in this claim) are set out in section 136 EqA 2010:-

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

143. Guidance on the application of the burden of proof provisions of the Sex Discrimination Act 1975 (which is applicable to the EqA, including claims of harassment and victimisation) was given by the Court of Appeal in *Igen v Wong [*2005] IRLR 258:

Conclusions

144. We will set our conclusions on each of the issues in the List of Issues, applying the law to the facts. We will not necessarily follow the order of the List of Issues.

Harassment

LOI 4.1.1 “She will probably fuck that up” on 12 December 2022

145. Our findings on this issue are at paragraphs 77 to 84 above.

146. Mr Williams’ words were clearly unwanted conduct. We have to consider whether this conduct was related to sex.

147. We have set out a context above. Mr Williams was concerned about the claimant’s performance and was expressing a view, in colourful terms, about how she was likely to perform a particular task. This view that she was likely to underperform in this particular task was based on his assessment of her recent performance. We can well imagine that a substantial degree of frustration was creeping in given the recent protracted correspondence attempting to agree minutes of the one-to-one meeting of 24 November 2022.

148. On the face of the comment there is nothing related to sex about it. That said, a comment does not necessarily have to refer explicitly to sex in order to be related to sex. For example, an assessment about capability based on sex-related stereotyping could be “related to” sex for the purposes of the legislation.

149. It was difficult for us to see how the claimant was asserting that this comment was sex-related. Her evidence and the thrust of her questioning of Mr Williams did not suggest she was asserting he was applying a sex-related stereotype. There is nothing from the context which suggest anything sex-related about this comment. In fact, the context strongly points to this comment simply being an, albeit graphic, comment about the claimant’s capability based on Mr Williams’ genuine assessment of it. There is nothing from which we could conclude that this conduct related to sex. Furthermore, we accept that the reason why Mr Williams made this comment, which he did not realise the claimant witnessed, was to make an observation about the claimant’s capability as he genuinely perceived it.

150. We do not uphold this complaint.

LOI 4.1.2 Constant requests for meetings (4 and 5 January 2023)

151. Our findings on this issue are at paragraphs 90 to 97 above.

152. The background to this allegation is the clearly deteriorating working relationship between the claimant and Mr Williams following the meeting of 24 November 2022 and the failure to agree minutes of this

meeting, the claimant overhearing Mr Williams' comment of 12 December 2022 and her sickness absence in the second half of December 2022.

153. Mr Williams was the claimant's line manager, and it is clear that there were a number of issues that needed to be dealt with; there was ongoing management of work, the application for flexible working, possible performance management issues and conduct issues arising from the claimant "hanging up" on him and not agreeing the one-to-one minutes. For her part, it is easy to see how the claimant was losing trust with Mr Williams, having overheard his comment on 12 December 2023.

154. We also had the benefit of seeing correspondence between Mr Williams and HR which illuminated what Mr Williams' thinking was.

155. We do not conclude that Mr Williams was making excessive or inappropriate requests for meetings. We have commented above that we do not accept the claimant's assertion that Mr Williams engaged in a strategy to trick her into attending a meeting on 5 January 2023 in order to harass and bully her.

156. While we could accept that Mr Williams' attempts to arrange meetings with the claimant at this point in time were unwanted by the claimant, again, we can find no evidence from which we could concluded that these attempts were related in any way to sex. The correspondence with HR in the background shows clearly that Mr Williams was seeking advice on how to address the various issues with the claimant, and that he was diligently following the advice he was given. The reason why he sought to arrange these meetings was to address these various issues and was entirely unrelated to sex.

157. Had we concluded that the attempts to arrange meetings was related to sex, we would not have concluded that this conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment (for shorthand "the requisite environment").

158. We do not uphold this complaint.

LOI 4.1.3 Improvement notice

159. Our findings of fact on this issues are at paragraphs 92 to 97, 101 and 106 to 107 above.

160. Again, we have had the benefit of seeing correspondence between Mr Williams and Ms Ryden of HR which, we are satisfied, sets out accurately what issues Mr Williams was seeking advice on, and what advice he was given. We consider that this contemporaneous documentary evidence sheds considerable light on Mr Williams' thinking at the time.

161. What is clear from this correspondence is that Mr Williams was concerned that he was finding difficult to meet with the claimant, and that

she “hung up” on him when he actually managed to find himself in a Teams meeting with her. He sought advice from HR and was advised to address this in a catch-up meeting with the claimant. He was advised that if this meeting did not take place, or the claimant left it, he should serve and informal improvement notice. When Mr Williams suggested that he might drop the improvement notice and focus more on capability, HR were clear in their (reasonable) advice that this would be an unwise course of action if further issues arose.

162. Receiving the notice was unwanted by the claimant. But again, we have difficulty in understanding how the claimant asserts that the sending of the improvement notice was in any way related to her sex. She did not establish in her evidence or her questioning of Mr Williams that sex had anything to do with this notice. The contemporaneous documentary evidence strongly suggests that this notice was sent for valid management reasons following considerable discussion with HR. This evidence was not undermined in any way. There is nothing from which we could conclude that sending this notice was in any way related to sex. Further, we accept that the reason why it was sent was to seek to address genuinely held concerns about conduct.

163. We do not uphold this claim.

LOI 4.1.4 Giving the claimant lower scores without any rationale (this appears to related to the meeting of 24 November 2022)

164. Our findings on this issue are at paragraphs 72 above, although there are numerous findings relating to the claimant’s performance running through this decision which we do not specifically highlight here, but which inform our conclusions on this issue.

165. Performance concerns were raised with the claimant in 2020 based on the observations of Ms Reeve and Ms Stapley (both women) who managed her. Mr Jarosz himself observed matters of concern prior to the claimant’s maternity leave. Following her return from maternity leave Mr Williams, her new line manager, observed continuing under-performance. Her peer, Mr Kamya, gave evidence of significant under-performance in a number of respects. We also heard evidence that more than one stakeholder raised concerns with LPP management about the claimant. There is a significant body of cogent evidence, with a consistency in themes (persistent issues with lateness, not being proactive, shifting blame to others, not delivering at the level expected of her grade etc.) coming from a variety of sources over a significant period of time. Her last two PDR scores had been 2 and which she had not appealed.

166. Our conclusion is that Mr Williams indicated on 24 November 2022 that the claimant was not likely to improve her PDR scores of 2 as she was not meeting her objectives. He did not fail to provide a rationale for this, but indicated where she was under-performing. As the grievance hearing was later to find, it was probably the case that Mr Williams had not been as diligent as he should have been in general management of the

claimant at bringing her under-performance to her attention, and this may have felt somewhat of a shock to the claimant.

167. There is nothing about this message that seems overtly sex-related and we were unsure of the basis of the claimant's suggestion that it was. The framing of the issue in the List of Issues, in that this indication of poor performance followed swiftly on the claimant's flexible working request, tends to suggest the claimant asserts a causal connection with the request. The request for flexible working was because of her caring responsibilities as a mother.

168. But the consistency of the observations of poor performance from a variety of sources lead us to the conclusion that Mr Williams' observation was in no sense connected to the request. Performance had been a concern since 2020 when flexible working was not an issue, and had been raised by three other managers, a peer and other stakeholders.

169. Even if the indication of poor performance in the 24 November 2022 meeting had, somehow, been related to sex, we do not find that the conduct (which we accept was unwanted) was done with the requisite purpose or had the requisite effect. The authorities make clear that the wording of section 26(1)(b) EqA is not to be cheapened. Communicating poor performance in these circumstances does not approach the threshold of harassment.

170. We do not uphold this claim.

Victimisation

171. The respondent accepts that the claimant's grievance of 16 January 2016 was a protected act.

<u>LOI 5.2.1 and 5.2.3 Mr Kamya's email of 25 January 2023 and managers not intervening</u>

172. Our findings relating to this issue are at paragraphs 112 to 119 above.

173. Insofar as Mr Kamya was concerned, we have found as a fact that he was not aware of the claimant's grievance. We further accept that the reason why he intervened in the email correspondence as he did was that he was frustrated by the claimant's assertions, which he felt were untrue and unfair, and the inappropriate manner he felt she was raising them. The claimant says that Mr Kamya's observations about the claimant's performance was not evidenced. However, we accept Mr Kamya's evidence, according broadly as it does with the evidence from a variety of other sources, that the claimant was indeed a poor performer.

174. We conclude that there is no evidence from which we could conclude that Mr Kamya acted as he did because of the protected act. Further, we accept Mr Kamya's evidence about the reason why he acted as he did, and that it was in no sense because of the grievance.

175. As for the manager's failing to intervene, it was not suggested in evidence or in the claimant's questioning of the respondent's witnesses that, essentially, the reason why they stood back and did nothing was because she had put a grievance in. There is nothing from which we could conclude that any inaction by, in particular Mr Williams, was because of the grievance.

176. We do not uphold these complaints.

LOI 5.2.2 Improvement notice

177. Our findings of fact on this issues are at paragraphs 92 to 97, 101 and 106 to 107 above. We have also made conclusions that sending the improvement notice was not an act of sex-related harassment in the section above on **LOI 4.1.3**

178. As we set out in paragraph 106 above, our findings are that the issue of the improvement notice was "in the works" some ten days before the grievance. Mr Williams was discussing the issue with HR after the conduct issues which were the subject matter of the notice arose. He was even considering dropping it at one point, but was advised that this might not be wise if conduct issues cropped up again.

179. There is no evidence whatsoever from which we could conclude that the improvement notice was sent because the claimant put in a grievance. Mr Williams sent the notice as an informal marker of minor misconduct which needed to be addressed. His decision was in no sense prompted by the grievance.

LOI 5.2.4 30 October 2023 refusal of request to work two days at home

180. This issue concerns the alleged requirement to work two days a week in the office, which the claimant asserts was indirect sex discrimination. We will therefore deal with the issue in under the next heading, following our conclusions on indirect discrimination.

Indirect discrimination

Did the respondent have a PCP requiring all staff to spend at least 2 days a week in the office? LOI 3.1. Did the respondent apply it to the claimant? LOI 3.2. Did the respondent apply the PCP to men or would it have done so? LOI 3.3

181. We have set out our findings above at paragraphs 52-63, 68-71, 74-75, 90, 98 and 102 (in respect of managerial decisions), 98 and 102 (in respect of formal process) and 125-6 (in terms of Ms McCann's decision).

182. The respondent, by way of Dr Sharp's closing submissions, asserts that there was no such PCP. Dr Sharp says that Mr Williams' email of 12 May 2022 [222] in which he says ""*there is now an expectation on all staff within LPP that we start coming into GDS twice a week. This is to bring us more in line with GSTT staff who now have returned to the office*" is communicating an expectation and not a mandatory requirement. Further, the respondent asserts that the respondent applied a number of individualised features to the expectation in respect of the claimant

(flexible arrival and departure as long as contracted hours and outputs are maintained, and flexible days) which provided substantial flexibility.

183. We conclude that the fact that the requirement to attend the office twice a week was communicated as an expectation rather than in mandatory terms does not prevent it from being a PCP. In terms of the flexibility of the requirement, the core element of the requirement was to attend the office twice a week. That is the PCP the claimant puts in issue. We consider that the appropriate place to consider the flexibility of the requirement is when we consider justification.

184. The respondent also contends that it did not apply the requirement to the claimant, in that the claimant was not actually required to attend the office. Mr Williams did not "police" the requirement and the claimant did not actually attend the office with any regularity prior to her final sickness leave.

185. However, the claimant put in an informal request to work from home, put in a formal request under the flexible working policy and appealed that determination unsuccessfully. The initial requirement was to attend the office three days a week, which was modified to two days.

186. The case of *Glover* makes clear that a PCP in relation to flexible working arrangements does not have to be practically worked to in order for it to be applied. We conclude that a determination under a formal flexible working policy is something which can very much influence an employee's employment decisions, even if they are not practically put into effect.

187. We conclude that the PCP of requiring staff to attend the office twice a week was applied to the claimant.

188. It was an expectation that was communicated to all in LPP, and so we conclude that it was applied to men also.

Did the PCP put women at a particular disadvantage compared with men by virtue of the unequal childcare burden experienced by women? LOI 3.4

189. At paragraph 82 of Dr Sharp's closing submissions she states:

> *"If the Tribunal finds that a PCP was operating in the alleged terms, if judicial notice is taken of the usual burden of childcare on women, then an isolated requirement to work in an office does place women at a disadvantage. However, the 2-day requirement was not mandatory, it was expected that individual circumstances would be discussed with Line Managers, and it was associated with flexibility, and on that basis the "PCP" in real terms did not cause any actual disadvantage to women compared to men".*

190. Again, what is in issue in this case is whether the application of the requirement to attend the office twice a week gave rise to an individual disadvantage to the claimant and a group disadvantage to women. The

more one factors in the individualised circumstances of the claimant, the less one is actually focussing on the actual PCP she relies on as disadvantaging the group.

191. We therefore are concerned with what Dr Sharp terms an "isolated requirement to work in an office". We note that she accepts that this does place women at a disadvantage if one takes judicial notice of the burden of childcare falling disproportionately on women. Pausing there, we do take judicial notice of such burden. More women than men shoulder the burden of childcare. A requirement to attend the office twice a week can create a disadvantage by requiring women to drop children off at nursery and pick them up. This might squeeze their working hours requiring them to catch up at other times.

192. We therefore take the respondent at its limited concession, and, considering the PCP itself and taking judicial notice of the burden of childcare falling on women, we find that the PCP put women at a particular disadvantage compared with men.

Did the PCP put the claimant at that disadvantage? LOI 3.5

193. The respondent contends that the PCP did not put the claimant to any disadvantage in that:

a. It was not actually applied to her and her work pattern did not in fact change;

b. The PCP was not policed and she was not subject to any sanction for not adhering to the requirement;

c. The claimant did not allow the PCP to be tested to see if it was workable:

d. The claimant rejected the proposal outright, and in reality anything other than permission to work at home fully, and only attend the office in exceptional circumstance was not going to be acceptable to her.

194. As factual contentions, we accept these. However, we do not necessarily accept that this meant that the claimant was not put at a disadvantage.

195. We were only presented with a small amount of evidence about what happened after 26 January 2023, but what there was indicates how someone can be disadvantaged by a PCP that it applied but not implemented.

196. As we set out at paragraph 125 above, the claimant was on long term sickness absence. During that process she indicated that she could not work to the arrangement proposed by the respondent. It would not be right for us to make detailed findings on matters we did not receive much

evidence on, but this illustrates that a PCP does not have to be put into effect to create perceived difficulty.

197. We conclude, therefore that the claimant was disadvantaged by the PCP. In terms of the way it was applied, we would conclude that she was not put to significant disadvantage. However, that is best considered under justification.

Was the PCP a proportionate means of achieving a legitimate aim? LOI 36 and 3.7

198. The aims pursued by the respondent in applying the PCP are not actually set out in the List of Issues, but are:

a. To enable the effective delivery of the Respondent's business;

b. To enable the team to remain integrated;

c. To ensure that the Claimant received the support she was identified as requiring due to performance concerns;

d. To maximise team members' effectiveness in their roles.

199. As we have set out above, we accepted the evidence of the respondent that the work of the claimant was responsible and involved high-value procurement exercises working closely with external stakeholders (paragraph 19). The Procurement Specialists worked together on projects (paragraph 110) and needed to maintain their specialist knowledge, especially in the light of the regulatory landscape and the increased pressure of work (paragraph 65). As we have set out throughout the course of these reasons, there were significant and persistent concerns about the claimant's performance, and there was a desire in management to ensure her effectiveness in her role. In the circumstances we find the respondent's aims legitimate.

200. Turning to proportionality.

201. We have regard to the perceived desirability of the LPP harmonising its working arrangements with the "host" and the rest of the Trust. We also accept the respondent's evidence that there was close working with external stakeholders. There was also a concern that lack of attendance within the office might lead to losing the office space as well as there being concerns about inner-London weighting. We accept the evidence of the respondent that being in the office would enable the respondent to support the claimant with aspects of underperformance, and therefore to maximise her effectiveness within the team.

202. The requirement to attend the office was therefore rationally connected to the aims the respondent was trying to achieve. We accepted the evidence of Mr Williams and Mr Jarosz that there was a need to support the claimant with her underperformance and that this would be done most effectively in the office (paragraph 71-2). This rationale was, perhaps, not best communicated to her until Ms McCann took over line

management, but it was explained to her nonetheless (paragraphs 125-6). At paragraph 98 it is clear that in January 2023 Mr Williams was explaining the business need and the team cohesion rationale to the claimant.

203. We consider now whether a less intrusive measure could have been adopted, rather than requiring attendance at the office twice a week. In considering this, we have regard to the flexibility offered by the respondent. It is not just a question of a bald requirement to attend twice a week. In his email of 13 January 2023 (paragraph 98) Mr Williams makes clear that the claimant's office days will be at her convenience in terms of her daughter's nursery. He makes clear that her working hours would be such as to allow her to come in late and leave early so she can drop off and collect her daughter, subject to maintaining contractual hours and outputs. He also makes clear that this would be for a trial period. In short, the flexibility put forward by Mr Williams mitigated against the disadvantage the claimant experienced. He was clearly assessing the impact of the requirement to attend the office on the claimant and putting forward practical measures to minimise it.

204. In summary, the respondent had a requirement to deliver its business, with an effective and integrated team, with the claimant's underperformance adequately supported. Requiring attendance in the office met these aims. We find that the it was reasonably necessary for the respondent to introduce such a requirement to meet its aims. The requirment had some impact on the claimant, but the respondent took steps to minimise that. The severity of the consequences of the requirement to attend the office twice a week was mitigated by flexibility in working patterns offered to the claimant. We find that a fair balance was struck between the claimant and the respondent having regards to the needs of the respondent and the impact on the claimant.

205. We do not uphold the claims for indirect discrimination.

206. In terms of the refusal to consider requests to work at home by Ms McCann in October 2023, this is also put as a claim of victimisation. Our findings are at paragraphs 125-6. There is nothing from which we could conclude that the decision by Ms McCann was in any sense to do with the fact that the claimant had put in the grievance. There has been a continuity of approach to the application for flexible working from well before the grievance. Further, the reason why the application was turned down by Ms McCann was for the reasons given in her email of 30 October 2023. Accordingly, we do not uphold the victimisation claim at **LOI 5.2.4**.

Employment Judge **Heath**

Date: 16th October 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 17th October 2024

FOR EMPLOYMENT TRIBUNALS

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ANNEXE

CLAIMS and ISSUES

The Complaints

1. The claimant is making the following complaints:

   1.1 Indirect sex discrimination;
   1.2 Harassment related to sex;
   1.3 Victimisation.

The Issues

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

3. **Indirect sex discrimination (Equality Act 2010 section 19)**

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

      3.1.1 The requirement for all staff to spend at least 2 days a week in the office?

   3.2 Did the respondent apply the PCP to the claimant?

   3.3 Did the respondent apply the PCP to men or would it have done so?

   3.4 Did the PCP put women at a particular disadvantage when compared with men by virtue of the unequal childcare burden experienced by women?

   3.5 Did the PCP put the claimant at that disadvantage?

   3.6 Was the PCP a proportionate means of achieving a legitimate aim?

   3.7 The Tribunal will decide in particular:

      3.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

      3.7.2 could something less discriminatory have been done instead;

      3.7.3 how should the needs of the claimant and the respondent be balanced?

4. **Harassment related to sex (Equality Act 2010 section 26)**

   4.1 Did the respondent do the following things:

4.1.1 Simon Williams stated at a meeting on 12/12/2022 that the claimant would 'f*** up the projects' assigned to her;

4.1.2 Make constant requests for 1:1 meetings, (requests made on 4 and 5 January 2023), despite the claimant's request to not attend unaccompanied;

4.1.3 Issue the claimant with an improvement notice after she refused to attend meetings with Simon Williams unaccompanied, on 18/01/2023;

4.1.4 Give the claimant lower quality scores without any real rationale and inform that she would be placed on an improvement plan (not long after her flexible working request) without proper reason as seen in the grievance outcome letter of 24/04/2023?

4.2 If so, was that unwanted conduct?

4.3 Did it relate to sex?

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

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

5. **Victimisation (Equality Act 2010 section 27)**

5.1 The respondent accepts that the claim did a protected act when she filed a complaint regarding discriminatory behaviour at work on 16 January 2023.

5.2 Did the respondent do the following things:

5.2.1 Treat the claimant in a condescending manner without any intervention from the staff who witnessed it or her line manager Simon Williams. Remmy Kamya indicated that the claimant could not manage her workload and that she had refused help, in an email dated 25/01/2023.

5.2.2 The improvement notice issued on 18/01/2023, after the claimant's complaint.

5.2.3 Raised issues about the claimant's performance in an email dated 25 January 2021 which was later withdrawn.

5.2.4 Continued to refuse the claimant's reasonable request to work one day in the office and two days from home to reach a compromise; as the claimant had asked to work remotely on all 3 days.

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

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

5.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

6. **Remedy for discrimination, harassment or victimisation**

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the claimant?

6.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the claimant be compensated?

6.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

6.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.9 Did the respondent or the claimant unreasonably fail to comply with it?

6.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

6.11 By what proportion, up to 25%?

6.12 Should interest be awarded? How much?